

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D85/2013

CATCHWORDS

Domestic building works-external rendering works-evidenced by exchange of emails-whether agreed contract rate per square metre and quoted hourly rate extended to all work subsequently performed by respondent-construction of contract.

Whether a term was implied by trade and custom.

Respondent found to have repudiated by subsequently asserting a number of matters concerning the scope of the works found to have been inconsistent with the agreement, including an assertion that the contract was a lump sum contract-contract found to have been duly rescinded by applicant.

Assessment of cost of completion damages due to the applicant.

Assessment of defective works damages due to applicant-insufficient evidence of damages.

Assessment of balance due to respondent for work and labour done pursuant to the agreement prior to termination by the applicant.

APPLICANT	TEVANS PROPERTIES PTY LTD (ACN 122 584 785)
RESPONDENT	CLAUDIO CIRO
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Hearing
DATE OF HEARING	29-31 January 2014, 15-17 April 2014, 20 June 2014 (final submissions)
DATE OF ORDER	1 September 2014
CITATION	Tevans Properties Pty Ltd v Ciro (Building and Property) [2014] VCAT 1102

ORDER

1. The respondent must pay the applicant \$10,827.25.
2. Costs and interest reserved. The Principal Registrar is directed to fix any application for costs before me, allow 3 hours.

MEMBER A KINCAID

APPEARANCES:

For Tevans

Mr M Dean of Counsel

For Mr Ciro

Mr T Sedal of Counsel

REASONS

INTRODUCTION

1. Tevans Properties Pty Ltd (“**Tevans**”) is the owner of a property at 291-297 Harkaway Road, Narre Warren North, Victoria.
2. Mr Trevor Evans is a director of Tevans. He has 45 years experience in the building and construction industry, having been involved in residential construction, commercial construction, industrial projects and major civil works. He is the National President of Master Builders Australia.
3. The respondent, Mr Claudio Ciro has 25 years experience as a professional renderer. He describes himself as providing “high-end” residential rendering work.
4. Following an exchange of emails in early 2012, Tevans engaged Mr Ciro to perform rendering works to a new residence at the property (the “**contract**”). Tevans was listed as the builder of the residence on an owner-builder building permit. Mr Evans and his wife now live there.
5. The residence is a large single story dwelling. There is also an indoor pool house located to the north of the tennis court. An internal walkway, or loggia, connects the pool house with an external paved area located west of the main bedroom.
6. Tevans terminated the contract by email to Mr Ciro dated 9 January 2013. It followed a number of emails from Mr Ciro to Mr Evans from early December 2012, by which Mr Ciro attempted to recover additional payments from Tevans for rendering works which, he maintained, were outside the terms of the agreement reached in early 2012.

THE ISSUES

7. Each party accuses the other of repudiating the contract. I am asked to determine which of them did so, and to assess the amount of damages to which the party not in breach is entitled.
8. Tevans also makes a claim for damages for alleged defective works carried out by Mr Ciro, which needs to be separately considered.

THE HEARING

9. I heard evidence from Mr Evans and the following further witnesses called by Tevans:
 - (a) Mr Murray Hamilton, Quantity Surveyor, an expert witness;
 - (b) Mr Antony Croucher, Building Consultant, an expert witness; and
 - (c) Mr Lachlan Byrne, the rendering contractor responsible for completing the works for Tevans following the termination of Mr Ciro, and for rectifying alleged defects in the work undertaken by Mr Ciro.

10. I heard evidence from Mr Ciro and the following further witnesses called by him:
- (a) Mr Richard Vaughan, Quantity Surveyor, an expert witness; and
 - (b) Mr Mark Vincevic, a renderer who assisted Mr Ciro in carrying out the works for Tevans.

THE CLAIM

11. Tevans claims that by email dated 9 January 2013 it accepted Mr Ciro's repudiatory conduct as putting an end to the contract.
12. Tevans claims damages flowing from the alleged breach. These damages are the total amount it has paid to Mr Ciro and to Mr Byrne, less the amount that Tevans calculates it would have paid Mr Ciro had he duly performed the contract. The amount Tevans paid Mr Byrne included not only the cost to complete the required work, but also the alleged cost of rectifying defective works.
13. The total claim made by Tevans for \$45,666 is made up as follows:

Total Costs of Rectification and Completion	\$63,824 ¹
Less cost of work performed by subsequent contractor, Mr Byrne, not within the scope of the contract with Mr Ciro	(\$3,488)
Amount paid to Mr Ciro	\$46,000
SUB-TOTAL	\$106,336
Less an amount calculated by multiplying the claimed area to be rendered (691 square metres ²) by the contract rate of \$75 per square metre including GST, being the amount which Tevans alleges it was obliged to pay Mr Ciro for all works	(\$51,825)
Less value of "Pool House" works and "Approved" variations ³	(\$8,845)
TOTAL	\$45,666

14. The total of Mr Byrne's labour costs, included in the figure of \$63,824 above, is \$54,367. If I find that Tevans repudiated, it still makes a claim for 40% of these labour costs (\$21,747), being the alleged cost of rectifying allegedly defective rendering work carried out by Mr Ciro. Tevans also

¹ Being the total referred to in attachment "A" filed and served by Tevans on 29 January 2014, the first day of the hearing, being an itemisation of the alleged cost of labour and materials charged by Mr Byrne to rectify and complete the works.

² Being the total area of the external faces of the dwelling required to be completed by Mr Ciro, (including window reveals not exceeding 250mm wide), less the total area of the window penetrations.

³ Described on page 2 of Mr Hamilton's report dated 22 October 2013.

claims \$440 being the value of a day's work performed by Mr Byrne (8 hours at \$55 per hour) rectifying allegedly defective rendering work performed by Mr Ciro to the curved wall in the loggia, and to the bulkhead. This amounts to a defective works claim of \$22,187. Alternatively, Tevans seeks \$1,950 being the sum determined by Mr Croucher for articulation joint repairs and re-working to the window reveals.

THE COUNTERCLAIM

15. Mr Ciro denies that he repudiated the contract prior to 9 January 2013. He claims that Tevans repudiated the contract by its email dated 9 January 2013.
16. Mr Ciro therefore claims \$27,874.63 on a *quantum meruit*, consequent upon Tevans's repudiation. This sum is calculated by assessing the reasonable value of the works performed,⁴ less monies paid by Tevans to Mr Ciro, calculated as follows:

Value of completed works, as assessed by Mr Vaughan (referred to as "Option 3" in his report, as amended during evidence)	\$67,158.75
GST	\$6,715.88
SUB-TOTAL	\$73,874.63
Less monies paid to Respondent	(\$46,000.00)
TOTAL	\$27,874.63

17. Mr Ciro claims in the alternative \$22,472.85 on a *quantum meruit*, based on the alleged actual cost of Mr Ciro's labour and materials, less monies paid by Tevans, calculated as follows:

Cost	Amount	15% Margin	GST	Total
Mark Vincetic	\$23,335	\$3,500.25	\$2,683.53	\$29,518.78
Claudio Ciro	\$27,300	\$4,095	\$3,139.50	\$34,534.50
Materials	\$3,493.73	\$524.06	\$401.78	\$4,419.57
TOTAL	\$54,128.73	\$8,119.31	\$6,224.81	\$68,472.85
Less monies paid to Mr Ciro				(\$46,000)
TOTAL				\$22,472.85

18. Mr Ciro also relies on the principle that where a contractor has done work under an agreement, but the agreement does not fix a price, the law implies

⁴ See *Lodder v Slowey* [1904] AC 442. Being a restitutionary remedy, the reasonable value of the works performed is the value of the benefit conferred on Mr Evans: see *Sopov & Anor v Kane Constructions Pty Ltd* [2009] VSCA 141 at [4]-[40] and particularly at [25].

a term that a reasonable price will be paid for the works.⁵ Mr Ciro also submits in the alternative, in effect, that the claimed contract was bad for uncertainty,⁶ which results in an entitlement to be paid a reasonable value for the benefits conferred on Tevans.

