

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D791/2010

**CATCHWORDS**

*Domestic Building Contracts Act – s30* whether builder able to retain payment for foundation variation whether no foundation data obtained; defective and incomplete work – sufficiency of evidence, whether defect exists on balance of probabilities.

**APPLICANTS**

Tiffany Louise Schultz t/as Panther Designer Homes, Andrew Peter Schultz t/as Panther Designer Homes, Marlene Patrice Nelson t/as Panther Designer Homes, Darren Lindsay Nelson t/as Panther Designer Homes

**RESPONDENT**

Stephen Duncombe

**WHERE HELD**

Melbourne

**BEFORE**

Senior Member E. Riegler

**HEARING TYPE**

Hearing

**DATE OF HEARING**

30 & 31 May, 1 June 2011

**DATE OF ORDER**

16 June 2011

**CITATION**

Schultz trading as Panther Designer Homes and Ors v Duncombe (Domestic Building) [2011] VCAT 1165

**ORDER**

1. The Respondent must pay the Applicant \$2,016.35 on the Applicant's claim.
2. The Respondent's counterclaim is wholly set-off against the Applicant's claim.

**SENIOR MEMBER E. RIEGLER**

**APPEARANCES:**

For the Applicants

Mr Nelson, in person and with written authority

For the Respondent

Mr Duncombe, in person.

## REASONS

- 1 This proceeding comprises a claim by the Applicants for \$13,130<sup>1</sup> plus interest, being the balance of monies said to be owed under a building contract entered into with Mr Duncombe relating to building work at Mr Duncombe's residential home in Mount Martha. Mr Duncombe counterclaims in the amount of \$115,312,<sup>2</sup> which represents losses said to have been suffered by him relating to defective work, incomplete work, delay and failure to comply with the *Domestic Building Contracts Act 1995* ('the Act').

### Background

- 2 At the relevant time, the Applicants all traded under the business name of Panther Designer Homes ('the Builder'). In April 2009, the Builder entered into a building contract with Mr Duncombe, which was in the form of a MBAV standard form contract ('the Contract'). The works to be undertaken under the Contract comprised a second storey extension to Mr Duncombe's home ('the Works').
- 3 At the time the contract was signed, neither working drawings nor engineering drawings had been prepared. Indeed the Contract simply mentioned a single plan drawn by Hoban Hynes entitled "H8199" as being the only contract document incorporated into the Contract. Nevertheless, the parties agreed that the Contract also incorporated a specification entitled *Panther Designer Homes Quote & Project Specifications*.
- 4 The Contract contained two special conditions, which stated:
  - SC1 Foundation work (i.e., concrete stumps to external wall). As per engineer's plans to support second storey extension – costs to be paid by owner. Includes any studwork to lower storey walls.
  - SC2 Studwork to existing home, re-patching of walls ready for painting as per engineer's plan not to exceed \$4,000.
- 5 In other words, the Contract purported to remove the cost of any foundation work from the contract price. Mr Nelson, who appeared on behalf the Builder, stated that the clause was inserted because no engineering drawings had been prepared at the time the Contract was entered into. He said that as a consequence, the cost of that work (if required) was unknown and therefore not included within the contract price.
- 6 Final working drawings and engineering drawings were prepared some time after the Contract was signed, with the Works commencing on 7 October 2009. The engineering drawings required certain foundation works and other structural works to be undertaken to ensure that the existing dwelling was able to support the Works.

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<sup>1</sup> Applicant's *Points of Claim* dated 29 March 2011.

<sup>2</sup> Paragraph 9 of the Respondent's *Points of Defence and Counterclaim* dated 12 November 2010

7 This then prompted the Builder to submit a variation notice for \$10,300 (**‘the Foundation Variation’**) which stated, in part:

Description of variation works requested by building owner:

(To be completed by building owner).

- Foundation works (as per special condition 1)  
i.e. concrete stumps to external walls as per engineer’s plans.
- Studwork to external walls of existing home (SC.2)
- Steel beams to compensate for load bearing wall

8 Mr Duncombe paid that Foundation Variation claim, initially without complaint, although he now contends that the variation claim is contrary to s 30(7) of the Act and seeks to be reimbursed for that payment.

9 The Works entailed removing the roof of the existing dwelling in order to construct the second storey extension. After the roof had been removed, severe storms occurred with the result that a significant part of the existing dwelling was water damaged. This necessitated significant remedial works by the Builder, which included plastering and repainting various parts of the existing dwelling and in the case of the existing ground floor Lounge Room, completely replacing the existing fibrous plaster ceiling with a new plasterboard ceiling. This work was undertaken without any additional charge. Not surprisingly, this incident caused significant delay to the progress of the Works. However, no extension of time claim was ever made.

10 Mr Nelson gave evidence that further delays were experienced by the Builder because of changes requested by Mr Duncombe or because of indecision on his part. This was denied by Mr Duncombe. In any event, no extension of time claim was ever made.

11 An occupancy permit was issued on 30 August 2010, although Mr Duncombe contends that the works were not completed as of that date.

## THE ISSUES

12 As indicated above the Builder claims its final progress claim under the Contract in the amount of \$10,630, plus a further \$2,500 representing a variation for extra tiling work and interest at 10.5% pursuant to the Contract. Mr Duncombe does not dispute that \$10,630 would have been payable had the Contract been performed in accordance with its terms. However, he contends that the Builder breached the terms of the Contract and as a result, he has suffered loss and damage amounting to \$115,312 (and continuing) which is set out in his *Points of Counterclaim* as follows:

Total payments made by owner to builder	\$211,170.00
Additional direct payment made by owner for labour and material	\$5,705.00
Additional amount paid by owner for foundations	\$10,300.00
Rectification costs as per attached SACS One Pty Ltd Quotation	\$97,365.00
Sub total	<u>\$324,540.00</u>

Less contract price	\$212,600.00
Due to owner	<u>\$111,940.00</u>
Liquidated damages at the rate of \$200.00 per week from the date of 5 May 2010 to 30 August 2010 (16.86 weeks at \$200.00 per week)	\$3,372.00
Further damages continue to accrue as the works remain incomplete <sup>3</sup>	

- 13 It seems that the claim made by Mr Duncombe double counts one aspect of the damages he claims. In particular, he adds \$10,300 for the Foundation Variation to the amount of his claim as money to be reimbursed from the adjusted contract price but then does not account for that sum when he deducts the original *contract price* of \$212,600. In other words, the amount he deducts from his alleged loss ((\$212,600) as being the *contract price* should be \$222,900; otherwise the amount of \$10,300 is effectively deducted twice. That then reduces the amount of his claim to \$105,012.
- 14 The issues in this case can therefore be summarised as follows:
- a Are the applicants entitled to retain the amount paid to them for the Foundation Variation?
  - b Are the works defective and if so, what are the reasonable costs of rectification?
  - c Are the works incomplete and if so, what are the reasonable costs of completion?
  - d Were the works late in completion and if so, what amount is payable by way of liquidated damages?
- 15 I will address each of the issues separately.

