VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D104/2013

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building Contract; Claim for final contract payment before works completed; purported termination of contract; repudiation; damages

APPLICANT	Stellar Constructions Pty Ltd (ACN: 138 323 574)
RESPONDENTS	Mr Tim Ferguson, Mrs Tina Ferguson
WHERE HELD	Melbourne
BEFORE	Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	25 to 28 November 2013 Further written material and submissions filed 6 December 2013
DATE OF ORDER	20 December 2013
CITATION	Stellar Constructions Pty Ltd v Ferguson (Domestic Building) [2013] VCAT 2159

ORDERS

1. The respondents must pay the applicant $3,744.38.
2. Costs reserved with liberty to apply. Any application for costs to be listed before Member M. Farrelly with a half day allocated.

MEMBER M. FARRELLY

APPEARANCES:

For the Applicant	Mr J. Gurr, of Counsel
For the Respondents	Ms S. Kirton, of Counsel

REASONS

INTRODUCTION

1 In June 2011, the applicants ("the owners") entered a building contract with the respondent ("the builder") for the construction of a new home ("the home") in Hampton for a contract price of $1,882,006.50.

2 The building works commenced in July 2011. During the course of construction, a number of design changes were made, some considered necessary by the builder and the owners and some elected by the owners. Mr Ferguson was often present on site during the course of construction, providing directions to the builder and its subcontractors. Up until November 2012, the parties were co-operative and progress payments were made without disputation.

3 On 16 November 2012, when the works were nearing completion, the builder allowed the owners and their two children to move into the home. On 28 November 2012 the builder sent an email, with attached spreadsheet, to the owners confirming the balance contract price of $336,287 (inclusive of variations) owing to the builder,. In December 2012, the owners made part payment of $205,222, but refused to pay the balance of $131,065 until all of the building works were satisfactorily completed.

4 On 4 February 2013, the builder commenced this proceeding seeking an order that the owners pay the balance of the contract price, $131,065, plus interest. Subsequently, in March 2013, the builder terminated the building contract. In response, the owners asserted that the purported termination of the contract was wrongful and amounted to a repudiation of the contract by the builder. The owners "accepted" the repudiation and ended the contract.

5 By counterclaim filed in the proceeding, the owners claim damages for the cost they say they will incur in completing, and rectifying defects in, the contract works. The sum claimed by the owners, $199,001.83 as at the time of the filing of the counterclaim in June 2013, was amended to $212,362.90 at the hearing.

6 For the reasons set out below, I find that:

- The builder's claim for payment made 28 November 2012 was, under the contract, a final payment claim.
- At the time of the 28 November 2012 claim, the contract works had not reached completion.
- By its conduct - in making and demanding full payment of the 28 November claim with the threat of legal proceedings if the owners did not make full payment - the builder evinced an intention to no longer be bound by the terms of the contract. The builder repudiated the contract.
- The owners were entitled to "accept" the builder's repudiation and

end the contract.

- The owners are entitled to set-off against the unpaid contract balance of $131,065 the reasonable cost they will incur in engaging a new builder to complete, and rectify defects in, the contract works. I assess such costs at $127,320.62, thereby leaving a balance of 3,744.38 to be paid by the owners to the builder.

THE HEARING

7 The hearing commenced on 25 November 2013 and ran for 4 days. Mr Gurr of Counsel represented the builder and Ms Kirton of Counsel represented the owners. A view of the home was conducted on the third day of the hearing. Mr Young, a registered builder and director of the builder, gave evidence for the builder. Each of the owners gave evidence.

8 Concurrent expert evidence was given by building consultants, Mr Ian Johnson, called by the builder, and Dr Ian Eilenberg, called by the owners. Mr Johnson and Mr Lees also produced written reports. The owners also produced reports they obtained from Mr Brian Gale of "Archicentre" dated 10 January 2013 and 3 June 2013 and a report of Mr Phillip Morris, quantity surveyor, dated 13 June 2013. Mr Gale and Mr Morris were not called to give evidence.

9 At the commencement of the second day of the hearing, the builder made an "open" offer to settle the proceeding for a sum of $100,000, inclusive of costs and interest, to be paid by the owners to the builder.

CHRONOLOGY AND EVIDENCE

10 In 2010 the owners engaged Mr David Norman of David Norman Design and Construction Pty Ltd ("the architect") to prepare drawings for construction of the home. In February 2011 the owners obtained engineering drawings from GHC Engineering Consultants.

11 In around March 2011 the owners had discussions with Mr Young of the builder. The owners and Mr Young were acquaintances. Mr Young and Mr Ferguson had known each other for several years and had spent time together on holidays.

12 On 28 June 2011 the owners and the builder signed a building contract for construction of the home for a contract price of $1,882,006.50 ("the contract"). The contract document is a standard form Master Builders' Association new homes contract, edition 1 HC-6 2007. The contract provides that the contract price is to be paid by way of 5% deposit and thereafter *"subsequent progress payments to be made monthly as per works completed and materials ordered"*. No construction period was specified in the contract.

13 It is common for domestic building contract documentation to include a general "specifications" document which provides detailed information in

respect of the contract works such as identification of floor coverings, various fixings such as taps, paint colour, and the like. In this case there is no general specifications document included as part of the contract documentation.

14 Constructions works commenced in around July 2011. There is no dispute between the parties that in the period July 2011 to October 2012:

- numerous design changes, some necessary and some elected by the owners, were made entitling the builder to claim variation extra charges for the building works;
- Mr Ferguson was regularly on site and often dealt directly with various sub-contractors of the builder.
- The builder made monthly claims, the quantum of which were assessed by the builder, and the owners paid those claims without question. The owners also made, with the builder's knowledge and consent, a number of payments direct to some sub-contractors.

15 The good co-operation between the builder and the owners, which clearly existed up until October 2012, began to dissipate from early November 2012. In early November 2012 the owners, who had recently sold their previous home, were eager for the construction of their new home to be completed so that they could move into the home. The builder was eager to complete construction of the home and receive full payment.

16 On 31 October 2012 the builder forwarded two invoices to the owners. One invoice identified a sum of $145,340 for *final payment on the contract*. The other invoice identified a sum of $59,882 for *balance on contract price*. At the time the invoices were sent to the owners the works were approaching completion and an occupancy permit had not yet been issued.

17 There is no dispute that the builder agreed to the owners taking occupation of the home on 16 November 2012, before the works had been completed. It appears that 16 November was the agreed date as it is the date that the occupancy permit was issued by the building surveyor. Not surprisingly, after the owners and their two children moved into the home, access to the site by the builder and subcontractors became more limited as access times and dates were to be arranged with the owners.

18 Throughout November 2012, the builder was in the process of finalising the balance of the contract sum to be paid by the owners, including all variation allowances. At the hearing, three invoices from the builder to Mr Ferguson, each dated 7 December 2012, were produced. Each invoice references the original contract price, a sum for variations, payments received and a balance payable by the owners. One invoice identifies the balance payable as $312,329. Another identifies a sum of $330,786 and the third invoice identifies a sum of $336,680. Although all the invoices were forwarded to the owners, it is apparent, and there seems to be no dispute, that the

invoices represented a "work in progress" as the builder finalised the contract balance owing.