19. If, on the other hand, it is held that Mr Ciro repudiated the agreement, Mr Ciro nevertheless seeks payment for the works he performed in accordance with the agreement prior to that date, assessed in accordance with the agreement. In this respect, he claims \$27,874.63 inclusive of GST, based again on the assessment of Mr Vaughan.
20. Any order made in favour of Mr Ciro would naturally be subject to any set-off in favour of Tevans in respect of any rectification damages.

THE AGREEMENT

21. There are two emails evidencing the contract. The resolution of many issues between the parties depends on the proper construction of their contents. It is therefore necessary for me to set them out in full.
22. On 30 January 2012 Mr Ciro emailed Mr Evans as follows:

Hi Trevor,

Sorry to take so long getting back to you!

The actual finish you are trying to replicate, is a very weathered old, mottled look. There will be no problem in getting this **finish**.

Option 1. If tilt panels [were] to be used:

All mouldings, bands around windows, keystones, corbels and plinths can be easily affixed to the tilt panels via polyurethane and fixings. Joints in the tilt panels will be filled with a polymer patching compound together with fibreglass mesh.

Then entire panels would receive (1) coat of polymer patching compound over **entire surface**. approx. 2-3mm. Then (1) coat of acrylic render base over **entire wall surface**. approx. 3mm. Then the final coat of traditional sand/cement based finish coat. approx 3mm. The method we will use to achieve **the finish** [you're] after (**final finish**) will actually involve the use of two differing **colours** [**emphases added**].

I wouldn't put too much emphasis on the expansion joints as the polymer patching compound and fibreglass tape does a good job. BUT like all cement products it can shrink and contract and there will be a chance that a hairline crack will show on the joints. An express joint (1mm) along the joint would be wise so that if there is movement, at least it will not be unsightly.

Costings for this would be \$75 per square metre

⁵ See *Horton v Jones (No 2)* (1939) SR (NSW) 305 at 319.

⁶ In Counsel's words, there was no "meeting of the minds in regard to the price for the vast majority of works performed by Mr Ciro which were not included in the original scope", the result of which there was no agreement.

Option 2. If brickwork was to be used.

All brickwork would receive a dashcoat (keycoat) 2mm-3mm Then traditional sand/cement render over entire areas. 10-15mm. Then the final coat of traditional sand/cement based finish coat. approx 3mm

All mouldings, bands around windows, keystones, corbels and plinths can be built up with the sand/cement render-therefore prefabricated mouldings can be eliminated here.

Or prefabricated mouldings can be affixed with polyurethane and fixings

In situ mouldings will not crack while prefabricated mouldings can over time.

Brickwork for this scenario can be average, as the cement render (10-15mm can hide imperfections)

Costings for this would be \$90 per square metre.

Option 3. If brickwork was to be used-this option requires brickwork to be fairly straight.

All brickwork would receive (2) coats acrylic render base over entire wall surface. Approx 6mm in total Then the final coat of traditional sand/cement base finish coat. Approx 3mm All mouldings, bands around windows, keystones, corbels and plinths can be easily affixed to walls via polyurethane and fixings or alternatively these can all be done in situ with sand/cement render.

Costings for this would be \$75 per square metre...

I hope the above helps Trevor.

Obviously [it's] going to come down to whether or not the tilt up panels are cheaper to erect or the bricks are cheaper to lay. Either way, render wise it will not make a large difference.

Either method above will enable us to achieve the finish [you're] after.

Let me know if the information above is not clear.

Any queries just let me know.

thanks

Claude (**emphases added**)

23. On 16 February 2012, Mr Ciro emailed Mr Evans again, as follows:

Trevor I have had a hard think about the mouldings, and come up with the following:

1. If you elect to go with the lightweight mouldings (bands) around the windows and doors...I suggest you do a quantity take off (lineal metres)...normal prices for fixing ...is that they will charge the same price to instal/fix as what it costs to buy the moulding eg if 240 metres of moulding is purchased for x amount then x will

also be the price to instal them. The quantity/pricing is based on the total lineal metres of mouldings purchased/delivered-NOT what the actual lineal metres are as per plans. Any wastage from offcuts from a length of moulding is STILL charged to fix-even though its waste/offcut.

2. To save on this, perhaps you have full time carpenters whom could install for you. Its fairly straight forward- I can show them how to install them properly.

You have to allow for fixings and polyurethane also when fixing lightweight mouldings.

3. If hand run (in situ) moulds are your preference, then these will be more costly than lightweight as mentioned above.

The only thing I can suggest to save \$ if your preference are insitu mouldings, is I am happy to show either yourself or carpenter exactly how to set up the straight edges for the mouldings, and then I can apply the render.

The setting up of the straight edges around the windows is the most time consuming part. Its very easy to do, so perhaps you may prefer this.

This will make us doing the bands insitu much much cheaper – because you have already set it out. I can show you exactly how it's done.

In so far as cost to have us do the mouldings-and your men do the set out/straight edges-I am prepared to just charge you however long it takes us, ie hourly rate. This in my opinion is a good option to save money and end up with a better product ie insitu mouldings, which means no cracks in joints (lightweight mouldings do crack at the mitres when done around windows) most of the time.

Let me know your thoughts Trevor. I'm doing my best to try and save you a buck and get the results [you're] after.

Insofar as the render prices I emailed you [on 30 January 2012], its going to be hard for me to lower these Trevor

If you were after a standard finish, I could lower it a little...**the custom finish** your after is the problem. It's a very specific look-which requires the final coat to be applied differently than your standard **finishes**-hence more time consuming.

The only difference a broom finish tilt panel can offer is that it would alleviate the use of an acrylic patching base coat.

Instead an acrylic base coat would be used as it is cheaper, but without compromising this first coat we would mix in additional polymer glue with it

The broom finish would also provide a better key for render

My suggestion to save-

1. precast panels broom finish

2. Base coat of the acrylic render with additional polymer added
3. 2nd coat of acrylic render
4. final coat of colour finish

And yourself with my guidance setting up straight edges for mouldings.