#### **FOUNDATION VARIATION**

- 16 Section 30(7) of the Act seeks to prohibit a builder from representing that the contract price includes the cost of foundation work but then subsequently claiming an additional amount in circumstances where that cost could have been ascertained had proper investigation been made prior to signing the contract. It states:
- (a) After entering into a major domestic building contract, a builder cannot seek from the building owner an amount of money not already provided for in the contract if the additional amount could reasonably have been ascertained had the builder obtained all the foundations data required by this section. [emphasis added]
- 17 In my view, the present case is somewhat different to the mischief sought to be prohibited by the Act. Here the Builder represented that the contract price did not include the cost of foundation work as may be required to

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<sup>3</sup> No amount is specified in the *Points of Defence and Counterclaim* respect of this head of damage.

complete the works. In essence, the cost of the Foundation Variation is not *an amount of money already provided for in the contract* because the Contract expressly states that the price for the Works does not include such an amount.

- 18 The parties were free to negotiate the terms of the Contract as they saw fit. I find that the parties agreed to exclude the cost of the Foundation Variation from the contract price, notwithstanding that this may have left some uncertainty as to the final contract price. That interpretation of the Contract seems to be consistent with the conduct of the parties at the relevant time, given that Mr Duncombe did not take issue with the Foundation Variation at the time it was submitted. In fact it seems that he first took issue with the Foundation Variation well after the occupancy permit had been issued and after proceedings had been filed by the Builder.
- 19 I therefore dismiss this aspect of Mr Duncombe's counterclaim.

### **ARE THE WORKS DEFECTIVE?**

- 20 Mr Spencer, an architect engaged by Mr Duncombe, gave evidence in support of Mr Duncombe's claim as it related to the cost to make good defective work. In that regard, Mr Duncombe relied upon a report prepared by Mr Spencer, which described the alleged defective work and provided an estimated cost to rectify that work.
- 21 Mr Duncombe also made reference to a quotation prepared by a builder known as SACS 1 Pty Ltd, which costed various rectification works at \$97,365. That quotation provided the particulars of Mr Duncombe's counterclaim, as it related to allegations of defective or incomplete work. Regrettably, nobody from that company was called to give evidence in the proceeding. In those circumstances, I place little weight on that quotation, given that its author was not able to be questioned as to how the amounts described therein were derived or calculated. Instead, I rely on the expert opinion evidence of Mr Spencer and the lay evidence of Mr Duncombe himself.
- 22 Mr Nelson did not call any witnesses other than giving evidence himself in answer to the allegations made against the Builder.
- 23 Dealing with each of the alleged defects in the order set out in Mr Duncombe's counterclaim, I make the following findings.

### **Waterproof decks**

- 24 Mr Spencer gave evidence that the front and rear upper level decks had been defectively constructed by the Builder because:

The decks have [not] been constructed to a high level preventing adequate waterproofing at junctions with the external cladding, and external window and door frames. Correct building practice, and BCA, require 75mm step down from internal floor level to top of

finished surface of decks/verandahs (refer to “Wet Seal Australia Pty Ltd” for recommended membrane installation).

The waterproof membrane has not been installed correctly, turn-up at sills and walls is low, membrane fixing to penetrations and upstands is defective and leaking; deck edge .... is unsatisfactory and encourages water entry into the deck structure. (Refer to James Hardie instructions for construction of waterproof decks).

Non-suitable decking sub-base has been installed. Chipboard should not be used due to its deterioration when wet or when exposed to moisture.

BCA, Standards, and proven construction practice, require compressed cement sheet or waterproof plywood as a sub-base.

Stainless steel balustrade glass supports require fixing with stainless steel bolts (not galvanised), with isolation washers where fixed to steel fascia beam.

Balustrade fixings have penetrated the membrane causing leaks into the deck structure.

Works are classified as Defective in accordance with Victorian Building Commission Guide to Standards and Tolerances, CL 13.

- 25 Mr Spencer said that the decks had to be demolished and rebuilt at a cost of \$24,750. During cross examination, Mr Spencer was asked how he arrived at that amount. He said that his firm had properly costed out the rectification work. It was put to him that his costing of \$24,750 was the aggregate of the price quoted by SACS One Pty Ltd in its quotation, which stated:

Front deck	\$14,510
Front deck base plates:	\$4,350
Rear deck	\$5,890

- 26 In response, Mr Spencer said that he may have adjusted his own costings to fit with the SACS One Pty Ltd price by 2-3%.

- 27 Indeed when one looks at the remainder of the costs provided by Mr Spencer, all but two items have exactly the same cost as the costing set out in the SACS One Pty Ltd quotation. Further, Mr Spencer was unable to produce any documents, such as a take-off, verifying or corroborating that he or his firm had independently calculated the costings referred to in his report. In my view, these factors undermine the weight to be given to his opinion evidence.

- 28 Mr Nelson gave evidence that although the decks were constructed on a base of “yellow tongue” chipboard, compressed cement sheet was placed over that flooring before a solid waterproof membrane was laid over the entire balconies with a turn up of 50mm at the junction of the house cladding. In his witness statement, which Mr Nelson adopted as his evidence in the proceeding, he states:

Both front and rear decking have been designed by Hoban and Hines Architectural and Designing Services. Chadwick and Grimmond Engineers Pty Ltd have also designed the steel and structural beams for all of the works including the balconies. Finally these plans were stamped by the relevant building surveyor - Advanced Building Strategies. A 50mm step down to the balconies waterproof membrane is clearly marked on the plan.

I have not used Wet Seal Australia for 15 years. Being a fibreglass product, over the years I have experienced many problems with deterioration and cracking in many showers. Wet Seal Australia had their specifications but they do not apply to my waterproofing membrane.

I use an American product called Protector Wrap. It is a flexible rubber and bitumen based matting with an indefinite life expectancy. It is 100% waterproof. With all the rain that we have had, never once has it leaked and it never will. The decking has been built with structural water resistant 19mm yellow tongue flooring over joists. This has compressed cement sheet installed over that which then has the Protector Wrap installed over that. The same procedure is used through the entire bathroom where the shower base forms part of the floor.