19 As part of its orderly progression towards final completion of the works, the builder produced successive lists of "outstanding" items of work. A list dated 26 November 2012 identifies 110 items of outstanding work, the majority of which could be considered as relatively minor incomplete works and defects requiring rectification. Over the ensuing three weeks the builder produced three further amended lists of outstanding works, each successive list identifying a reduced number of outstanding items. The list dated 27 November 2012 identifies 99 items of outstanding work. The list dated 10 December 2012 identifies 46 items and the list dated 18 December 2012 identifies 18 items.

20 Between 20 and 23 November 2012 the builder forwarded to Mr Ferguson a number of "contract variations" which identified numerous variation extra charges totalling $54,157.

21 On 28 November 2012 the builder forwarded to the owners a spreadsheet identifying the sum of $336,287 as the contract balance owing by the owners. Of the sum owing, $205,222 is identified as the balance owing on "contract" invoices and $131,065 is identified as the sum outstanding on "variations" invoices. The spreadsheet was emailed to Mr Ferguson by Mr Tom Haag, project manager for the builder. Mr Haag's accompanying email states *"see attached spreadsheet showing the final breakdown of variations and contract works paid which corresponds with the final claim. I believe the document issued Friday [23 November] may have been an older document. Any queries let me know"*.

22 The builder says that the email of 28 November with the attached spreadsheet was the last progress payment claim made by the builder ("the 28 November claim"). Mr Ferguson says that on receipt of the claim he was in the process of reconciling his own records. Having regard to the numerous invoices and contract variation claims Mr Ferguson had received from 31 October 2012, it is understandable that he was concerned to reconcile the claim with his own records.

23 On 30 November 2012 Mr Ferguson forwarded an email to Mr Young in which he says, in part:

> Dear Garry,
>
> Just confirming that I am trying to reconcile the accounts and final figures. I have spent about 5 hours over the last 2 days trying to finalise.
>
> So that you are aware I have been given 5 different final figures in the last week from your office with up to a 10% difference.

24 It appears that in response to this email, the builder forwarded a further spreadsheet to Mr Ferguson. Mr Ferguson produced a spreadsheet dated 2 December 2012 ("the 2 December 2012 spreadsheet") which he says was

forwarded to him by the builder. I accept Mr Ferguson's evidence as there is no other logical reason as to how he came to possess the spreadsheet. The spreadsheet identifies a slightly different sum in respect of outstanding variation invoices, namely the sum of $131,458. Because of this difference, the total outstanding sum is identified as $336,680.

25 It is apparent that at the time the 28 November claim was forward to Mr Ferguson, there remained numerous items of work to be completed. The builder's outstanding items list dated 10 December 2012 identifies 46 outstanding items, including the following:

- Rooftop, hand rail to glass as per building surveyor
- Rooftop wall, cap on downpipe
- Rooftop, renderer to clean roof sheets
- Rooftop, glass reinforcing can be done using an extension of the seat
- Balcony walls, paint around balcony
- Master bedroom, bath leak
- Staircase, paint stringer
- Front entry, caulk around front entry matt
- Front entry, caulk stairs
- Guest bathroom, caulking to shower screen bottom
- Media room, paint grilles
- Basement, paint and patch around tap
- Basement, fit-off ramp lights
- Basement storeroom, dishwasher kicker joinery
- Pool house, sauna caulk at entry
- Back garden, install trampoline, query size
- Front window, paint window frame

26 The builder says that all of the items in the outstanding items lists constituted "defects" which the builder was in the process of rectifying as part of its ordinary obligation to rectify defects during the *defects liability period* provided for in the contract. Whilst I accept that, pursuant to clause 19.1 in the contract, a six month defects liability period commenced on the date the owners took possession of the home (16 November 2012), I do not accept that all of the outstanding items constituted "defects" to be rectified. In my view many of the outstanding items of work clearly constitute works not yet completed by the builder.

27 Shortly after issuing the 28 November claim, the builder began pressing the owners for payment. This is apparent from the following emails from Mr Young to Mr Ferguson:

- Email of 6 December 2012 wherein Mr Young says *"Tim, tried to call earlier do you want to catch up re the variations and also the progress payments as I am getting lots of heat from the subcontractors?"*
- Email of 11 December 2012 wherein Mr Young says "*Tim, I have called and sent previous email regard to payment of outstanding amount. The amount outstanding is putting severe strain on my business and our reputation as I am unable to pay firstly my staff this week and all of the subbies involved. I am happy to meet with you again to discuss if there are any issues but would appreciate payment of both the contract and variation amounts*".

28 On 12 December 2012 Mr Ferguson rang Mr Young and they had a heated conversation. Mr Ferguson says that he expressed his concern as to the quality of a number of the building works and the fact that numerous works were yet to be completed.

29 On 14 December 2012 Mr Young sent an email to Mr Ferguson responding to the matters raised in the telephone conversation. The email includes the following comments:

> As you know we have developed our own defects list and are *nearing completion* of these items. You mentioned that there is works which are not complete which we are unaware of. We are more than happy to walk through the project and to talk about any queries or concerns you have.
>
> In good faith, we completed handover of keys and access to the property prior to *the final payment* being received, which is contrary to our contract agreement.
>
> …To date we haven't received any indication on receiving *the final amounts* and it would be appreciated if you or the bank could give a date on full and final payment [emphasis added]".

30 At the hearing, a series of phone and text messages in the period 13 December 2012 to 20 December 2012 between the builder's representative, Mr Coulthard, and Mr Ferguson were produced. It is apparent from the text messages that, in the period the messages were sent, Mr Coulthard and Mr Ferguson were communicating and confirming arrangements in respect of a variety of works being or to be carried out by the builder.

31 On 17 December 2012 the owners made payment to the builder in the sum of $145,340. On 24 December 2012 the owners made a further payment to the builder in the sum of $59,882. The payments relate directly to the two invoices to the owners dated 31 October 2011, referred to above. The sum total of the payments, $205,222, is the sum identified in the 28 November

claim for outstanding "contract" invoices not including the outstanding sum on "variations" invoices.

32 After making the above payments, the unpaid balance of the 28 November claim was $131,065. This is the sum being claimed by the builder in the proceeding. The builder also claims interest on that sum.

33 On 24 December 2012, the builder's lawyers, HWL Ebsworth, sent a letter of demand to the owners ("the 24 December 2012 demand letter") which states in part:

> We act for Stellar Constructions Pty Ltd and are instructed that:
>
> 1. The works under the building contract for [the property address] *have reached completion.* You have taken possession of the works;
> 2. Certain defects have been rectified to date, and our client has committed to continuing to rectify any remaining defects *in accordance with the defects liability provision* of the building contract;
>
> …
>
> 5. Our client requires the payment of $131,458 by close of business on 28 December 2012, failing which VCAT proceedings will be issued against you seeking an order for that amount together with interest.
>
> [emphasis added]

34 The sum demanded, $131,458, is slightly more than the balance owing under the 28 November claim, $131,065. The explanation, it appears to me, is that the sum demanded has been taken from the 2 December 2012 spreadsheet. The discrepancy in the sum demanded is, in my view, of little relevance. What is relevant is the assertion by the builder's lawyers that the works under the contract *have reached completion* and that the builder was continuing to rectify remaining defects *in accordance with the defects liability provision* in the contract.

35 The builder now says that the 28 November claim was a "progress" payment claim, as distinct from a final payment claim. In my view, it is clear from the builder's communications to the owners, in particular the email accompanying the 28 November claim, Mr Young's email to the owners dated 14 December 2012 and the 24 December 2012 demand letter that, from the time it issued the 28 November claim, the builder asserted an entitlement to full payment of the 28 November claim on the basis that the contract works had been completed with only the rectification of "defects", as listed in the builder's successive outstanding items lists, remaining to be done during the defects liability period as provided on the contract. In these circumstances, the 28 November claim must, in my view, be treated as the builder's final payment claim issued on completion of the contract works.