As mentioned moulds can be done on an hourly basis, allow \$55p/h should only take a few days for the mouldings around windows (**emphases added**).

24. It is not in dispute that Mr Evans ultimately decided to use tilt up panels with a “broom finish” for the external walls of the residence. This meant that the 2-3mm coat of acrylic polymer patching compound, recommended in Option 1 of the email dated 30 January 2012 in order to create a better key (or fix) between the substrate and the render, was not required. Instead, Mr Ciro was to apply two base coats before applying the sand/cement finishing coat, as suggested in the closing paragraphs of his email dated 16 February 2012.
25. I find that the parties contracted on the basis of the above two emails in about mid June 2012. This was the time that Mr Ciro purchased products for the proposed works, and started work.

TERMINOLOGY

26. In order to assist with the terminology used in these Reasons, I provide below a working description of some of the terms that are used in the above emails, which I gained during the giving of evidence:

substrate	The base material on which an external finish is to be applied.
Pre-fabricated concrete tilt panels	A type of external wall construction. A form of substrate. Usually placed about 10mm-20mm apart to allow for movement. A “backing rod” is placed vertically in the gap between panels, to function as a backing for caulking which is subsequently placed in the gap, levelled off at the external face of the panels.
Polystyrene (or “foam”)	Another form of substrate
Articulation joint	Joint created by the renderer, to avoid random shrinkage cracking of the external render coats as a result of thermal expansion. The renderer applies render so as to leave a gap where the articulation joint is required. No cutting of the render, post application, is therefore required cf express joint.
Express joint	A type of articulation joint, created in the render after the render has been recently applied over the intended joint so as to control shrinkage cracking of render under thermal

	expansion. Commonly created with a trowel. In the case of tilt panel construction, render is cut through to the caulking below.
Fibreglass reinforcing mesh (or “tape”)	Available in rolls up to about 100mm wide. Fixed or embedded into the base coats of render, where an articulation or express joint is to be created in the render. In the case of tilt panel construction, applied longitudinally down the vertical tilt panel joints, such that when an express joint is subsequently created in the render (thus also cutting through the mesh at the joint) the remaining mesh to each side provides reinforcement to the edges of the render remaining at both sides.
Polymer patching compound	A coat first applied to the substrate to create better adhesion (or “key”) of an acrylic base coat or finish coat to the substrate
Acrylic render basecoat	The coat of acrylic render applied to the substrate (with or without a patching compound) beneath the sand/cement coat (can be one coat or more)
Sand/cement coat (sometimes referred as the “colour” or “traditional render”)	The top coat applied over the acrylic base coat, often having the desired colour mixed into the sand/cement mix.
Window mouldings (or bands)	A strip of painted or rendered material, around the sides of windows and other penetrations to provide an architectural accent. Available in prefabricated form in various profiles, or built up in render <i>in situ</i> by the renderer.
Keystone	A strip of painted or rendered material, with various profiles, at the top of a window opening, to provide an architectural accent.
Corbel	A solid feature, jutting from a wall, supporting the weight of a feature above. Can be decorative only.
Plinth	Architectural profile feature, rising up to a metre above external ground level around a dwelling, applied to substrate.
Quoins (or Quoin stones)	Raised profiles fixed into the corners of a building to compliment the surrounding brickwork or render
Ashlar lines	Joint lines cut (or “scribed”) into the render, particularly into mouldings

	and keystones, for decorative effect.
Reveals, sills, heads	Those parts of the side of a window or door opening that is between the outer surface of a wall and the window or door frame

Did the \$75 per square metre rate include all rendering to mouldings, keystones, corbels and plinths and such other further works?

27. A question of construction I am required to determine is whether the agreed rendering rate of “\$75 per square metre” referred to in Option 1 of the email dated 30 January 2012 was, as contended by Tevans, an “all-in” rate. That is, it included not only the rendering to the external faces of the concrete tilt panels, but also the further rendering works undertaken by Mr Ciro, or anticipated to be undertaken by him were it not for the termination of the contract.
28. These further works included:
- (a) rendering of the faces and edges of prefabricated window mouldings, including the taping of joins between mouldings and window reveals, heads and sills to reduce the risk of cracking where moulds meet the tilt panels;
 - (b) “building up” of the reveals, heads and sills so that they become flush with the prefabricated mouldings;
 - (c) “scribing” of prefabricated mouldings, heads, sills and reveals with “ashlar lines”;
 - (d) rendering of internal areas;
 - (e) rendering of polystyrene areas; and
 - (f) decorative insitu rendering (rustification lines, quoins, etc) at the front entrance.
29. By necessity, the rendering to the mouldings, building up of reveals, scribing and the like were to be undertaken to certain features placed *upon* the concrete tilt panels.
30. Tevans contends that the “\$75 per square metre” rate included not only the rendering of the concrete tilt panels referred to in the drawings, but also work associated with the contemplated “mouldings, keystones, corbels and plinths” referred to in the 2 lines immediately below the heading “Option 1” of the email dated 30 January 2012. In other words, it contends, if Mr Ciro charges \$75 per square metre for say, 6 square metres of rendering, he cannot then make a further charge for carrying out rendering to pre-fabricated mouldings (and necessary incidental work such as the affixing of fibreglass reinforcing mesh) that may be attached to that 6 square metre area.

31. Tevans relies on:
- (a) the content of the revised drawings and photographs sent by Mr Evans to Mr Ciro;
 - (b) Mr Ciro’s sequential description of the works included in “Option 1” of his email dated 30 January 2012, in which he starts with the works associated with the affixing of “mouldings, bands around windows, keystones, corbels and plinths...[by] polyurethane and fixings, then the work associated with filling the joints between the tilt panels, and goes on to state:
“**Then entire** panels would receive [1 patching coat] over **entire surface**...then [1 coat of acrylic base coat] over **entire wall surface (emphasis added)**
Tevans submits that if only the surface area of the tilt panels was to be rendered for the price of \$75 per square metre, then the word “entire” is superfluous since, on any view of the contract, the tilt panels were to be totally and not partially rendered;
 - (c) the fact that the \$75 per square metre rate was not expressed as being exclusive of the work required to be performed by a renderer in conjunction with the contemplated affixing of mouldings, keystones, corbels and plinths;
 - (d) the fact that Mr Ciro did not make the \$75 per square metre rate conditional upon the provision of further information by Mr Evans; and
 - (e) the fact that nowhere in the email (or in the subsequent email dated 16 February 2012) was it expressly stated by Mr Ciro that the rendering of mouldings, keystones, corbels and plinths would be charged in addition to the \$75 per square metre rate.
32. Tevans submits that it would have been a simple matter for Mr Ciro to state that tilt panels only would be rendered for the \$75 per square metre rate, and that mouldings, bands around windows, keystones, corbels and plinths would be charged at a rate to be determined. This was not done.
33. Mr Ciro submits that one cannot construe from the words of the email dated 30 January 2012 and the subsequent email dated 16 February 2012, an intention that he would not be paid any amount, in addition to the \$75 per square metre rate, for contemplated extra works. He says that the words “\$75 per square metre”, properly construed, covered only the contemplated rendering to the concrete tilt panels, and that he was therefore entitled to make an additional charge for all other works beyond this scope.