- 29 As to the use of galvanised bolts to fix the balustrade posts, Mr Nelson said that this work was done by a nominated contractor of Mr Duncombe and the Builder was therefore not responsible for the quality of the work performed. I disagree. The relevant tradesperson entered into a subcontract with the Builder and on that basis it is responsible for the work performed by that person, notwithstanding that he or she may have been nominated by Mr Duncombe.
- 30 Having said that, however, I am not satisfied that whatever work was completed by the nominated contractor is causing leakage into the deck structure. During the course of my inspection of the premises on 30 May 2011, I saw no signs of any water staining on the soffit lining under the front deck indicating any leakage from the deck. Further, Mr Spencer gave evidence during cross examination that no destructive investigation of the front or rear decks had been undertaken by him to establish whether the membrane had been compromised or that there was a failure to adequately seal where the balustrade posts penetrated the membrane. Similarly, I was not taken to any standard or building regulation stipulating that the anchoring bolts had to be made from stainless steel rather than galvanised iron. Consequently, I find there is insufficient evidence to substantiate the claim that water is entering the deck structure at a point where the balustrade posts penetrate the deck membrane or that the use of galvanised bolts constitutes a defect.
- 31 Mr Spencer gave further evidence that the deck edge treatment was unsatisfactory and that it encouraged water entry into the deck structure. He mentioned the presence of corrosion on an aluminium strip which was

fixed to the edge of the tiles abutting the steel fascia beam of the front deck. Mr Spencer gave evidence that the corrosion was caused by a chemical reaction to the aluminium strip when fixed to steel. He contended that the presence of white crystals on the face of the aluminium strip was evidence of that corrosion.

- 32 Mr Nelson gave evidence that the aluminium strip was not fixed to the steel fascia beam but rather, fixed to the edge of the tiles and made no contact with the steel fascia beam. He said that the white substance was not corrosion but simply a build up of salt, either from the slate tiles used on the deck or from the salt air, given the proximity of the dwelling to Port Phillip Bay.
- 33 In my view, there is insufficient evidence to support a finding that the edge strip is suffering from corrosion, resulting from a breach of the terms of the Contract on the part of the Builder. I accept the evidence of Mr Nelson that the aluminium strip is not fixed to the steel fascia beam but rather, siliconed onto the edge of the slate tiles.
- 34 Mr Spencer and Mr Duncombe both gave evidence that the flashing of the front deck where it intersected with the timber posts that passed through the south and north corners was defective. I disagree. I find that there is no evidence that the intersection between the timber posts and the deck are not watertight. During the course of my view, I noticed that the membrane had been upturned on the post and then sealed, which indicated to me that the corner had been flashed. This was confirmed by Mr Nelson, who said that the membrane was upturned around the posts and had been cut at or just above the finished level of the slate tiles and then sealed with silicon. Again, there were no signs of water penetration in the soffit lining that would indicate that the method of flashing around the timber posts was unsuccessful.
- 35 During the course of my view, Mr Spencer pointed out cracks in the joins between weatherboard cladding located immediately beneath the south side of the front deck. He opined that this was due to water penetrating the deck edge as it met with the dwelling on that south side, causing the weatherboards to swell and crack. He suggested that there was insufficient free board between the deck and the window and door sills and that the membrane did not have sufficient up-stand to prevent water ingress behind the wall cladding.
- 36 Mr Nelson reiterated what he had already stated in his witness statement, namely that the drawings only required 50mm freeboard between the top of the slate tiles and the entry points into the dwelling. He stated that the membrane had sufficient up-stand to prevent water ingress, although he conceded that at the junction of the two external corners of the house and deck, there was a short section of membrane that did not extend up the wall. He said that was an omission on the Builder's part and could be the cause of water ingress behind the weatherboard cladding identified by Mr Spencer as



having been adversely affected by moisture. He gave evidence that rectification of that deficiency was easy to effect. He said that it was necessary to take up the tiles where the front deck intersects with the south west and north west corners of the house, clean and then prime the area to create a bonding surface. He said that the *Protector Wrap* would then be placed into position and fused to the existing membrane to create a waterproof seal. He stated that the cost to uplift the tiles at each corner and relay the same was \$450. He further gave evidence that the cost to lay the additional membrane was \$200, calculated at 2 hours work for two tradespeople. Accordingly, he estimated that the total cost to the Builder to repair that aspect of the front deck was \$650.

- 37 As to the allegation that the chipboard floor did not comply with the BCA, I was not referred to the relevant section of the BCA upon which Mr Spencer relied. Nevertheless, I have had recourse to the BCA 2008 at Clause 3.8.1.4 (Page 383) which deals with wet areas and states:

3.8.1.4 Materials – water resistant substrates

For the purposes of this Part, the following materials used in a waterproofing system in conjunction with water resistant surface materials in accordance with 3.8.1.5 are deemed to be water resistant:

- (b) For floors:
- (i) Concrete in accordance with AS3600 or AS2870
  - (ii) Compressed fibre cement sheeting manufactured in accordance with AS/NZS 2908.2
  - (iii) Compressed fibre cement sheeting manufactured in accordance with AS/NZS 2908.2 and supported on a structural floor
  - (iv) Flooring grade particle board sheeting [emphasis added]
  - (v) Structural ply board manufactured in accordance with AS/NZS 2269 and installed in accordance with AS 1684.2, AS 1684.3 or AS 1684.4.

- 38 Having considered the section of the BCA referred to above, I am of the opinion that the use of yellow tongue flooring sheets in conjunction with compressed fibre cement sheeting and a *water resistant surface material*, such the *Protector Wrap* used by the Builder, satisfies the requirements of the BCA, Therefore, I find that the work in constructing the front and rear decks is not defective, save and except for the two corners referred to above. In that respect I accept the uncontested evidence of Mr Nelson that the reasonable cost to the Builder to repair those two corners is \$650.

- 39 Mr Duncombe is, however, under no obligation to permit the Builder to carry out those repairs, given that the Contract is no longer operative.<sup>4</sup> Consequently, I determine that a further 25% is to be added to the Builder's cost to cover the reasonable cost of supervision, administration and profits charged by a rectifying builder ('**the Margin**') and an additional 10% for GST, making a total of \$893.75. In arriving at 25% for the Margin, I have adopted the *margin* applied in the SACS One Pty Ltd, which I consider reasonable.
- 40 Therefore, I will allow Mr Duncombe's counterclaim as it relates to the front and rear decks in the amount of \$893.75, being the amount that I find is the reasonable cost to repair.