36 As noted above, I find that the contract works were not completed as at 28 November 2012. As discussed later in these reasons, I find that the builder,

by issuing and demanding payment of the final payment claim before the contract works were completed, committed a substantial breach of the contract.

37 By letter to the builder's lawyers dated 27 September 2012, the owners responded to the 24 December 2012 demand letter. In the response letter the owners list a number of defective and incomplete building works. The list includes the following:

- The basement floor finish is inconsistent in colour and texture.
- Some roof sheeting remains unattached and unsealed.
- The roof has not been cleaned satisfactorily to remove excess render.
- Some wall render has not been completed on the top roof.
- The ceiling in ground floor sitting room has a large hole that is not plastered and the entire ceiling requires repainting.
- The basement kitchenette has not been fitted off.

38 In the letter the owners also state:

> We have always maintained our intention to pay the balance of variations once the building works have been completed to our complete satisfaction but your client [the builder] to date has not completed the works.
>
> …. your client is now prohibited from entering the property in any format whatsoever. His site foreman (Grant) may be granted permission to enter after reasonable notice has been received by us to carry out building works".

Mr Ferguson gave evidence that he intended the restriction on site access to apply only to Mr Young and that the owners would allow the builder's supervisor, Mr Grant Coulthard and sub-contractors access to the site.

39 On each of 7, 9 and 10 January 2013, Mr Coulthard sent emails to Mr Ferguson in an attempt to confirm site access for the carrying out of works. The last email states:

> I have organised most trades to be on site on Monday 21 January at 8:30 a.m. to complete the items stated on your list dated 27 December, we will also have contractors there on Tuesday 22nd at 8:30 to finalise all works. With all this works I will be on site at all times to supervise all works. Please confirm by end of today whether these dates/times are okay.

40 Mr Ferguson did not respond to the emails. In early January 2013 he contacted "Archicentre" to arrange for an inspection and report on the building works. The Archicentre building consultant, Mr Gale, attended the site and inspected the works with Mr Ferguson on 10 January 2013. Mr Gale provided Mr Ferguson with a report dated 10 January 2013. The report lists 32 items of alleged defective and incomplete works, many of which do

not appear on the builder's "outstanding items" lists produced to that point in time.

41 By letter dated 11 January 2013 to the owners, the builder's lawyers responded to the owners' letter of 27 December 2012. The letter includes the comment:

> Our client's position in response is that it will rectify the remaining defects as set out in the enclosed list (the defects) in accordance with the defects liability provision of the building contract …

The enclosed list includes items raised by the owners in their letter dated 27 December 2012. In the letter the builder's lawyers also assert:

- that the owners' attempt to limit site access was unreasonable and *"tantamount to a wrongful repudiation of the contract"*
- that the owners were *"legally obliged to have already made payment in full"* of the sum of $131,458 for works completed by the builder.

The letter concludes with an offer, open for acceptance by the owners until 20 January 2013, that the owners pay the outstanding amount into a solicitor's trust account *"with an irrevocable written direction to the solicitor (with a copy to us) to pay that sum to our client immediately on completion of the Defects"*.

42 On 18 January 2013 Mr Coulthard sent an email to Mr Ferguson requesting confirmation of access to site for trades to complete various works. Mr Ferguson responded with a telephone message to Mr Coulthard as follows:

> "Grant, as Garry [Young] has initiated legal action there will be no access to our property granted to Stellar Construction.

43 Also on 18 January 2013 the owners sent a letter by email to the builder's lawyers in response to the builder's lawyers letter of 11 January 2013. In the letter, the owners list further items of defective and incomplete work. They also say that, because of the conduct of the builder *"we can no longer allow access to our property by your client or his staff"*.

44 Later that day, 18 January 2012, the builder's lawyers responded with an email letter to the owners which, amongst other things, reiterated the offer made in their letter to the owners dated 11 January 2013.

45 The owners did not respond to the above letter.

46 On 1 February 2013 the builder's lawyers forwarded to the owners a notice of intention to terminate the contract ("the builder's first default notice"). The notice identifies the following alleged breaches of the contract on the part of the owners:

- Failure to make full payment to the builder of the 28 November claim.
- Wrongful revocation or withdrawal of the licence granted to the builder to free and uninterrupted access to the site.

The notice requires the owners to remedy the breaches within 14 days, failing which the builder intended to terminate the contract.

47 On 4 February 2013 the builder filed at VCAT the application which commenced this proceeding. In the application the builder confirmed that it was seeking an order for payment of the *"balance of contract plus interest plus costs*" on the grounds:

> The respondents are wrongfully withholding the balance of the contract price, namely $131,065 despite the fact that they have taken possession of the premises. The respondents will not respond to our communications and have refused to pay the outstanding amount. The respondents are also liable for interest up to 4 February 2013."

48 By email letter dated 1 March 2013, the owners' lawyers, Hall and Wilcox, responded to the builder's lawyer's letter dated 1 February 2013. In the letter the owners' lawyers, amongst other things:

- dispute that the contract works are complete
- note that the builder commenced the VCAT proceeding on 4 February 2013
- put an offer, open for acceptance until 6 March 2013, to the effect that the owners pay the sum claimed by the builder, $131,065, into the owners' lawyers trust account with the money to be released to the builder upon the builder's completion, to the satisfaction of the owners, within 21 days of the defective and incomplete works outlined in the Archicentre report dated 10 January 2013 [the report having been previously provided to the builder's lawyers].
- confirmed that Mr Garry Young of the builder was prohibited from entering the owners' property.

49 Later that day, 1 March 2013, the builder's lawyers responded with a letter sent by email and registered post to the owners' lawyers. Enclosed with the letter was a further notice of intention to terminate the contract, similar in terms to the builder's first default notice. The letter also states that the builder is *"continuing to exercise its right under the Contract to suspend works due to the breaches listed in the Notice of Intention to Terminate, which breaches are continuing*".

50 The owners' lawyers responded with a letter to the builder's lawyers dated 8 March 2013 wherein they dispute that the owners were contractually obliged to pay the balance of the 28 November claim when works were not completed. Amongst other things, the letter also states:

> We are instructed that our clients are prepared to allow your client access (on the terms specified in clause 7.2 of the contract) to allow your client to complete the contract works on and from 12 March 2013. Please let us know what time your client will be arriving on site.

51 By 15 March 2013 the owners' lawyers had received no response to the above letter and they emailed a letter to the builder's lawyers advising:

> We are instructed that, since the date of our letter, your client has made no attempt to contact our clients and that no further works have been completed under the contract. Your client's failure to continue with the works constitutes a substantial breach of the contract. Accordingly, we enclose a copy of a notice of intention to terminate served on your client today".

The enclosed notice of intention to terminate identifies the builders alleged breaches of contract as:

- Failure to complete the building works in a proper and workmanlike manner and with reasonable care and skill and with due diligence
- Unreasonable suspension of the building works by the builder.