Finding:

34. The email dated 30 January 2012 sets out three different cost options, depending on the type of substrate chosen by Tevans, and the cost of rendering such substrates. It also contains advice given by Mr Ciro to Mr

Evans about the relative merits of the different substrates, and whether the cost of rendering different substrates would greatly affect the overall construction cost.

35. Option 1 contemplates the use of concrete tilt panels. Option 2 and Option 3 relate to the possible use of external brick construction.
36. Turning to the email itself, in my view it is clear, on its face, that its purpose was not to provide an all-encompassing rate for the rendering of concrete tilt panels, regardless of the extent of further rendering works that Mr Ciro might be required to perform (such as the rendering of mouldings, keystones, corbels and plinths that may be attached *to* them).
37. The intent of the email was, I think, to assist Mr Evans choose which substrate to use. After setting out three different possible substrates and the different per square metre rendering cost for each substrate, advising regarding the advantages and disadvantages of the different substrates, Mr Ciro concludes the email in a way that suggests that his prime concern was the extent to which the choice of substrates would affect the desired appearance of the finishes, and the cost. In particular, I make the following observations:
 - (a) Option 1 of the email expressly refers to the rendering of “panels” and “wall surfaces”. Options 2 and 3 expressly refer to rendering of “brickwork”. Pre-fabricated mouldings, bands around windows, keystones, corbels and plinths are, as the email suggests, “affixed” to tilt up panels. Those building elements are not themselves, in my view, “panels” or “wall surfaces”.
 - (b) The introductory paragraph to the email makes it clear that its concern was the “very weathered old, mottled look [or] finish” desired by Mr Evans, and not the contemplated mouldings, keystones, corbels and plinths. It is only the extent to which Mr Evans’s choice of substrate may affect the means by which these further works are undertaken that they are mentioned.
 - (c) The email does not expressly say that mouldings will be rendered. It says that they can be affixed to the tilt up panels. This is consistent with the purpose and context of the email, being a discussion of the pros and cons of different substrates and whether the cost of rendering affects the choice of substrate.
 - (d) Construction was yet to begin. It is clear from the email that the type of substrate was yet to be chosen by Mr Evans and, as the email dated 16 February 2012 makes clear, no decision had been made regarding whether any mouldings around doors and windows would be rendered in situ, or would be prefabricated (and if prefabricated, the design and dimensions of the moulding were yet to be chosen). Mouldings were not chosen until after works began in mid 2012. There was also no specification as to what, if any, scribing was to take place. I accept Mr

Ciro's submission that Tevans's suggested interpretation is one that results in the parties having agreed upon a rate for these items prior to these items being chosen (or affixed to the panels), and before any specification for such further decorative works has been agreed. That is to say, the \$75 per square metre rate would apply prior to the parties knowing whether mouldings would be installed to all doors and windows, whether mouldings would be insitu or prefabricated (each resulting in rendering work of varying complexity), the size of any mouldings (and therefore the thickness of render required to build out reveals, heads and sills) and whether moulding faces would be scribed with ashlar lines. The proposition that such further works usually attract additional costs was supported by evidence given by both Mr Croucher and Mr Byrne. The interpretation contended for on behalf of Tevans has the result that a concrete tilt panel wall (as shown on the drawings) containing mouldings, keystones, corbels, plinths, and with ashlar lines applied to those features would cost the same as a plain rendered wall. I do not consider that the interpretation contended for by Tevans is one that makes business sense.

38. For the above reasons, I find that the \$75 per square metre rate related only to the application of render to the concrete tilt panels.
39. The contents of the further email dated 16 February 2012 reinforce my conclusion. I consider that it was primarily to provide further assistance to Mr Evans concerning his choice of mouldings. Numbered paragraphs 1 and 2 of the email address the possibility of using lightweight pre-fabricated mouldings. Numbered paragraph 3 refers to the use of "hand run" in situ mouldings. One option suggested by Mr Ciro, to "save [Mr Evans] \$" was for Mr Evans or his carpenter to "set up the straight edges for the mouldings", and then Mr Ciro would "apply the render". Numbered paragraph 3 goes on to state "the cost to have [Mr Ciro render the mouldings] would be [calculated on] an hourly rate". This rate is re-stated in the last paragraph of the email. In my view Mr Ciro was, by this email, expressly reserving to himself the right to charge an additional hourly rate for rendering any pre-fabricated mouldings.
40. It cannot therefore be reasonably said, in my view, that on a proper construction of the emails, the \$75 per square metre rate was intended to cover all such further works.

Relevance of Photographs

41. On 27 April 2010, Mr Evans sent Mr Ciro a series of emails attaching photographs of houses, one of which was described as having a "French provincial" appearance (the "**photographs**"). One of the emails stated as follows:

Claude sorry for the multiple emails, as you can see from the photos **this is the finish** we would love to achieve...[emphasis added]

42. On 2 June 2010, Mr Ciro sent Mr Evans a further email. The email contained suggestions and advice in relation to the use of second hand solid bricks, a recommended bricklayer and plasterer. The email also stated:
- Regarding the rendered **finish** you like-as per pictures-we can replicate virtually **any finish you require**.
- When the time comes Trevor- I will show you a few samples of what we can do- both externally and internally.
- Not sure if Neil Slattery told you- but we import a number of decorative plasters from Italy. Once again I will show you a few samples down the track... [**emphases added**]
43. Tevans says that the photographs showed not only the style and finish that Mr Evans intended to be achieved, but also included window and door mouldings, and scribed ashlar lines. Tevans contends that Mr Ciro therefore well knew that Tevans required certain decorative features to be affixed to the concrete tilt panels the subject of the subsequent “\$75 per square metre” quote.
44. Mr Ciro points out that one of the photographs shows windows and doors, with moulds and scribing; four of the photographs show a render finish, without showing doors and windows; two photographs show a walkway with openings, and no mouldings; other photographs show mouldings, without scribing. He submitted, in effect, that it is impossible to draw any sensible instruction from the photos concerning the extent to which the rendering of decorative design features would also be required.
45. The photographs must be seen in the context of the covering emails dated 27 April 2010 and 2 June 2010. That correspondence refers only to the “finish” that Mr Evans was trying to achieve. I accept Mr Ciro’s submission that I should conclude from this that the purpose of Mr Evans sending these photographs to Mr Ciro was to convey to Mr Ciro only the render finish that Mr Evans was intending to achieve. Without any reference made by Mr Evans to decorative rendering work in the body of the respective emails, I do not accept that the photographs represented a general specification of the works that Mr Ciro was in fact required to perform.