### **Ensuite Shower**

- 41 Mr Spencer gave evidence that the ensuite shower floor did not drain adequately to prevent ponding and overflow onto the surrounding floor. He stated that the shower drain outlet was too high and lipped over the tiles, which prevented water from completely draining. He gave further evidence that the taps and shower rose outlets were not adequately sealed into the wall to prevent moisture entry into the wall framing. He estimated the cost to rectify those items of work at \$3,495.
- 42 Mr Nelson gave evidence that the whole of the Ensuite floor, including the shower floor, was sealed using the *Protector Wrap* product referred to above. He stated that the problem with the shower drain was that the grate which screwed into the drain socket had not been tightened sufficiently and as a result was protruding from the socket and creating a lip to the surface of the tiles. This was confirmed during the course of my visual inspection.
- 43 Mr Nelson further stated that the *PosiStrut* floor beams had a section which was recessed 50 mm where the shower was located. He said that this meant that the chipboard flooring within the shower recess was 50mm lower than the rest of the Ensuite, which allowed the tilers to form their screed to fall to the shower waste. He contended that the only rectification required was to unscrew the grate and then to screw it down flush. He suggested that that work would not take more than half an hour to complete, at a cost of \$60. He further suggested that a flexible sealer or a grout be used to seal around the taps and shower rose and that this could be done at the same time as when the grate was screwed down flush with the tiles.
- 44 I do not accept that the shower recess does not have sufficient fall to the shower drain. My inspection of the shower revealed that the tiles had been cut in a manner consistent with there being fall towards the shower drain. Further, I accept the evidence of Mr Nelson that the problem lay with the grate not having been screwed down flush with the tiles, rather than with

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<sup>4</sup> The Builder contends that the Contract is wholly performed, given that an occupancy permit has been issued by the relevant building surveyor. Further the defects liability period was stated to be 7. Assuming the reference to 7 is a reference to 7 months, the defects liability period has now expired.

the laying of the tiles. I further accept the evidence of Mr Nelson that the reasonable cost to the Builder to rectify that problem is \$60. For the reasons stated above, I allow a further 25% Margin plus GST to that amount, making a total of \$82.50 which I regard as the reasonable cost to rectify that item. I therefore allow \$82.50 in respect of this aspect of Mr Duncombe's counterclaim.

## **Steel corrosion or protection**

### *External steelwork*

45 There are two aspects of Mr Duncombe's counterclaim relating to the corrosion and protection given to steel members used in the construction of the Works. First, it is alleged that the external structural steel does not have the minimum protective coating required by the BCA. In that regard, I was provided with an extract of the BCA 2010, which set out minimum protective coatings for structural steel members. According to that publication, I understand Mr Duncombe's residence to fall within the category of *Low* which is defined as follows:

Low – rural inland includes dry rural areas remote from the coast or source of pollution. Many areas of Australia beyond at least 50 kilometres from the sea are in this category including most cities and towns such as Canberra, Ballarat, Toowoomba, Alice Springs, and some suburbs of cities on sheltered bays such as Melbourne, Hobart, Brisbane and Adelaide but are more than one kilometre from the sea. However each of these have many exceptions which are in more corrosive categories.

46 In the present case, the parties agree that the dwelling is located 1.3 kilometres from Port Phillip Bay. This confirms that the environment category is *Low*.

47 Mr Spencer gave evidence that the galvanised steel beam fascia to the front balcony was not up to the standard required by the BCA because there were signs of surface rust on its face. He contended that there should be no sign of rust, had the steel member been treated with the correct gauge of galvanising. He was unable to say, however, what gauge of galvanising had been applied to the beam.

48 I disagree with the conclusion reached by Mr Spencer. The marks that I observed during the course of my inspection were almost black in colour and ran in near vertical stripes down the face of the beam in two or three locations. It appeared similar to a stain caused by a constant flow of dirty water, rather than rust staining.

49 Mr Nelson gave evidence that the beam was purchased from Bluescope as a galvanised beam. He said that Bluescope were provided with the engineering drawings and he had no reason to believe that the galvanising treatment applied to the beam was not in accordance with those drawings and the BCA. He rejected the contention that the marks on the beam were

rust and suggested that they were stains caused by water running off the edge of the front deck.

- 50 Given that there is no direct evidence that the galvanising treatment is not up to the standard required by the BCA, I find that on the balance of probabilities the protective coating applied to the steel member accords with the minimum requirements set out in the BCA. Similarly, I find that on the balance of probabilities, the marks on the face of the beam are not rust. Accordingly, I dismiss this aspect of Mr Duncombe's counterclaim.

*Internal steelwork*

- 51 The second aspect of Mr Duncombe's counterclaim that relates to the protection or corrosion of steelwork concerns the internal and concealed steelwork. Mr Spencer gave evidence that there was greater risk of corrosion with internal steelwork than with external steelwork because external steelwork was able to be washed down by rain and thereby remove any build up of chloride caused by salt in the air. During the course of my inspection, a manhole was opened to allow me to view the internal steelwork. A photograph of that steelwork was taken and provided to the parties at the next sitting day. During cross-examination, Mr Spencer said the photograph of the internal steelwork showed red rust. He said that the condition in the steelwork was substantially worse than when he first inspected the site in March 2010. He said that he had taken photographs of the same steelwork at that time and that the comparison between the photograph taken on 30 May 2011 and his own photographic evidence taken in 2010 revealed a stark difference between the condition of the steelwork between those two dates. Mr Spencer subsequently provided the Tribunal with a copy of the photograph he took in March 2010. I have compared the two photographs and in my opinion there is no discernable difference between the condition of the steelwork as it was installed to the condition of the steelwork as it presently is. Indeed, further photographs were produced showing the steel members lying on the ground before they were installed. It seems to me that the condition of the steelwork prior to installation is substantially the same as its condition is now in situ.
- 52 Mr Nelson said that it was quite common for there to be surface rust on black steel because it is usually stored outside before being transported to site. Mr Duncombe said that it was unacceptable that there be surface rust on the internal steel members because he was entitled to have all building components supplied new.
- 53 In my opinion, the fact that there is surface rust on the black steel is of no significance. It does not mean that the steel members are not new. Further, there is no evidence before me that the structural integrity of the steel is in any way compromised.
- 54 I do not accept the evidence of Mr Spencer that the treatment to be given to internal steelwork needed to be greater than what would be required to external steelwork. That contention is not supported by the minimum

requirements set out in the extract of the BCA handed to me, which clearly require a higher standard of protective coating to external steelwork than to internal steelwork. In that regard, Mr Spencer argued that the BCA is unclear when it refers to internal steelwork. He gave evidence that the reference to the internal installation of steelwork was a reference to an installation where there was no air circulation within the location of steelwork, such as a sealed laboratory. I disagree with that interpretation. The relevant building code from which Mr Spencer relies is the BCA 2010 Class 1 and Class 10 Buildings Housing Provisions Volume Two. That particular volume of the BCA is said to relate to *houses, sheds, carports, etc.* There is no reference in that volume of the BCA to confine its application to a laboratory type environment.

- 55 Further, Table 3.4.4.2 entitled *Protective Coatings for Steelwork* states that no protection is required for internal steelwork if it is located in a permanently dry location. There is no mention in the BCA that such a location must be free of air circulation. Indeed, Note 6 states:

Internal locations subject to moisture, such as in close proximity to kitchen or bathroom exhaust fans are not considered to be permanently dry location and protection as specified for external locations is required.