52 Later that day, 15 March 2013, the builder's lawyers responded with a letter to the owners' lawyers which states in part:

> For reasons previously stated at length, the cause of the present dispute is your clients' ongoing refusal, in breach of the contract, to pay the balance of the November payment claim. Our client is therefore continuing to validly suspend works pursuant to its rights under the contract. Our client intends to terminate the contract unless your clients make payment in accordance with the contract within 14 days of receipt of our notice of intention to terminate dated 1 March 2013".

53 On 21 March 2013 the builder's lawyers sent a letter to the owners' lawyers which states in part:

> Your clients have failed to make any further payment to our client since we served the notice of intention to terminate dated 1 March 2013. They have not shown any reasonable cause for the continuing refusal to pay the balance of our client's November payment claim. Accordingly, we hereby enclose on behalf of our client a Notice Terminating Contract."

The enclosed notice of termination confirms the termination of the contract by reason of the failure of the owners to remedy the breaches outlined in the builder's notice of intention to terminate the contract dated 1 March 2013.

54 By letter dated 25 March 2013 the owners' lawyers advised the builder's lawyers that:

- The builder's purported termination of the contract was wrongful
- Clause 22.3 in the contract prohibits the builder from terminating the contract if the builder is in substantial breach of the contract
- For the reasons articulated in the owners' notice of intention to terminate dated 15 March 2013, the builder is in substantial breach of the contract
- By serving the termination notice, the builder has indicated a clear intention not to be bound by the terms of the contract and has

> repudiated the contract and that *"We hereby notify you that our client accepts your clients' repudiation and consider that the contract is now at an end"*

The letter goes on to confirm that the owner will seek recovery from the builder for the cost associated with completing the contract works.

TERMINATION OF CONTRACT

55 As noted above, I find that the 28 November claim constituted a final payment claim issued by the builder on "completion" of the contract works. The contract defines completion of the works as meaning when the works to be carried out under the contract *have been completed in accordance with the plans and specifications* and an occupancy permit has been issued. Although an occupancy permit was issued on 16 November 2012, I am satisfied, for the reasons outlined above, that the contract works were not completed when the builder made the 28 November claim, or indeed at any time prior to the termination of the contract in March 2013.

56 I am also satisfied that the builder was well aware that the works were not completed. The outstanding items lists produced by the builder evidence the builder's knowledge in this regard.

57 Clause 17 in the contract sets out the obligations of the parties upon completion of the works. The builder is required, amongst other things, to provide to the owners a written request for a final inspection. The inspection provides the owners the opportunity to identify and prepare a list of items of work which the owners consider to be incomplete or defective. The builder must then complete any "necessary" outstanding items identified in the list. The final inspection procedure as prescribed in the contract is not unusual. It is common for standard form domestic building contracts to prescribe similar provisions.

58 At paragraph 5 in its Points of Claim filed in the proceeding, the builder says that the owners conducted a *"final inspection"* of the building works on 16 November 2012, the day that the owners also *"took possession"*. At paragraph 6 in its Points of Claim the builder asserts that the owners *"did not notify* [the builder] *at the Final Inspection or when taking possession of the Works of any Works that* [the owners] *claimed were defective, incomplete or not in accordance with the Plans and Specifications*.

59 Mr Ferguson says that no final inspection was carried out on 16 November 2012 or at any other time. I accept his evidence. There is no evidence that the builder provided to the owners a written request for a final inspection, and it is not suggested by the builder that any such notice was provided. Mr Young says that the inspection was carried out by the builder's supervisor, Mr Haag, with the owners on 16 November 2012. Mr Haag was not called to give evidence. Mr Young himself was not present at the alleged inspection as he was, at that time, involved in a charity bicycle ride event.

The builder produced no "defects list" prepared or signed by the owners at the inspection and the builder does not suggest that any such list exists.

60 On all the evidence I am satisfied that, contrary to matters pleaded in the Builder's Points of Claim, no final inspection as contemplated by the contract was carried out.

61 At paragraph 7 in its Points of Claim, the builder says that the 28 November claim was *"a Final Claim payable pursuant to clause 17.7 of the contract or alternatively a Progress Claim payable pursuant to clause 11.9 of the contract."* As noted above, I find that it was a final payment claim. Clause 17.7 in the contract provides that the owners are to pay the final claim upon completion by the builder of all necessary outstanding items in the "defects list" provided by the owners to the builder at the final inspection.

62 In my view the conduct of the builder - issuing the final claim, the 28 November claim, and demanding full payment of the claim with the threat of legal proceedings if the demand was not met– when the works were, to the knowledge of the builder, not completed, constitutes a substantial breach of the contract. The builder, by such conduct, evinced an intention no longer to be bound by the contract. In my view the owners were entitled to refuse to make full payment of the final claim. They were also entitled, as they eventually did in March 2013, to accept the builder's repudiation.

63 In my view the builder was not entitled to terminate the building contract on 21 March 2013, as it purported to do, in the circumstance that the builder itself was in substantial breach of the contract from 28 November 2012.

64 While I accept that, at least in the period 18 January to 8 March 2013, the owners refused the builder access to the site, I do not consider such conduct to be repudiatory in the circumstance that the builder was wrongfully demanding full payment of the final payment claim. In any event, I find that, before accepting the builder's repudiation and bringing the contract to an end on 25 March 2013, the owners had, by their lawyers' letter to the builder's lawyers dated 8 March 2013, confirmed that the builder would be granted access to the site to complete the contract works.

65 For the above reasons, I find that the builder's purported termination of the contract on 21 March 2013 was invalid, and the owners were entitled to, as they did, accept the builder's repudiation of the contract and bring the contract to an end on 25 March 2013.

DEFECTIVE AND INCOMPLETE WORKS

66 The owners concede that $131,065, the sum claimed by the builder not incuding interest, is the unpaid balance of the contract price before allowing for the cost of rectifying defective works and completing incomplete works.

67 Section 8 of the *Domestic Building Contracts Act* 1995 prescribes mandatory warranties in respect of building works carried out under a

domestic building contract. The warranties are expressed in the contract at clause 10.1. By the warranties, the builder warrants, amongst other things:

- That the works will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract
- That all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and, unless otherwise stated in the contract, those materials will be new
- That the works will comply with all applicable laws and legal requirements
- That the works will be carried out with reasonable care and skill

68 Mr Johnson and Dr Eilenberg each produced reports and gave evidence in respect of items of building work which the owners claim are incomplete or defective and do not meet the abovementioned warranties. Mr Johnson and Dr Eilenberg each provide cost estimates for rectification works. In many instances they agree that rectification works are necessary, however they disagree on the cost of the rectification works.

69 Mr Johnson provides three alternative rectification cost estimates. The first assumes that the builder will return to carry out the rectification works and, in so doing, the builder will call on various of its subcontractors to carry out rectification works at the subcontractors' cost. The second alternative again assumes that the builder will return to carry out rectification works, but without sub-contractors bearing some of the cost. The third alternative is the estimated cost the owners will incur in engaging a new builder to attend to the rectification works, including an allowance for preliminaries, a builder's margin of 30% for overheads and profit and GST.

70 Mr Young says that the builder is ready and willing to attend to any necessary rectification works, and that it will be able to call on subcontractors to do some of the works at the subcontractors' cost.

71 Dr Eilenberg's rectification cost estimate is what he considers to be the reasonable cost the owners will incur in engaging a new builder to carry out necessary rectifications works. His estimates include a contingency sum for many items of work, a builder's margin of 40% for preliminaries, overheads and profit, and a final allowance for GST. While giving evidence, Dr Eilenberg conceded that a builder's margin of 30% for overheads and profit, as suggested by Mr Johnson, may not be unreasonable.