Relevance of drawings

46. Mr Evans on behalf of Tevans contacted Mr Ciro in about April 2010.
47. On 27 April 2010, Mr Evans emailed Mr Ciro some architectural drawings marked “Preliminary, Not for Construction”.
48. On 30 July 2010, Mr Evans sent Mr Ciro a series of emails attaching revised drawings marked “issued for construction” (the “**revised drawings**”). The first email of the series stated as follows:

Hi Claude, these are the latest drawings... please give me a call for any clarification required for areas and base material to be rendered or any other details required.

49. These drawings indicate that the proposed construction work included:
- (a) a main residence with a footprint of approximately 50 metres by 15 metres;
 - (b) an attached multi-car garage (approximately 14 metres by 8.5 metres);
 - (c) a separate indoor pool room, gym and dining area with a footprint of approximately 25 metres by 12 metres
 - (d) a curved, covered internal walkway or loggia leading from a paved area to the pool room; and
 - (e) a detached multi-car garage, hay shed, dog house and utility room.
50. The revised drawings provided to Mr Ciro prior to his email dated 30 January 2012 only specified render to the external walls. Some openings shown in the revised drawings have mouldings around them, however these are not specified in the drawings to be rendered.
51. In relation to rendering, the relevant aspects of drawings are as follows:
- (a) on drawing A400D (“Elevations: Main Residence”):
 - (i) the notation “render finish as selected” is made in four locations. In each of these locations there is an arrow pointing towards the middle of an external wall panel;
 - (ii) the notation “rendered base” occurs in five locations. In each of these locations there is an arrow pointing towards the base of a wall; and
 - (iii) there is no reference to use of render in relation to the borders of doors and windows. The borders of the windows are marked “timber framed windows and doors”;
 - (b) on drawing A500D (“Sections Main Residence”) there are two references to “rendered masonry veneer walls with 75mm cavity”, with arrows pointing to external walls.
 - (c) drawing A700D (“Door and Windows Main Residence”) contains door and window details. There is no reference on this drawing to render.
 - (d) drawing A402C (“Elevations Pool House”) is the same in relevant respects to the main residence elevations:
 - (i) there are references to “render finish as selected” with arrows pointing to the middle of wall surfaces;
 - (ii) there are references to “rendered base” with arrows pointing to the bases of walls; and

- (e) drawing A702C (“Doors and Windows Pool House”) contains door and window details. There is no reference to render in relation to the borders of doors and windows.
52. There are no references on any of the drawings to:
- (a) the use of rendered mouldings around doors and windows, or the rendering of window borders (moulds or otherwise);
 - (b) scribing around doors and windows;
 - (c) decorative or in-situ rendering work;
 - (d) rendering of internal areas; or
 - (e) rendering of polystyrene substrate.
53. On all the evidence, I find that the “\$75 per square metre” rate applies only to Mr Ciro’s rendering of the concrete tilt panels, and that Mr Ciro was therefore entitled to charge for additional work.

Did the \$75 square metre rate include the area of window penetrations?

54. The second issue of construction is whether the \$75 per square metre rendering rate referred to in the email dated 30 January 2012 should be charged only in respect of the external surfaces of the concrete tilt panels actually rendered, or whether it included the notional rendering of the window and door penetrations (which, of course, were not rendered). Mr Ciro says that he was entitled to charge on the latter basis, to take account of the considerable extra labour involved in applying render to the reveals, heads and sills around the window penetrations.
55. Mr Ciro engaged Mr Vaughan to provide a report dated 22 October 2013. Mr Vaughan undertook a measurement of the external surfaces of the panels from the architect’s drawings. He did not conduct a site measurement.
56. Mr Vaughan calculated that the total area of the window penetrations is 222 square metres. Depending on what proportion of the square metre rate I determine Mr Ciro is entitled to charge (there is a dispute concerning the number of coats applied by Mr Ciro at the date of termination), the inclusion of the areas of the penetrations in the area notionally “rendered” increases Mr Ciro’s claim, on Mr Vaughan’s calculations, by up to \$11,100.⁷
57. Tevans submits that a square metre rate for rendering plainly excludes areas (such as window penetrations) that are not rendered. It therefore denies liability to pay for notional rendering to the assessed 222 square metres.
58. Tevans engaged Mr Hamilton who provided a report dated 22 October 2013. The area of the penetrations was not calculated by Mr Hamilton.
59. Mr Ciro submits that having regard to the background, the context and the market in which the parties were operating, the area of the penetrations is to

⁷ Assuming I find that 2 basecoats were applied by Mr Ciro, of the proposed 3 coats .

be included in the calculation of the total area of wall surfaces, for the following reasons:

- (a) Mr Ciro gave evidence that charging for the voids is included to compensate for stopping and starting that accompanies rendering work around any penetration, and the work to reveals themselves;
 - (b) Mr Byrne gave evidence that voids would be included in the square metre rate;
 - (c) the practice is sufficiently notorious and acquiesced in that Mr Evans himself appears to have based his own calculations on voids being included;
 - (d) Mr Hamilton gave evidence that a “rendering estimator” (Mr Sedal submits, a person in the position of Mr Ciro) would include voids;
 - (e) Mr Hamilton gave evidence that voids can either be: (a) included in “lieu of narrow widths”; or (b) voids can be excluded, with a separate rate then applying to narrow widths/reveals. He took the latter approach in his report, using lineal metres to price reveals, and deducting voids. Mr Ciro submits that the fact that he did not provide a separate lineal metre rate for reveals, indicates that the parties must be taken to have intended that the former approach was the approach to be adopted under the contract; and
 - (f) Mr Hamilton says that in the absence of applying the render rate to window and door penetrations, the contractor would need to be paid for the narrow width reveals (consistent with the evidence of Mr Ciro and Mr Byrne). This is supported by the fact that the vast majority of the cost involved in rendering is the labour, rather than materials.⁸ There was no evidence that it takes less time to render a wall with an opening. The evidence, such as that given by Mr Croucher, was to the contrary.
60. Tevans submits that there is no sufficient evidence of a sufficiently notorious practice that everyone, when making a contract of this nature, can reasonably be presumed to have imported such a term into the contract. He relies on the evidence of Mr Croucher to the effect that the charging for notional penetrations is often an area of dispute between parties to rendering contracts.

Finding

61. The words of the contract are silent on whether the more labour intensive rendering work undertaken by Mr Ciro to the reveals, heads and sills of the window and door penetrations was to be compensated for by also including

⁸ This is clear from the breakdown of labour and materials for both Mr Byrne and Mr Ciro. Further, Mr Hamilton gave evidence to this effect: T1: 97.30

the total area of those penetrations in the total area of applied render for which he can charge.