- 56 Again, the expanded definition of an internal location makes no mention of air circulation as a criteria to exclude steelwork from what would otherwise be classified as an internal location.
- 57 In the present case, the internal steelwork has no protection. It is what Mr Nelson has referred to as *black steel*. Having perused the relevant sections of the BCA and the engineering drawings, I find no requirement that the internal steelwork needs to be protected.
- 58 Therefore, I dismiss that aspect of Mr Duncombe's claim.

### **Window flashings**

- 59 Mr Spencer gave evidence that the existing, new and altered window and door frames have not been flashed adequately. Both Mr Spencer and Mr Duncombe gave evidence that window leaks were evident and that there was no evidence of head and sill flashings. Mr Spencer said that the works did not therefore comply with Clause 3.5.3.6 of the BCA. He recommended that the windows be removed and that flashings be installed in accordance with the BCA at a cost of \$8,685.
- 60 Mr Nelson gave evidence that all new windows and doors installed by the Builder had head and sill flashings. He said that the existing windows on the ground floor of the residence were not installed by the Builder and there was no contractual obligation for it to replace or alter those existing windows, save and except for one window which was to be re-located. Mr Nelson gave evidence that the ingress of water emanating from the existing ground floor windows may have arisen because an eave which had

previously been constructed approximately two weatherboards higher than the window head had to be removed in order to construct the Works in accordance with the contract documents. He suggested that the eave may have offered some protection against water ingress and its absence may have allowed water to enter the window heads. He reiterated that no work was done altering the structure of the existing windows, save and except for when he returned to site after Mr Duncombe had complained about water ingress and had applied a flexible sealer to the head of the existing window frames. In addition, he said that the only existing window that was *touched* was one window of the lower section which was removed and installed upstairs in accordance with the plans.

- 61 In relation to the new windows installed by the Builder, Mr Nelson conceded that there had been a water leak through the window installed in the upstairs Theatre Room but that it was found to be water entering through the glazing and not through the flashing. He said that he attended the site in April 2010 whereupon the glazing was re-sealed.
- 62 Mr Duncombe provided photographs of a stain to the wall in the Theatre Room where that particular window had leaked. Mr Nelson gave evidence that he had provided advice to Mr Duncombe's wife as to how to remove the stain. It appears, however, that whatever attempt had been made to remove the stain was unsuccessful. He conceded that if a painter was engaged by the Builder to paint that section of wall, the minimum cost would be \$150.
- 63 Having looked at the terms of the Contract, I find no provision requiring the Builder to undertake any work to the existing windows, save for removing one window and reinstalling it in another location. I do not believe that the Contract required the Builder to make good any deficiency in the head flashing or sill flashing of the existing windows. I do not find that restoration of the existing windows or doors was work required to be done under the Contract. Accordingly, I dismiss Mr Duncombe's claim as it relates to the existing window and door flashings.
- 64 In relation to the upstairs Theatre Room window, I am not satisfied that a leak still exists, although I accept that there was a leak at some earlier point in time. Further, I accept that the damage caused by the previous leak has not been properly repaired. I therefore allow the reasonable cost of repainting that section of wall. Accordingly, I allow \$150 plus 25% Margin and GST, making a total of \$206.25 in respect of this aspect of Mr Duncombe's counterclaim.

### **Roof gutter**

- 65 Mr Spencer gave evidence that the side roof gutter adjacent to the rear deck had been installed without adequate fall, depth and width. He gave evidence that the gutter was leaking into the building. I note there was evidence of water ingress which was apparent during my inspection of the dwelling. Mr Nelson conceded that there was a problem with the

construction of the side roof gutter. He suggested that the roof tiles should be removed so that a new box gutter could be installed. He gave evidence that the cost to the Builder to undertake that work would be \$510. Mr Spencer estimated that the cost of an independent builder to undertake that work would be \$880.

- 66 In my view, it is appropriate to allow \$880 in respect of that particular work. That amount is close to the estimate given by Mr Nelson when one adds margin of 25%, GST and a further amount for any necessary paintwork. As I have already stated, Mr Duncombe is under no obligation to engage the Builder to undertake that rectification work and as a consequence, his damages should be calculated by reference to what it would cost him to engage a third party builder to carry out that work. I will therefore allow \$880 in respect of that aspect of Mr Duncombe's counterclaim.

### **Ceilings**

- 67 As I have already commented, the existing dwelling suffered storm damage during the course of the building works with the result that the Builder undertook substantial repairs of existing parts of the dwelling. The existing ceilings were made from fibrous plaster and the repair work comprised refixing the fibrous plaster to the ceiling joists and patching where required. In relation to the Lounge Room, the fibrous plaster ceiling was completely removed and replaced with plasterboard.
- 68 Mr Spencer gave evidence that where the fibrous plaster sheets were substantially damaged through water ingress, then it would have been appropriate to replace all of the affected areas with plasterboard. Mr Duncombe pointed to various parts of the ceiling to indicate that the rectification of the existing ceiling was not adequate because there were hairline cracks or imperfections in the ceiling surface.
- 69 Mr Nelson gave evidence that the repair work resulted in the existing ceilings now being 90% better than they were prior to the water damage. He said that there was only one crack near the staircase which had re-emerged and that the balance of the *imperfections* was simply crazing. He said that the crack near the staircase was due to normal movement and not because of any structural deficiency.
- 70 My inspection revealed that there were some marks in the existing fibrous ceilings, although I do not consider that those marks were or are cracks. I agree with Mr Nelson that they are crazing and in my opinion do not warrant any further remedial work. The only crack that I observed was near the staircase. It was less than 1mm in width.
- 71 Clause 9.1.5 of the *Building Commission Guide to Standards and Tolerances 2007* states:

Cracks in walls, ceilings and bulkheads that is greater than 1mm is a defect if it is visible from a normal viewing position. Cracking in

recessed and bulkjoints is a defect if it is visible from a normal viewing position.

- 72 There is no evidence that the crack near the staircase is cracking in recessed and bulkjoints or greater than 1mm in width. Accordingly, I dismiss this aspect of Mr Duncombe's claim.