72 In the circumstance where the owners have accepted the builder's repudiation and brought the contract to an end, the builder has no contractual entitlement to return and carry out necessary rectification/completion works. Having regard also to the animosity plainly evident between Mr Young and Mr Ferguson, I do not think it reasonable to require the owners to accept the builder's return to carry out rectification

works. In my view, the owners are entitled to set off against the unpaid contractual balance the reasonable cost they will incur in engaging an independent builder to carry out any necessary rectification works.

73 Having regard to the nature of the works to be carried out, and the evidence of Mr Johnson and Dr Eilenberg, I think it reasonable to allow, before adding GST, a 35% margin for preliminaries, overheads and profit, with no additional contingency allowance.

74 The costing for each item of rectification work referred to below is the cost of rectification work before applying the 35% margin and GST. Where Dr Eilenberg's cost estimates are referred to, I have removed any allowance he has made for a contingency sum, save for those items where the parties agree to "split the difference" between Dr Eilenberg's and Mr Johnson's estimates. I will apply the 35% margin and GST to the total figure reached after considering all items.

WATER LEAKING INTO BASEMENT

75 Mr Johnson and Dr Eilenberg agree that water is leaking into the basement situated underneath the ground level living area in the home. At the view I observed signs of water ingress at the north east and south east areas of the ceiling in the basement. At each location, small rust stains are emerging on steel structural beams.

76 Mr Johnson and Dr Eilenberg agree that it is important to prevent the leaking into the basement. Both agree that it will be necessary to install a waterproof membrane underneath the exterior paving tiles laid at ground level adjacent to the north and east exit doors/windows of the living area.

77 In his costings report, Dr Eilenberg allows for the removal of doors and windows in order to satisfactorily finish or terminate the waterproof membrane. However, following the view of the home on the third day of the hearing, Dr Eilenberg now agrees with Mr Johnson that it is not necessary to remove the doors and windows, provided a shallow drain is installed where the paving meets the doors/windows. Mr Johnson says that the drain is not necessary. I prefer Dr Eilenberg's evidence that the installation of the drain will provide a suitable juncture for the finishing off of the membrane.

78 After removing from Dr Eilenberg's cost estimate his allowances for removing and reinstating the doors and windows, including consequential repairs and painting associated with the removal and replacement of the windows and doors, Dr Eilenberg's cost estimate is $29,651.85. The costing includes the rectification of the rust appearing on the steel beams and the repainting of the basement ceiling and wall.

79 Mr Johnson's rectification cost estimate is $23,058. His allowance does not include the installation of shallow drain referred to above. Nor does it include the cost of rectifying the rust to the steel beams and repainting the basement ceiling and walls. Mr Johnson's costing includes an allowance for

checking a downpipe, located behind the exterior foam cladding on the north east corner of the house, for leaks.

80 Having viewed the home and having had Mr Johnson and Dr Eilenberg explain to me their respective proposed scope of works, I prefer Dr Eilenberg's scope of rectification works which includes the installation of a shallow drain as part of the waterproofing works and the rectification of the rusting steel beams and repainting works in the basement. For this reason, I allow Dr Eilenberg's cost estimate, $29,651.85.

POLISHED CONCRETE FLOOR

81 The finished ground floor of the home is polished concrete slab. At the view I observed that:

- The floor has numerous shrinkage cracks, some of which appear to have been filled with an epoxy filling.
- The floor looks "patchy" in that there are numerous areas where the finish is very noticeabley uneven with respect to the exposed aggregate. Mr Johnson and Dr Eilenberg agree that the patchy finish is likely the result of uneven grinding of the floor.
- There are a couple of areas where the floor finish is particularly poor, particularly at the entrance and the stairs.

82 In my view, the general appearance of the floor can be aptly described as disappointing and not of a standard that one might reasonably expect.

83 Mr Johnson and Dr Eilenberg agree that, despite the shrinkage cracks, the floor is structurally sound and that appropriate rectification will involve regrinding the floor, filling shrinkage gaps and resealing the floor. Initially, Mr Johnson allowed only for piecemeal regrinding of the floor in the worst affected areas. Following the view, however, he agrees that appropriate rectification will involve regrinding the whole floor to achieve as uniform a finish as practicable.

84 Dr Eilenberg's rectification cost estimate is $33,847.36. A significant portion of the estimate, around $12,600, is an allowance for removing the doors and joinery including the island bench in the kitchen, together with the cost to disconnect and subsequently reconnect electrical wires and plumbing. Dr Eilenberg considers that it will be very difficult to achieve a satisfactory uniform finish without removing the joinery.

85 Mr Johnson provides a cost estimate of $8,895. He says that, although a tedious task, the entire floor can be reground without removing the joinery.

86 Having regard to the fact that the floor is a very prominent feature in the owners' new home, I consider that no short measures should be taken in rectification works. I accept Dr Eilenberg's evidence that, to achieve an acceptable finish, it will be necessary to remove and reinstate the joinery.

87 There is a significant difference between Dr Eilenberg's allowance for grinding, polishing and sealing the floor, $16,639.92, and Mr Johnson's allowance, $7995. Dr Eilenberg's allowance is calculated at $137.52 per square metre for 121 metres, a rate he says he obtained after ringing a concrete polisher. The owners' submit that the rate is also the rate published in the "Cordell Building Cost Guide" on the basis that a densifier finish, rather than an epoxy finish, is used to achieve the best result.

88 Mr Johnson allows only $65 per square metre for 123 metres, a rate he applies following a discussion he had with "Grind and Seal", a company specialising in polished concrete floor finishes. Mr Johnson also supplied a one page letter from "Grind and Seal", which appears to be a standard response to an email enquiry. The letter outlines two different methods of polished concrete. One method, the "Grind and Seals" method, is priced at $50 to $80 per square metre. The second method, the "Hiperfloor" method, is priced at $100 to $120 per square metre. The difference between the two methods appears to be that the "Hiperfloor" method includes putting "*a densifier down to harden the floors surface by up to 10 times and go over the floor up to 7 times with diamond impregnated resin pads to get the desired shine (the concrete itself not an artificial shine from topical sealer), then the floor receives a penetrating sealer which soaks into the floor to prevent staining leaving the floor looking and feeling like glass. This process has between 10 & 14 steps but is suitable for indoor concrete only"* [as opposed to the "Grind and Seals" method which has between 3 and 5 steps and is suitable for indoor and outdoor concrete].

89 Although he does not articulate how he arrives at the rate of $65 per square metre, it appears that Mr Johnson adopts the mid range of the cheaper "Grind and Seals" method.

90 Again, being of the view that no short measures should be taken in rectifying the floor, I think it fair to adopt the more expensive rate as provided by Dr Eilenberg.

91 The rectifications will obviously create considerable dust and some damage to the painted surfaces throughout the very large ground floor area. Dr Eilenberg allows for painting, after the floor rectification works are done, at a cost of $2,763.60. The allowance includes $500 for paint. Mr Johnson allows only $640 for painting repairs. In addition to the painting, Dr Eilenberg allows for raking out and filling cracks in the concrete floor and an allowance for protection materials. Mr Johnson makes no allowance for these items. Again, having viewed the home and being of the view that no short measures should be taken, I prefer Dr Eilenberg's allowances.

92 Dr Eilenberg's cost estimate includes an allowance for "sundry materials" at $1,000. As no explanation is provided as to what "sundry materials" will be required, I exclude the allowance.