62. It is therefore necessary for Mr Ciro to rely on an implied term to the effect that the total area of the window and door penetrations is included. A term can be implied on the basis of “trade custom and usage”, or implied in fact so as to give the contract business efficacy.
63. The circumstances in which a term will be implied by trade custom and usage were considered by the High Court in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*.⁹ They are summarised in a leading contract law text¹⁰ as follows:
- (a) the existence of custom is a question of fact;
 - (b) actual knowledge of the custom is not required;
 - (c) the custom need not be universally accepted, but there must be evidence that it is so well known and acquiesced in that everyone making a contract in that situation can be reasonably presumed to have imported that term into the contract. It must be ‘uniform, notorious, reasonable and certain’;¹¹ and
 - (d) a term is not implied on the basis of custom if it is contrary to the actual terms of the contract.
64. Mr Croucher was engaged by Mr Evans to provide opinion on the defects claim brought by Mr Evans. He provided reports dated 5 February 2013 and 28 October 2013. Mr Croucher is a building consultant with considerable experience of domestic building construction. His experience leads him to the view that there is not a notorious practice of charging for the notional rendering of window penetrations so as to compensate the renderer for the more labour intensive work around the reveals. His experience is that rendering jobs are either priced specifically for the actual render coat being applied (with work on reveals, mouldings etc being charged in addition) or priced on a square metre rate (which rate includes the areas of all window penetrations, so as to take account of the work being done to reveals). He is of the opinion that, who are experienced in domestic building construction, would usually have discussed which of the two methods is applicable. There is no evidence of any such discussions in this case.
65. In my view, the opinions of Mr Hamilton and Mr Croucher clearly acknowledge that there are two methods of approaching the issue.
66. On all the evidence, I find that there is insufficient evidence of a term implied by custom and usage such that, in the *Constan Industries* rubric, everyone making a rendering contract of this sort can be reasonably

⁹ (1986) 160 CLR 226 at 236

¹⁰ *Cheshire & Fifoot Law of Contract*, 10th Australian edition at para 10.54

¹¹ *Asset Insure Pty Ltd v New Cap Reinsurance Ltd (In Liq)* 225 CLR 331 at 353.

presumed to have imported the term contended for by Mr Ciro into the contract.

67. Further, in my view it is not necessary to imply a term ‘to give business efficacy to the contract’.¹² That is to say, the contract is effective without it.
68. On the evidence, I find that Mr Ciro has no entitlement to charge \$75 per square metre for the window and door penetrations.

CONTRACT REPUDIATED BY WHOM?

69. On 17 June 2012, Mr Ciro sent Mr Evans a series of emails attaching information regarding various chimney designs, and saying that he would be happy to lend Mr Evans some books he had on the subject.
70. It is not in dispute that Mr Ciro attended the site on 22 June 2012 and that he provided Mr Evans with the books he had said he would lend.
71. Mr Ciro gave evidence that interleaved within the books was a letter to Mr Evans entitled “Quotation-Estimates” dated 22 June 2012. The contents of this letter, if received by Mr Evans, would have avoided much of the argument that later occurred concerning the basis of Mr Ciro’s subsequent charging.
72. I accept Mr Evans’s evidence that he never received the letter. There is no evidence that Mr Evans ever saw the letter, let alone agreed with its terms. For this reason I pay no regard to the letter.
73. The rendering works began on 9 July 2012.
74. Mr Ciro performed the works with his assistant, Mr Vincetic.
75. Mr Evans gave evidence that he was hospitalised in late July 2012 for a shoulder joint replacement, but which resulted in unfortunate further severe injury. This resulted in him remaining in hospital for 6 weeks. The effect of subsequent nerve pain medication was in his words “fairly huge”. His evidence was that in August 2012 he did not know “which way was up”, but that he was receiving emails either picking them up directly from his computer, or being provided by Mrs Evans.

Email dated 24 October 2012 to Mr Evans

76. On 24 October 2012 Mr Ciro emailed Mr Evans:

Hi Trevor

Below [are] my banking details...:

Not sure the amount you are going to deposit? But I think say [\$25,000] is fine if that works with you.

The following is a schedule of planned works so as we keep the project moving.

¹² The second requirement before a term can be implied, in accordance with the statement of principle in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283

1. Finish base coat to all walls pool area. Arch bead or similar to frames around windows at rear of pool/shower room.
 2. Finish antiquing chimney pots / sikaflex hats to pot / install birdproof-weatherproof mesh then install on top of chimneys.
 3. Finish window and door reveals throughout house – where mouldings have been installed. Scribe ashlar lines into moulds at agreed locations.
 4. Insitu blockwork/quines to front entry doorway (once foam ceiling / bulkhead is installed)
 5. Render to doorway heads (foam) above pool doors-externally
 6. Build up render to brick piers reveals abutting door/windows in pool area/externally.
 7. Finish coat of render can be applied to pool house internal walls once the majority of other trades have finished....
77. Mr Ciro submits that none of the rendering works referred to in Mr Ciro's email was specified in the revised drawings.
78. Mr Evans's evidence was that, upon receipt of the email, he assumed that items 3, 4 and 5 would be included in the \$75 per square metre rate, and that items 1, 2 and 6 were variations, and that they would be charged by Mr Ciro at \$55 per hour. This hourly rate was the amount quoted by Mr Ciro in his email dated 16 February 2012 for rendering in situ mouldings, presuming them to have been first set out by Mr Evans or his other contractors. In the absence of there being any other discussion about the rate for these or other variations, Mr Evans says that it was reasonable for him to assume that the hourly rate then quoted would apply to all extra work that was not included in the \$75 per square metre rate.
79. On or around 25 October 2012 Mr Evans paid Mr Ciro \$25,000, being the amount referred to in the email.

Email dated 7 December 2012 to Mr Evans

80. On 7 December 2012, Mr Ciro emailed Mr Evans:

[Next week] we will work on the following, the reveals to the fireplace/pizza oven/blueboard, external window reveals/heads, front entry feature mouldings, render to sills to window openings-loggia where wrought iron has been installed.

Trevor I have just done an approximate quantity estimate for works to date, and for the overall job to date.

We had confirmed before the project commenced of a metre rate for the acrylic base coat¹³ and natural sand/cement finish to the house (pre-cast panels) \$75 **standard** walls.

¹³ Which I take to be a reference to the two acrylic base coats referred to in the email from Mr Ciro to Mr Evans dated 16 February 2012.

This estimate is pretty straightforward, additions on top, would be coating ALL mouldings with the final decorative finish, scribing all mouldings, patching al fixing holes, fibreglass mesh to all joints where mouldings abut reveals, build up of sills and side reveals, front entry decorative mouldings(in situ), chimney facings, chimney parapet, coating chimney pots, fixing of chimney pots.

The pool house/loggia, curved wall walkway, foam areas, columns/piers, (in situ bands to pool piers, etc etc, are the areas where the square metre rate is inapplicable, due to the majority of these areas being corners, curves, foam areas, high access areas, small piers,/door heads/

To put it into perspective, a brick pier with corners requires much more time to complete than a flat larger wall area, as there is a need for straightedges to be held in place 8 times just for 1 pier. Likewise curved foam areas require more attention and time. Likewise bulkheads and window/door returns require more time. The square metre rate originally agreed upon is for a flat wall surface, easily accessed from ground level 1 metre above ground i.e house area.