### **Ceiling design in Master Bedroom and Theatre Room**

- 73 Mr Duncombe alleges that the approved drawings required the ceiling in the Master Bedroom and Theatre Room to be a cathedral ceiling pitched at 33°. What has been constructed does not comply with the approved drawings. In particular, the as-constructed ceilings contain a small section of flat ceiling rather than being constructed to an apex.
- 74 Mr Nelson gave evidence that the engineering drawings required a 250mm steel wedge beam to be installed as a ridge beam, with the consequence that the cathedral ceiling could not be constructed without exposing that beam. Consequently, what was shown on the architectural drawings could not be constructed. He said that he spoke to Mr Duncombe's wife and also had a meeting with both Mr and Mrs Duncombe, where he drew a diagram on the wall as to how the wedge beam affected the construction of the ceiling and what alternative method of construction could be adopted. He said that the diagram drawn on the wall depicted what had ultimately been constructed. He said that both Mr Duncombe and Mrs Duncombe agreed with the as-constructed altered design.
- 75 Mr Duncombe disagreed that any concluded agreement was reached to vary the design of the ceilings. He contended that it was open for the Builder to have boxed-in the steel member and still constructed the cathedral ceiling, however, that option was not discussed at the relevant time.
- 76 I note that no variation notice was submitted in relation to the altered design. Nevertheless, Mr Neilson reiterated that the altered design was agreed between the parties at the relevant time. He stated that no complaint was raised in relation to the as-constructed ceilings until the Builder was provided with a copy of the SACS One Pty Ltd quotation dated 2 November 2010, well after the works were completed.
- 77 I find that on the balance of probabilities there was agreement to vary the plans substantially in accordance with the as-constructed ceilings. I make this finding for a number of reasons. First, I accept the evidence of Mr Nelson in relation to the discussions that he had with Mr and Mrs Duncombe at the relevant time regarding the varied design. Second, I note that Mr Duncombe states in his witness statement at paragraph 74:

The builder decided to pitch the ceiling at an angle that meant they would have to create a flat ceiling rather than pitch the ceiling at an angle that would meet either side. This defective work was raised with the builder at the time and they chose to ignore my wife and me.



78 Despite what was said in Mr Duncombe's witness statement, I note that in the Archicentre report that he had commissioned on 30 March 2010, being a date when the works were substantially complete, no mention was made of the as-constructed ceilings not being in accordance with the Contract documents. It seems to me that had this been an issue in dispute at the relevant time, it would have been raised in the Archicentre report, given that the Archicentre report comments on most of the other defects raised in Mr Duncombe's counterclaim. It seems inconceivable to me that such a significant aspect of Mr Duncombe's counterclaim was not raised during the course of the Archicentre inspection or that there exists no other correspondence flowing between the parties complaining about the as-constructed works unless there was agreement between the parties to vary the works as constructed.

79 Consequently, I dismiss this aspect of Mr Duncombe's counterclaim.

### **Fire place hearth**

80 Mr Duncombe contends that the Contract between the parties required the Builder to provide a metal or moulded beading to the perimeter of the downstairs fire place hearth. Mr Nelson conceded that the finishing of the floor to the fireplace hearth required further work. He gave evidence that previously a 19mm quad surrounded the fireplace hearth but was removed by his contractors. He did not know the reason why that quad was removed but conceded that it needed to be reinstalled.

81 His evidence was that the cost to engage a carpenter to install the quad would be approximately \$75 and the cost of materials would be \$10.

82 Mr Spencer adopted the costings set out in the SACS One Pty Ltd quotation that the cost to provide a metal or moulded beading to the perimeter of the fireplace hearth was estimated to be \$835. Like all other costings set out in the SACS One Pty Ltd quotation and in Mr Spencer's report, no particulars were provided as to how that amount was derived. Having viewed the fireplace hearth during the course of my inspection, I do not understand how a metal or timber surround could cost that amount. Accordingly, I accept the evidence of Mr Nelson that the reasonable cost to the Builder to replace that quad is \$85, including materials. I add 25% Margin plus GST to that amount to arrive at \$116.90, which I consider to be a reasonable amount for the cost of engaging an independent builder to undertake that work. I allow that amount in respect of Mr Duncombe's counterclaim.

### **Grouting to pavers**

83 Mr Duncombe gave evidence that a number of external pavers in the rear courtyard were removed by the Builder in order to complete the Works. Those pavers have been reinstated; however, grouting to the reinstated pavers has not been undertaken. Mr Spencer estimated that the cost to undertake that work was \$1,255, again adopting the pricing from the SACS One Pty Ltd quotation.

- 84 Mr Nelson agreed that the grouting work was yet to be done; however, he estimated that there was two hours work for a tiler to undertake that work. He said that the cost of the tiler was \$60 per hour and the cost of materials was \$40, which comprised yellow sand and cement. Accordingly, he estimated that the total cost to the Builder to undertake that work was \$180.
- 85 Having inspected the rear courtyard, it seems to me that there is only a small section of the external paving that requires to be grouted. It is unclear to me how the amount of \$1,255 costed by Mr Spencer was derived or calculated, given the small amount of area that needed to be grouted. Accordingly, I accept the evidence of Mr Nelson that the reasonable cost to the Builder to undertake that work is \$180, to which I add 25% margin and GST making a total of \$247.50. I allow that amount in respect of Mr Duncombe's counterclaim.

### **Ground level timber floors**

- 86 Mr Duncombe gave evidence that he had requested a matt finish waterbased product to be used on all the new and damaged floors that required sanding and polishing. He contended that the Builder used a high gloss polyurethane finish resulting in the floors taking on an orange colour. He further said that the floors were not finished very well as they contained blisters and marks which were evident in various places. Moreover, he contended that the floors were sanded and polished at a time when other building work was still being undertaken, such as painting and finishing off. He stated that the floors were not protected during that period with the result that they were marked and dirty.
- 87 Mr Nelson gave evidence that the Contract did not specifically require a matt finish water based product to be used on the floors. He referred to the *Project Specifications*, which stated:
- Polished Tasmanian solid timber floors to theatre, area top of stairs, master bedroom (timber floor will frame carpet square of approximately 3.5 metres x 3.5 metres as discussed) and walk in robe area.
- 88 In other words, the Contract did not require any polishing to the ground floor area. Nevertheless, that area was sanded and polished as a result of water damage caused during the course of the Works. Mr Nelson said that he had discussed the floor polishing with Mrs Duncombe and had indicated to her what the finished floor would look like. In particular, he said that he wet an area of floor to show how the floor would appear once the polyurethane finish was applied. He gave further evidence that it was the intention of the Builder to apply three coats of polyurethane finish to the sanded floors but that only two coats were applied before a complaint was raised by Mr and Mrs Duncombe about the finished look of the floors.