93 For all the above reasons I am satisfied that Dr Eilenberg's cost estimate, save for the allowance for "sundry materials", is reasonable. Accordingly I allow $32,847.36 for the floor rectification works.

BASEMENT KITCHENETTE

94 The kickrail to the cabinet/bench in the basement kitchenette has not been installed. There is also a noticeable stain/mark, which appears to be glue or some other substance, on the benchtop. Dr Eilenberg allows $1,716.71 for the cost of replacing the entire cabinet/bench.

95 Mr Johnson allows $250 only for the installation of the missing kickrail. He says that the mark on the bench is easily removed. When inspecting the home, he was able to scrape a portion of the mark off with his finger.

96 Having viewed the kitchen bench, I prefer Mr Johnson's costing and, accordingly, I allow $250 for this item.

DRIVEWAY LIGHTS

97 The lights installed along the edges of the driveway have not been fixed into position and sealed. Dr Eilenberg allows $510 to secure and seal the lights. The cost estimate in his report includes an allowance of $150 for sundry materials, however he conceded in evidence that the materials allowance is excessive. Mr Johnson allows a rectification cost of $270.

98 Having viewed the incomplete works, I prefer Mr Johnson's costing and allow $270 for this item.

BASEMENT FLOOR

99 During the course of construction works, liquid was spilt onto the concrete basement floor. Although the builder attempted to clean the area affected, there remains an area of several square metres where the basement floor remains slightly discoloured in comparison to the remainder of the floor. There is also a couple of very small areas of the floor near the bottom of the stairs which have an uneven finish.

100 Dr Eilenberg allows $6,249.80 as the cost to regrind the affected areas of the floor, apply an epoxy coating to the entire floor and apply a coat of paint over the basement walls and ceiling.

101 Mr Johnson allows $775 to rectify the small areas of flooring adjacent to the stairs and $1,965 to prepare and recoat the basement floor where it is discoloured.

102 In my view these "defective" works are relatively minor. The area of the basement floor which is discoloured is an area where cars are parked. The uneven finish to the floor near the base of the stairs is minor. I note also that Dr Eilenberg's cost estimate includes repainting of the basement walls and ceiling, an item which has already been allowed for in respect of rectifying

the water leak into the basement. For these reasons, I prefer Mr Johnson's estimate and I allow a total sum of $2,740.

DRIVEWAY WALLS

103 At the view I observed that there is a prominent join mark at around head height along rendered driveway walls. Dr Eilenberg opines that the noticeable join line is probably the result of a section of the walls, the bottom half only, being re-rendered. The walls are unsightly and, in my view, rectification works are warranted.

104 Dr Eilenberg considers the best solution is to chip back the noticeable join area and re-render both walls. His cost estimate, $2,534.38, allows for the hire of a bin for rubbish at $686.30.

105 Mr Johnson allows for a similar rectification method, however, strangely he allows for the rectification of only one of the driveway walls. Having observed the walls at the view, I am satisfied that the defect exists in both walls.

106 I am satisfied that Dr Eilenberg's costing is reasonable, save that I do not consider it reasonable to allow for the bin hire. The small amount of debris/rubbish does not warrant the hiring of an industrial bin. Accordingly, after removing the allowance for bin hire, I allow a sum of $1,848.08.

ROOF PLUMBING AND CLEANING

107 Mr Johnson and Dr Eilenberg agree that cappings and hanging flashings to the upper roof area are inadequately fixed and generally poorly supported. They both also agree, and it was apparent at the view, that there is render splatter on the roof sheeting which should be removed.

108 Mr Johnson allows $6,352 for the plumbing works and $462 for the removal of the render splatter.

109 In his costings report, Dr Eilenberg's allows $11,849.12 for both items, however in evidence he confirmed that his allowance includes a typographical error in respect of materials cost where the sum allowed is $4,000 instead of $400. After rectifying the error, his allowance is $8,249.12.

110 The main difference between the costings appears to be Dr Eilenberg's larger allowance for labour.

111 I consider it fair to allow the mid-point between Dr Eilenberg's costing (as adjusted above), $8,249.12, and Mr Johnson's costing for both items, $6,814. Accordingly, I allow $7,532 for these items.

MISSING PATCH OF WALL RENDER

112 Mr Johnson and Dr Eilenberg agree that the renderer missed a very small patch of the exterior wall near the roof line. Dr Eilenberg allows $163.40 to

patch the area. He agrees it is a 5 minute job but he has allowed a callout fee for the renderer.

113 Mr Johnson allows $65.

114 As a renderer will be engaged to rectify the driveway walls, it will be a simple matter for the renderer to attend to this item. For this reason, I prefer Mr Johnson's costing and allow $65.

ROOFTOP SECURITY INTERCOM

115 The security intercom system protruding from the north face of the rendered screen wall at roof level requires final fit-off including the provision of a weatherproof housing. The builder says this is incomplete work falling outside the scope of the contract works. With no contract specifications document, there is no document confirming who was responsible for the works.

116 The owner says that the builder installed the intercom system and simply did not complete this item of work.

117 Mr Johnson makes the following comment in his report:

> "I am instructed by the builder that installation of the security/intercom system was a variation to the contract and that access to the property was denied before the work could be completed".

118 I am satisfied, on the balance of probabilities, that this is incomplete work within the builder's contract scope of works.

119 Mr Johnson allows a rectification cost of $200. Dr Eilenberg allows $500. I think it fair to "split the difference" and, accordingly, I will allow $350.

PLASTER WALL FROM GROUND FLOOR

120 Dr Eilenberg says that the high plaster walls to the entry foyer are showing signs of distress, bowing slightly, probably as the result the of there being only one horizontal movement joint at the ground floor level. He recommends the installation of a second movement joint at about the first floor level height.

121 Mr Young says that during construction he raised with the architect the prospect of installing further movement joints, however the architect instructed Mr Young to construct the walls with only the one movement joint. The owners are unable to contest Mr Young's evidence from their own knowledge and the architect was not called to give evidence.

122 Mr Johnson says that the walls appear to him to be satisfactory and that it is only upon very close inspection and in certain light conditions that a very slight bow can be detected in the south-east corner of the stairwell wall.

123 Having viewed the home, I agree with Mr Johnson. I viewed the walls from several positions in good light and was unable to identify any bowing of the

walls of any significance. From normal viewing positions the walls appear satisfactory.

124 Although I accept Dr Eilenberg's evidence that the installation of a further movement joint would accord with normal good building practice, I also accept Mr Young's evidence as to the instructions given by the architect.

125 For the above reasons, I make no allowance for this item.

ROOF GLASS BALUSTRADE

126 The glass screens on the roof deck installed on top of a dwarf wall lack stability. Mr Johnson and Dr Eilenberg agree that rectification works to stabilise the screens are required.

127 The parties confirm that in the event I find that the owners should be compensated for the reasonable cost of engaging an independent builder to carry out rectifications to the balustrade (as I do find), they agree to "split the difference" between the cost estimate of Mr Johnson and Dr Eilenberg. Mr Johnson cost estimate is $2,280. Dr Eilenberg's estimate (including a contingency allowance) is $3,421.09. "Splitting the difference" I allow $2,850 for this item.