Insofar as the mouldings on the house are concerned, I suggested in previous emails that we could have done these on an hourly rate (in-situ) if required-this was so as to provide a cost saving option for you. As the prefabricated mouldings were selected-and installed by your men (ie supplied and fixed) this is not applicable.

Therefore, the square metres area on the house @\$75 per metre for acrylic base coat and sand/cement finish (portofino finish as supplied by MAC) **together with all the variations** shall give us the total for the house area. Together with all variations, eg coating mouldings, chimneys, front entry mouldings, etc etc

The pool house/loggia/internal/external/walkways/piers/foams areas/etc, the actual square metre areas here will be a start point for me to working out the total here.

A total price for this section will have to be worked out. I will have to measure what areas are deemed as flat standard wall areas \$75 per metre and what areas fall into the other category (ie not standard)

As mentioned above the time required to render these areas far exceeds the time required for the house area [**emphases added**].

81. Mr Evans did not reply in writing to this email. His evidence was that, as a result of his hospitalisation, he was still only able to type emails with his left hand, and that it was easier for him to pick up the phone, and speak to Mr Ciro, which he often did. His principal concern at the time of his receipt of the above email, clear from his evidence, was that Christmas 2012 was approaching, and he had expected the entire project to have been completed by that time. Mr Evans particularly wanted the pool room to be completed by then. I infer from this that he was naturally keen to have the pool room completed for the enjoyment of his family and guests. His evidence was that when he complained to Mr Ciro about the delay, some time prior to the

date of this email, Mr Ciro denied any obligation on his part to finish prior to Christmas.

82. Mr Evans's evidence was that during one of those conversations, after his receipt of the email, he informed Mr Ciro that he wished to meet him on site to discuss what was being proposed by Mr Ciro. Mr Evans's evidence was that doing things this way was a usual feature of the entire project, which was not in his words, a "commercial contract" and that "nobody had [written] subcontract agreements or anything like that". Tevans was an owner builder. I take it, by this evidence, that Mr Evans is referring to the absence of formal written contracts between Tevans and each of the various trades engaged on a project.
83. Mr Evans gave evidence that he was anxious to speak to Mr Ciro about the variations claimed in the email dated 7 December 2012. He went so far as to say in evidence that his "heckles had gone up" upon receipt of the email. He said that he then spoke about the claimed variations on the phone with Mr Ciro. He agrees that Mr Ciro attended the site on 13 December 2012 to carry out works, but that that was a day on which Mr Evans was unable to hold discussions. He said that when he saw Mr Ciro some time that morning Mr Evans was already running late for another appointment, and that he apologised to Mr Ciro for not being able to stay.
84. I accept that Mr Ciro and Mr Vincitec were on site on 13 and 17 December 2012.

Email dated 1 January 2013 to Mr Evans

85. Mr Evans and Mr Ciro met on site on 31 December 2012 when, on Mr Evans's evidence, they had an inconclusive "disconcerting" conversation about the claimed variations. I infer from this email from Mr Ciro to Mr Evans that followed, that on that occasion Mr Evans requested Mr Ciro to provide some substantiation of his claim for variations, and also requested him to commit to a finishing programme upon the resumption of works after the Christmas shutdown period.
86. On 1 January 2013, Mr Ciro sent Mr Evans an email, attaching a tax invoice of the same date addressed to Tevans, seeking a progress payment for "**ALL** work done and **ALREADY** completed to date".
87. The invoice reads as follows:

TAX INVOICE

Progress Claim No 2

Project: 291 Harkaway Road, Narre Warren

Scope of Solid Plastering works as follows:

Contract lump sum total (emphasis added):	\$99,210
GST	\$9,921
Total [inc] GST	\$109,131

Previous Progress Claims and Paid to Date \$25,000 (Progress 1)

Amount of this claim being Progress Payment No 2 for all works completed up to date:

Amount	\$45,000
GST	\$4,500
TOTAL [inc] GST	\$49,500

Invoice Amount \$49,500

88. The email from Mr Ciro also stated that he would be “on site full time on the 14th or 15th of January to complete the remainder of the works”, and that he envisaged “that it would take 3-4 weeks full time-4 men to completely finish”.
89. Mr Evans stated in evidence that that part of the email relating to the alleged lump sum contract left him:

“absolutely reeling and wondering, where...did that come from?”
90. Mr Evans gave evidence that he thought that it bore “no resemblance to the terms of the engagement” of Mr Ciro.
91. By the same email, Mr Ciro also attached what he described as “a breakdown of the quotation to complete all works for the job”.
92. The “breakdown of the quotation” was headed “Quotation as Requested”. It stated that the “contract lump sum” was \$109,131 (being particularised as \$99,210 plus \$9,921 GST). Neither the tax invoice nor the accompanying “quotation” showed how Mr Ciro had calculated that of an alleged lump sum of \$109,131 there was \$49,500 owing for work to date (having regard to the earlier payment by Mr Evans of \$25,000).
93. Mr Evans’s evidence, which I accept, was that during the meeting on 31 December 2012 he never requested Mr Ciro to provide a quotation. In this circumstance it was natural for Mr Evans to ask, which he confirmed in evidence, for a further breakdown to substantiate the claim then being made by Mr Ciro.

Email dated 2 January 2013 to Mr Evans

94. By email dated 2 January 2013 Mr Ciro again attached the tax invoice sent the day before, together with a document entitled “Quotation (as requested) further breakdown”. This document provided further details as to how the alleged contract lump sum total of \$99,210¹⁴ was made up but again, no particulars on how Mr Ciro had calculated that of an alleged lump sum of \$109,131 there was \$49,500 owing for work to date (having regard to the earlier payment by Mr Evans of \$25,000).

¹⁴ It also include another lump sum figure of \$116,446 calculated on what Mr Ciro described as a “normal square metre rate” of \$95, presumably to encourage Mr Evans to the view that he had received a bargain by having Mr Ciro agree to a \$75 per square metre rate.

Email dated 5 January 2013 to Mr Evans

95. On Saturday 5 January 2013 Mr Ciro sent an email to Mr Evans, requesting Mr Evans to advise whether the invoice would be paid “in the next day or so”.
96. Mr Evans made an offer during the weekend to pay \$12,000 to settle the claims of Mr Ciro.