- 89 Mr Duncombe gave evidence that he subsequently arranged for another contractor to sand back the floor on the ground level and apply a matt finish to that floor at a cost of \$4,000, which he now claims from the Builder.
- 90 I was shown a number of photographs of the finished ground level floor prior to it being sanded back by the contractor engaged by Mr Duncombe. Based on those photographs, I do not agree that the polished floors took on an orange appearance. In my opinion, the colour of the floors matched that of the timber staircase constructed by the Builder, which was also polished with a gloss polyurethane finish and appears to be of a tan colour.
- 91 I accept, however, that the appearance of the floor as shown on the photographs produced during the course of the hearing is substantially different to its current appearance, which is significantly lighter in colour and matt in finish.
- 92 As I have already stated, Mr Nelson said that the sanding and polishing of the floors on the ground floor level were not part of the original Works under the Contract. He said that this area was sanded and polished as a consequence of the water ingress that occurred during the course of the building project. He gave evidence that the sanding and polishing of the floor undertaken by his contractors was done so as to best match the appearance of the floor prior to the incident of water ingress. He said that he did not charge any extra for undertaking that work.
- 93 In my view, the Builder was obligated to restore the floor to a condition nearest to what it was, prior to the water damage occurring. There was no obligation for the Builder to change the appearance of the floors to something other than what was present prior to the water damage occurring. Based on the evidence before me, I find that on the balance of probabilities the Builder achieved that result, albeit, that Mr and Mrs Duncombe may have wanted something different in terms of the finished look. In other words, this is not a situation where the Contract required a particular finish to be achieved and where the Builder has failed to achieve that required result. This is a situation where damaged floors were to be made good and I consider that this result was substantially achieved, except for the fact that one final course of sanding and polishing was still to be undertaken.
- 94 I note that Mr Duncombe also complains about the finish to the staircase. In particular, he gave evidence that the polyurethane gloss finish to the staircase has made the staircase slippery and unsafe. Mr Spencer also gave expert opinion that the finished surface of the staircase is unsafe and requires some further treatment to prevent persons from slipping.
- 95 Mr Spencer gave evidence that although the stairs had been *nicely built*, the building regulations required that the treads have some non-slip surface. He suggested fixing Carborundum strips to the treads. He gave evidence that they were easily fixed. Regrettably there is no evidence of the reasonable cost to supply and fit the Carborundum strips, although I

understand that the strips are relatively inexpensive and easy to fit, given that they are self adhesive.

- 96 Doing the best that I can with the evidence before me I will allow \$1,100 inclusive of Margin and GST as being the reasonable cost of applying the final coat of finish to the floor that Mr Nelson admits was not done. This also includes the supply and fixing of the Carborundum strips to the stair treads to prevent slippage on the stair treads. I have arrived at this figure based on the amount that Mr Duncombe says was the cost to completely re-sand and polish the floor to achieve the current look. In my view, the work of applying one final finishing coat to the floor that had already received two courses of sanding and polishing represents one quarter of the total work required to sand and polish the floor, taking into account that less work is required with each progressive course of sanding and polishing. Accordingly, I allow \$1,000 for the cost of applying the final course of sanding and polishing and \$100 for the supply and fixing of the Carborundum strips to the stair treads.

### **Painting**

- 97 Mr Duncombe gave evidence that a number of areas of the Works had not been painted. These included:
- (a) Kitchen bay window ceiling. He contended that this was part of the water damaged works and as a consequence was required to be repaired and repainted by the Builder.
  - (b) The replaced *external kickboard on the left side of the house* (barge board).
  - (c) The replaced deck board on the front deck (ground floor).
  - (d) The lower section of the two front posts at the front of the front deck.
  - (e) The replaced plasterboard and skirting inside Bedroom.
  - (f) The replaced plasterboard around kitchen patio doors.
  - (g) The external fascia and eave on the south side of the house.
  - (h) Some areas of the house and chimney.
  - (i) The external side of the en suite bathroom window.
  - (j) The second storey guttering.
- 98 Mr Nelson gave evidence that the painting of the lower parts of the dwelling was not part of the Contract. He said that the Works comprising the upper storey extension was the only part of the dwelling that the Builder was required to paint.
- 99 In relation to the upstairs fascia, he gave evidence that that area was in the process of being painted but he received an email from Mr Duncombe that he wanted to change the colour of the gutter and fascia. Consequently that work stopped. That element of painting remains to be painted. Mr

Duncombe gave evidence that the painting stopped because the colour of the paint used by the Builder did not properly match the existing part of the dwelling.

- 100 Having viewed the premises, it is apparent to me that there are minor aspects of the exterior and interior of the dwelling that requires painting. In particular, I observed that the fascia on the south side was not painted; parts of the chimney were not sufficiently matched in colour; the posts below the front ground floor deck had not been painted; some of the base boards on the north side of the house had not been painted; a small section of the front deck had not been painted and a section of ceiling in the kitchen had not been painted. In addition, there were parts of the rear deck that were water damaged as a result of the defective rear gutter.
- 101 Mr Spencer states in his report that the painting works comprise:
- Painting works are incomplete. Provide 2 no. finishing coats to walls, ceilings, architraves and skirtings, external weatherboards, windows, posts, fascias and eave linings.
- Probable cost to repair: \$7,950
- 102 In my view, the amount of painting contemplated by Mr Spencer is not commensurate with the painting that I observed needed to be done to comply with the terms of the Contract and make good water damage. In particular, it appears that the amount of painting contemplated by Mr Spencer relates to painting all of the exterior of the house, or at least a very large part of it, including the ground floor which was not part of the Works. Given that Mr Spencer has not itemised his costing, it is impossible for me to ascertain what value I should assess as being the reasonable cost of painting for those areas that I observed required painting.
- 103 Mr Duncombe produced a quotation from Surface Technologies for \$5,984, which related to the cost of painting various parts of the exterior of the house. That quotation included re-painting all of the existing ground floor windows. As I have already determined, the Contract did not require the Builder to re-paint the existing windows. Regrettably, the quotation did not break up the cost of painting so that each area was priced separately. In those circumstances, I have no way of determining how much of the quotation relates to painting work for which the Builder is liable.
- 104 Moreover, Mr Duncombe gave evidence that the cost of painting as set out in the Surface Technologies quotation was claimed by him under the head of damage known as *Additional direct payment made by Owner for labour and material* in his *Points of Defence and Counterclaim*. He said that this head of damage also included a claim for duct cleaning in the amount of \$225 and the cost of engaging Archicentre in the amount of \$530. However, the sum of those claims does not add up the amount claimed for that head of damage, being \$5,705. This makes his claim somewhat confusing, especially when one considers that the amount claimed pursuant to the SACS One Pty Ltd quotation already allocates \$7,950 to painting, which

includes most if not all of the work described in the Surface Technologies quotation.

- 105 By contrast, Mr Nelson gave evidence that he estimated that there was one half of a days work left for the painter to complete all painting works required under the Contract. He conceded, however, that a painter would, in all likelihood, charge the Builder a full day and that this cost was \$450 excluding materials.
- 106 I find, however, that there is additional work that Mr Nelson does not concede is the Builder's responsibility. For example, the kitchen ceiling, which I consider requires re-painting as part of the work related to repairing the water damage. In my view, it is reasonable to allow two full days for completion of the painting works required by the Builder, although I accept Mr Nelson's evidence that the cost to the Builder is \$450 per full day excluding materials.
- 107 Therefore, I allow \$900 for labour and \$100 for materials as being the Builder's cost to complete the painting works for which it is responsible. To that amount I add the Margin and GST making a total of \$1,375, which I allow in respect of this aspect of Mr Duncombe's counterclaim.<sup>5</sup>

#### **Liquidated damages for delay**

- 108 As indicated above, Mr Dumcombe claims liquidated damages at the rate of \$200.00 per week from the date of 5 May 2010 to 30 August 2010 (16.86 weeks at \$200.00 per week). Clause 18.1 of the Contract states:

If the Builder fails to bring the Works to Completion by the Completion Date, the Builder will pay or allow to the Owner by way of pre-estimated and Liquidated Damages, a sum calculated at the rate stated in Item 17 of the Appendix for the period from the Completion Date until the Works reach Completion or until the Owner takes Possession, whichever is earlier.