AGREED ITEMS

128 There are a number of further items of defective or incomplete works in respect of which the parties agree, as they do with the roof balustrade item referred to above, to "split the difference" between the rectification cost estimates of Dr Eilenberg and Mr Johnson. On this basis I allow the following sums:

-	Bowed trim to north facing sliding door	$148
-	Broken paving slab	$75
-	Gaps to life thresholds	$460
-	Uneven paint finish to lift door frames	$147.50
-	Wall finish at the ceiling junction to rear balcony	$1,160
-	Rubber buffer to door	$69
-	Door handle to powder room	$49
-	Missing cover plate to GPO	$53
-	Screw missing to front door	$48

MIRRORS

129 The owners claim $1,328 as the estimated cost they incurred in replacing the mirrors in the two ensuites to the childrens' bedrooms and the powder room on the ground floor. The original mirrors, installed by the builder, were glued to the walls. The owners say that the mirrors were installed too high for practical use by their children. As the mirrors were glued to the

wall, it was not possible to remove them, for the purpose of relocating them at a lower height, without breaking the mirrors. The owners removed the old mirrors and replaced them with new mirrors at a lower height.

130 Mr Ferguson says that his wife Tina placed yellow stickers on the walls to indicate to the builder the appropriate height for installation of the mirrors. Mrs Ferguson, who gave evidence at the hearing, gave no evidence in respect of the mirrors.

131 Mr Young says that the height of the mirrors was confirmed with the owners prior to their installation.

132 I find, on the evidence before me, that the owners have failed to establish, on the balance of probabilities, that the builder installed the mirrors at an incorrect height or in contradiction to the owners' instructions. Accordingly, I make no allowance for this item.

TRAMPOLINE

133 There is no dispute that the landscape design documentation, obtained by the owners, specified an in-ground trampoline of "Olympic Elite" size and that the builder installed a slightly smaller "Olympic" size trampoline. The builder admits the error. A query on the size of the trampoline is noted in several of the builder's outstanding items lists.

134 Mr Ferguson says also that there is a problem with the excavation over which the trampoline is installed at ground level. The excavation has concrete sloping walls. Mr Ferguson says that he has been advised by a representative of the trampoline supplier, "Mr Trampoline", that as his children grow and become heavier, they will be at risk of hitting the concrete wall when they jump on the trampoline. No witness from "Mr Trampoline" was called to give evidence.

135 Mr Ferguson also produced a quotation from "Mr Trampoline" dated 19 February 2013 for the replacement of the "Olympic" size trampoline mat with a larger "Olympic Elite" size mat. The quotation allows for further excavation works, however, it appears from the quotation that the excavation works are directly related to the increased size of the Olympic Elite mat. The quoted cost is $3,180, subject to the return to "Mr Trampoline" of the smaller "Olympic" mat. The owners have carried out no rectification works in respect of the trampoline and they are unsure as to whether "Mr Trampoline" would now be prepared to accept the return of the smaller Olympic size mat. If Mr Trampoline will not now accept a swap of mats, the cost to install a new Olympic Elite trampoline would appear, from the quotation, to be $9,911.

136 On the evidence before me, I am not satisfied that the excavation is unsuitable for the Olympic size trampoline currently installed. There is no evidence of any problems with the use of the trampoline to date and I do not consider Mr Ferguson's "hearsay" evidence as to what he was told by "Mr

Trampoline" as sufficient to find that the excavation is defective or unsuitable.

137 There is no doubt, however, that the trampoline is slightly smaller in size than the trampoline specified under the contract. An "Olympic Elite" mat is 4.27 x 2.13 metres, whereas an "Olympic" mat size is 4.27 x 1.83 metres.

138 There is no evidence that the slightly smaller trampoline installed has, to date, proved unsuitable for its intended purpose. Mr Ferguson confirmed that his children happily use the trampoline. And as noted above, I do not accept, on Mr Ferguson's hearsay evidence alone, that the use of trampoline will be compromised in some way in the future.

139 It is well recognised in law that where works and materials are not in conformity with the provisions of a contract, the "prima facie" measure of damages is the amount required to rectify the non-conformity in order to bring the work and materials substantially in accordance with the provisions in the contract. This principle, however, is subject to the qualification that it must be *reasonable* to require the works necessary to achieve conformity with the contract[1].

140 On all the evidence, I am not satisfied that it is reasonable to require the replacement of the trampoline currently installed. I do not accept that the trampoline installed is dysfunctional or unsuitable for its intended use. In my view, the owners should be compensated only for the difference in price between the Olympic Elite size trampoline specified in the contract and the Olympic size trampoline provided. The quotation from Mr Trampoline, referred to above, indicates that the supply cost of an Olympic Elite mat is $6,300, whereas the supply cost of an Olympic mat is $5,830, a difference of $470.

141 Accordingly, I allow $470 for this item.

TIMBER GATE DAMAGE

142 The external timber gate has been slightly damaged and there are a couple of small areas where the staining to the gate framing and cladding has not been completed.

143 As there is no evidence as to when the damage to the gate occurred, before or after the builder was last on site, I am not satisfied that the builder is responsible for the damage. The builder is, however, responsible for the incomplete painting.

144 Dr Eilenberg allows $111.18 for the repair and repainting of the gate. Mr Johnson allows $80 for just the satisfactory completion of the painting. As I am allowing only the cost of the painting, I accept Mr Johnson's figure and allow $80.

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[1] See Bellgrove v Eldridge (1954) 90 CLR 613

CONTROL JOINT IN CONCRETE BLOCK WALL

145 The south side of the rendered driveway wall has one articulation joint, and that joint has not, as it should have been, caulked. The owners say also that a further articulation joint should be installed as there is a section of the wall in excess of 6 metres in length with no articulation joint.

146 Dr Eilenberg allows $802.24 as the cost to caulk the existing joint and to install a second articulation joint. Mr Johnson says that the existing articulation joint should be caulked, at a cost of $80, but that there is no need to install a second articulation joint.

147 Dr Eilenberg concedes that it is “debatable” whether the Building Code of Australia requires that articulation joints be installed at not greater than 6 metre intervals. In any event, he says it is common practice to install articulation joints at intervals not exceeding 6 metres.

148 Mr Johnson and Dr Eilenberg agree, and as I observed at the view, the wall is sound and there is no sign of movement damage to suggest that a further articulation joint is required. For this reason, I make no allowance for the installation of a further articulation joint.

149 As Dr Eilenberg and Mr Johnson agree that the existing articulation joint should be caulked, I accept that the caulking is required and I allow Mr Johnson’s cost estimate of $80.

NO WATER TO REFRIGERATOR ICEMAKER

150 The icemaking function in the refrigerator adjacent to the kitchen pantry is non functional because there is no water supply to it. Dr Eilenberg allows $780 to dismantle the surrounding joinery and carry out plumbing connections to supply water to the refrigerator. As Dr Eilenberg is unsure as to the extent of plumbing works required, his cost estimate includes an allowance of 8 hours labour for a plumber. Mr Johnson does not address this item.

151 Mr Young says that plumbing for the supply of water to the refrigerator has been installed and all that is required is the call out of a plumber to make a simple connection. The owners are unable to contest Mr Young’s evidence as they know nothing about the plumbing. All they know is that the icemaker has no water supply.

152 I accept Mr Young’s evidence and, doing the best I can, I allow $200 as the reasonable cost to engage a plumber for the task. Accordingly, I allow $200 for this item

WATER SUPPLY TO STEAM OVEN

153 A steam oven has been installed in the kitchen, however the steam function is not currently operable because, like the refrigerator, the oven has not been connected to the plumbing. Dr Eilenberg allows $1,030 to connect the

oven to the plumbing. Again, his costing includes 8 hours labour for a plumber as he is unsure of the extent of plumbing works required.

154 Mr Young says that the builder made no allowance for water plumbing connection to the oven because the owners selected the steam oven only after the plumbing works had been carried out.

155 There is no general specifications document and as the owners provide no evidence to suggest that the contract works included the provision of water to the oven, I am not satisfied, on the balance of probabilities, that the plumbing works now required are within the scope of contract works to be carried out by the builder. Accordingly, I make no allowance for this item.

SQUEAKING FLOORS

156 Dr Eilenberg says that the first floor, in the area of the hallway and the master bedroom, squeaks when walked upon. He allows $562.28 as the cost to roll back the carpet and renail the timber floor.

157 Mr Johnson did not inspect and report on the squeaking floor as it was not included as part of the owners' claims until it first appeared in Dr Eilenberg's report of 19 November 2013.

158 At the view I paced up and down over the areas of floor identified by Dr Eilenberg but was unable to confirm the squeaking. For this reason, I make no allowance for this item.

RAINWATER HEADS

159 Dr Eilenberg says that the provision for overflow to the rainwater heads, in most cases two small holes or one very poorly installed hole in the rainhead, is inadequate. This was obvious at the view. Mr Johnson did not report on this item however he noted the poor overflow provision at the view.

160 As Mr Johnson provides no rectification costing for this item, I accept Dr Eilenberg's cost estimate and allow the sum of $760 to rectify the defective work.

NO JUNCTION BOX TO SOLAR HEATING CABLES

161 As noted by Mr Johnson, wiring apparently associated with the solar hot water system has been left exposed on the roofing.

162 Mr Young says that the installation of the solar hot water system was arranged by the owner and did not form part of the builder's contract works. His evidence in this regard is uncontested and, accordingly, I make no allowance for this item.

MEMBRANE NOT CLEANED OFF LAUNDRY DOOR THRESHHOLD

163 Mr Johnson accepts that excess membrane over the laundry door threshold should be removed and he allows a sum of $75. As Dr Eilenberg provides

no cost estimate for this item, I accept Mr Johnson's estimate and allow $75.

POWDER ROOM DOOR

164 Mr Johnson and Dr Eilenberg agree that the door to the powder room in the basement is slightly water damaged with swelling and lifting of the face of the lower edge of the door.

165 Mr Johnson opines that it appears that the bottom edge of the door was trimmed at some stage and not resealed, thus allowing moisture penetration.

166 I accept the evidence of Dr Eilenberg and Mr Johnson that a new door should be supplied and fitted. As Dr Eilenberg provides no cost estimate for this item, I accept Mr Johnson's estimate and allow $360.

SLIDING CAVITY DOORS

167 There are problems with the sliding cavity doors installed throughout the home:

- The doors have recessed door pull handles which cannot be accessed when the doors slide fully back within the door frame. Having viewed the doors, I am satisfied that they are not satisfactorily functional. Rectification will require either the installation of door stops to prevent the doors from receding fully into the door frame or the installation of recessed pull rings to the leading edge of the doors.
- Some doors are poorly aligned and this has caused minor scraping damage to the doors as they are pushed into and pulled out of the door frames. The doors need to be realigned and the minor damage repaired.

168 Mr Johnson estimates a rectification cost of $1,280. His estimate includes the provision of doorstops as the method to solve the problem of the inaccessibility of the door handles when the doors are slid fully back within the frame. Dr Eilenberg provides no rectification cost estimate

169 There is no evidence upon which I might find that the builder was obliged to install ring pull handles to the sliding doors in lieu of doorstops. Accordingly, I accept Mr Johnson's rectification method. I also accept Mr Johnson's rectification cost estimate and allow $1,280.

CEILING TO GROUND FLOOR SITTING ROOM

170 A very heavy circular stone bath has been installed in the master suite ensuite, situated above the ground floor sitting room. Mr Young says, and his evidence is not contested, that a leaking pipe to the bath caused water damage to the sitting room ceiling. Mr Young says that he believes the damage to the pipe was caused by the sheer weight of the stone bath. When investigating the leak, Mr Young decided to add strength to the framing supporting the bath. The builder removed a section of the sitting room

ceiling and nailed short lengths of plywood to each side of the trusses to give them additional strength. Mr Young says that an engineer approved the structural works, but no document confirming the approval has been produced.

171 The leaking water pipe remains to be fixed and the sitting room ceiling is to be reinstated and painted. Mr Johnson allows $1,031 for these works.

172 Dr Eilenberg is concerned that the additional structural work carried out by the builder may not be adequate. He allows $4,196.65 for rectification works including further carpentry works, the removal of the ply lining and replacement with 12mm structural plywood. Dr Eilenberg concedes that, without the opinion of a structural engineer, he is unable to confirm whether the existing framing is inadequate to support the bath.

173 As there is no expert engineering evidence as to the adequacy of the timber framing, I am not satisfied that the extra structural works recommended by Dr Eilenberg are necessary, and I will allow only the cost of rectifying the leaking pipe and reinstating the ceiling. With the structural works removed, Dr Eilenberg's rectification costing is $2,607. The main differences between Dr Eilenberg's costing and Mr Johnson's costing is the labour allowance for painting (Dr Eilenberg $889.44 and Mr Johnson $320) and Dr Eilenberg's allowance for the provision of mobile scaffold, $340, for which Mr Johnson makes no allowance. I consider it fair to "split the difference" between their cost estimates and, accordingly, I allow $1819.

TOTAL RECTIFICATION COSTS

174 The total of the allowances I have made above for the rectification of incomplete and defective works is $85,737.79. To this figure I add a 35% margin for preliminaries, overheads and profit $30,008.23) to reach a sub total of $115,746.02. To this figure I add 10% GST allowance, $11,574.60, to reach a total of $127,320.62 as the assessment of the reasonable cost the owners will incur in engaging an independent builder to rectify and complete the contract works.

SET-OFF AGAINST UNPAID BALANCE OF THE CONTRACT

175 As noted above, the owners concede that the unpaid balance of the contract price, assuming satisfactory completion of the contract works, is the sum demanded by the builder, $131,065. Although the builder claims interest on this sum, I make no allowance for interest because, for the reasons outlined above, I find that the builder was not entitled to payment of the sum while the contract works remained incomplete.

176 I also make no allowance for interest on the assessed cost of the rectification works because the assessment represents the cost the owners will now incur in engaging a new builder to carry out the rectification works.

177 After setting off the assessed cost of rectification works, $127,320.62, against the unpaid balance of the contract, $131,065, I find that the owners are indebted to the builder in the sum of $3,744.38. I do not consider it appropriate or fair to award interest on this sum. I have found that the owners were justified in refusing to meet the builder's demand for full payment of the builder's final payment claim. I have found also that the owners were justified in accepting the builder's repudiation of the contract. The sum I will order the owners to pay the builder is not a sum of money which the builder ought to have been paid some time ago. It is simply the end financial outcome of a proceeding initiated upon the wrongful conduct of the builder and, in that circumstance, I do not consider interest should be awarded.

CONCLUSION

178 For the above reasons I will make one order in respect of the builder's claim and the owners' counterclaim, namely that the owners pay the builder $3,744.38. I will reserve the question of costs with liberty to the parties to apply.

MEMBER M. FARRELLY