- 109 The sum stated in Item 17 of the Appendix to the Contract is \$200 per week. I accept the evidence of Mr Duncombe that the Works commenced on 7 October 2009. Item 9.2 of the Contract stated that the building period was to be 210 days. Accordingly, in the absence of any extension of time, the date for completion of the Works was 5 May 2010.

- 110 Mr Nelson gave evidence that there were delays in the construction of the Works. However, no extension of time claim was ever made. Clause 15 of the Contract states:

If the progress of the Works is delayed by ...

THEN

In any such case, the Builder will within a reasonable time advise the Owner of the cause and the reasonable estimated length of delay and the Builder will be

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<sup>5</sup> This amount includes the cost to repaint the section of wall in the upstairs Theatre Room but excludes the amount of painting required to the rear balcony following rectification of the rear gutter, which amount is already included in the cost to repair that rear gutter.

entitled to a fair and reasonable extension of time for Completion of the Works;

- 111 There is no evidence that any notice of delay was given to Mr Duncombe. Further, although Mr Nelson says that the works were delayed, there is no evidence to establish that such delay critically impacted on the construction program. In the absence of any delay claim or evidence of critical delay, I determine that the date for completion of the Works was not extended. Accordingly, I find that the date for completion of the Works is 5 May 2010.
- 112 Mr Duncombe contends that he is entitled to liquidated damages under the Contract until the Works are wholly completed. I disagree, Clause 18.1 of the Contract expressly states *or until the Owner takes Possession, whichever is earlier*. In my view, any entitlement to liquidated damages for delay ceases once a home owner takes possession of the works under the contract.
- 113 Mr Nelson contends that that the liquidated damages clause does not apply because Mr Duncombe remained in the dwelling during the construction of the Works. I do not agree with this contention. In my view, Mr Duncombe took possession of the Works after the occupancy permit was issued. It was at this point that he and his family were lawfully authorised to use and occupy the Works, notwithstanding that they may have occupied other parts of the dwelling during construction. In other words, although they lived in the dwelling during the construction period, they were not entitled to use the Works until the occupancy permit issued.
- 114 Consequently, I find that the Builder was 118 days late before possession of the Works was given to Mr Duncombe. I therefore calculate the liquidated damages at \$28.50 per day making a total liability of \$3,363. I allow this amount in respect of Mr Duncombe's counterclaim.

## **OTHER MATTERS**

- 115 In his witness statement, Mr Duncombe raises a number of other matters under the heading *Defective Works*. For example, damage to front doors and window frames, the colour of the Colourbond roof, the design of the arched windows, the use of second hand roof tiles and the presence of surface rust on external door handles and fittings. However, none of the matters raised are the subject of any expert opinion or comment by Mr Spencer. Moreover, the *Points of Defence and Counterclaim* filed by Mr Duncombe in the proceeding makes no mention of those particular items nor does it put a price or a cost to remedy those items. In the absence of such evidence, I am unable to make any determination as to damages (if any) suffered by Mr Duncombe as a result of any breach of the Contract on the part of the Builder. Accordingly, insofar as those items form part of Mr Duncombe's counterclaim, I dismiss that aspect of the claim.

- 116 As indicated above, Mr Duncombe also claims the cost of duct cleaning in the amount of \$225 and \$530 in respect of the services provided by Mr Spencer, whilst engaged as an Archicentre consultant. Invoices were tendered as evidence of those expenses. In my view, it is reasonable to expect that duct cleaning would be part of the Builder's cost of final clean up. I will allow that amount in respect of Mr Duncombe's counterclaim.
- 117 However, I do not allow the cost of the Archicentre report. In my view, that was an expense incurred by Mr Duncombe of his own making and not as a consequence of a breach of contract on the part of the Builder. This finding is reinforced by the fact that most of the items said to be defective in that report were ultimately not upheld.
- 118 Accordingly, I find that Mr Duncombe has succeeded in the amount of \$8,283.65 in respect of his counterclaim, made up as follows:

<b>Item description</b>	<b>Amount Allowed</b>
Waterproof decks	\$893.75
Ensuite shower	\$82.50
Window flashings <sup>6</sup>	Allowed for in Painting
Roof gutter	\$880
Fireplace hearth	\$116.90
Grouting to pavers	\$247.50
Ground level timber floors	\$1,100
Painting	\$1,375
Liquidated damages for delay	\$3,363
Duct cleaning	\$225
<b>TOTAL</b>	<b>\$8,283.65</b>

- 119 This amount is to be set off against the amount claimed by the Builder.

### **THE BUILDER'S CLAIM**

- 120 As indicated above, Mr Duncombe concedes that the final progress payment due under the Contract was \$10,300. Save that Mr Duncombe seeks to set-off his counterclaim against this amount, this amount is not in dispute.
- 121 The Builder also seeks payment for a variation relating to additional tiling works. Mr Nelson gave evidence that there was an additional cost for the laying of the slate and porcelain tiles. He said that the Contract made a

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<sup>6</sup> The amount of \$206.25 is comprised within the overall allowance for Painting.



provisional sum allowance for the cost of laying the tiles in the amount of \$40 per m<sup>2</sup> and that the cost to lay those tiles was \$20 per m<sup>2</sup> over that sum.

- 122 The Contract makes reference to the *Project Specifications* in relation to prime cost items and provisional sum allowances. However, the *Project Specifications* only make reference to prime cost allowances. There is no mention of any allowance for provisionally pricing the labour cost of laying tiles. Consequently, I find that the labour cost of laying the tiles is part of the contract price and not a provisional cost. I therefore dismiss this aspect of the Builder's claim.
- 123 Consequently, I find in favour of the Builder in the amount of \$10,300. From this amount, I deduct \$8,2838.65 being the amount that I have determined in favour of Mr Duncombe. Accordingly, I will order that Mr Duncombe pay the Builder \$2,016.35, being the difference between those two amounts.
- 124 In addition, the Builder claims interest pursuant to Clause 15 of the Contract at 10.5% per annum. In my view, it would be unfair to make any award for interest, given that the Works were not wholly completed by the Builder. In those circumstances, I do not believe that Mr Duncombe was under any obligation to make payment of the final progress claim, notwithstanding the issuance of the occupancy permit on 30 August 2010. In particular, painting and other minor items of works were still to be completed. Accordingly, I make no award for interest on the claim.

**SENIOR MEMBER E. RIEGLER**