Email dated 7 January 2013 to Mr Evans

97. By an email dated 7 January 2013 Mr Ciro provided particulars as to how, in effect, he had calculated an amount of \$73,615¹⁵ including GST allegedly due at that time, which I summarise in the table below:

Description of work completed	Total Amount allocated in alleged contract lump sum	Amount claimed by Mr Ciro, in tax invoice dated 1 January 2012 based on state of relevant package completion
<p>-Applied 2 coats of acrylic modified render base to external tilt panels of the house (70% allegedly completed);</p> <p>-Applied fibreglass mesh to where the architectural mouldings met the dor and window reveals (36 openings), in order to prevent cracking a that juncture, and built up window and door reveals with 20-30cm of render to ensure that they are finished flush with the mouldings render base to architectural mouldings (about 70% allegedly completed). The parties fell into dispute over whether these works were included in the \$75 per square metre rate</p> <p>-applied cement render to all chimney pots, including all high tapered sections, and parapets.(about 100% allegedly completed)</p> <p>-applied a sand cement render to the main door entrance, applied insitu bands and rustication lines, and additional render to both sides of entry pre-cast panels and fixed fibreglass mesh to all external corners (about 30% allegedly completed)</p>	\$54,600	\$34,670
applied 1 coat of acrylic base coat to all internal walls of the poolhouse and loggia, followed by one coat of finish coat so as to provide a suitable surface for painting. This work also included rendering and finishing all 8 brick piers, carrying out in situ band work to the piers, applying fibreglass mesh to all corner areas and where the fixed glass		

¹⁵ Mr Ciro mistakenly states in his email \$73,215.

panels meet, work associated with building up bands to allow for installation of mosaic tiles, and rendering and finishing brick piers abutting doors in loggia, and 6 brick piers within the loggia area and all associated works (allegedly 100% completed).		
These works were an agreed variation to the works contemplated by the agreement. Again, the parties subsequently disagreed on whether Mr Ciro was entitled to charge for these works on the basis of only the agreed square metre rate or, as he did, a combination of that rate and a rate based on “time to complete and difficulty”.	18,960	\$18,960
-applied 2 coats of acrylic modified render base to the external areas of the poolhouse and loggia. This included the rendering of brick piers, areas also located there with a polystyrene substrate, curved walls, soffits, ceilings and bulkheads also located there (allegedly 70% allegedly completed).		
This was an agreed variation to the works contemplated by the agreement. The parties subsequently disagreed on whether Mr Ciro was entitled to charge for these works on the basis of only the agreed square metre rate or, as he did, a combination of that rate and a rate based on “time to complete and difficulty”.	\$25,650	\$19,985
	\$99,210	\$73,615 (inc GST)
Plus GST	\$9,921	
TOTAL	\$109,131	

98. By his email dated 7 January 2013 Mr Ciro stated that work to date of \$70,000 was being claimed by him,¹⁶ less \$25,000 already paid by Tevans. This resulted in a net total claim of \$45,000. He also claimed \$4,500 GST on this figure, which does not appear to have been correct.¹⁷

Email dated 9 January 2013 to Mr Ciro

99. On 9 January 2013, Mr Evans sent Mr Ciro an email in response, with an attached “without prejudice letter” offering to pay \$16,980 in full and final settlement in response to Mr Ciro’s claim for \$49,500.

100. The attached letter set out Mr Evans’s justification for his offer, and also stated:

¹⁶ Effectively conceding \$3,615.

¹⁷ There was also evidence, relied on by Mr Evans, that Mr Ciro’s registration for Goods and Services Tax was cancelled from 16 January 2012.

Your tax invoice no 2 dated January 01, 2013 is rejected as it bears no resemblance to your original quote contained in your email 30/1/12 which formed the basis of your engagement (\$75.00 PM2), and your later email 16/2/2012 re your hourly rate (\$55.00) for additional work to the window mouldings

101. The letter also stated:

your services are terminated forthwith.

102. The contract was therefore brought to an end by Mr Evans on 9 January 2013.

103. On the assumption of the offer being acceptable, Mr Evans sent a proposed Deed of Release to Mr Ciro later in the day.

Email dated 9 January 2013 to Mr Ciro

104. Mr Ciro emailed Mr Evans on 9 January 2013, apparently later in the afternoon:

The account [dated 1 January 2013, attached to the email] is overdue and FULL payment is due by Friday 11 January 2013.

105. Mr Evans transferred \$21,000 to Mr Ciro's account on 11 January 2013. Mr Evans's evidence was that the payment of this amount was made after a visit to his property by some colleagues of Mr Ciro, which left Mr Evans extremely unsettled. I need not dwell on that aspect further. It is this payment and the previous payment of \$25,000 that makes up the \$46,000 total amount paid by Mr Evans to Mr Ciro.

106. Mr Evans also provided to Mr Ciro a copy of a report of Mr Hamilton following Mr inspection on 10 January 2013, which provided an estimate of all work to date of about \$26,400. This estimate is to be compared with the \$73,000 provided earlier by Mr Ciro's email dated 7 January 2013.

Mr Ciro's Case

107. In his closing submissions, Mr Sedal for Mr Ciro provided an Appendix 1, containing a summary of the key features of the documents provided by email by Mr Ciro to Mr Evans in early January 2013. Mr Ciro submits that the key issue in dispute in relation to these documents is Mr Evans's claim that the effect of them, properly construed (being Mr Ciro's breakdown of the total cost of the works, together with his claim for a progress payment) constituted a repudiation, that Mr Evans was entitled to accept on behalf of Tevens.

108. Mr Ciro submits that the email dated 7 December 2012 explained which items of work would be in addition to the \$75 per square metre rate. If one compares these works with the drawings provided, he says, they are all additional to the works specified in the drawings. Mr Evans gave evidence that the 7 December 2012 email from Mr Ciro imported a new concept of "standard walls" that had not previously been part of the agreement between the parties. This, Mr Ciro submits, is a purely semantic argument. Mr Ciro

says that he simply chose to refer to the surfaces of the tilt up panel walls as “standard walls”. Had he referred to those areas as ‘the areas marked “render finish as selected” on the drawings’, or ‘the wall surfaces referred to in my 30 January 2012 email’ the effect, Mr Ciro submits, would be the same. That is to say, no new concept has been imported: Mr Ciro says he was simply informing Mr Evans, consistent with all of the previous documents, that additional work that he was instructed to perform that was not specified at the time he gave a square metre rate, and because it took additional time, would incur an extra charge.

109. Mr Ciro submits that I should reject any suggestion that Mr Ciro’s request for additional payment amounts to a repudiation of his contract with Tevans. He says (by reference to Appendix 1 of his Counsel’s Submissions) that the documents provided by him to Mr Evans in early January 2013 did not depart in any way from the substance of the agreement evidenced by the two emails in January and February 2012. Mr Ciro proposed to charge the same rate of \$75 per square metre for the wall surfaces of tilt up panels set out in his 30 January 2012 email and specified on the drawings with which he had been provided. For additional items of work that were later requested by Mr Evans, and that had not been specified on the drawings, he proposed to charge an additional amount. This, he says, cannot be construed as a repudiation of the agreement.
110. Mr Ciro says that the argument put by Mr Evans to the effect that these documents “bore no relation” to an existing agreement can be met by the argument that the works he was ultimately instructed to perform bore no relationship to the drawings or the initial scope of work.
111. He submits that even if, contrary to the above submissions, Mr Evans was able to establish that something in Mr Ciro’s cost breakdown or second progress payment request conflicted in some way with an earlier agreement, this does not lead to the conclusion Mr Ciro repudiated the agreement. To repudiate the agreement, Mr Ciro says, he would need to have asserted the existence of a fundamentally different agreement and refused to perform works on the basis of the existing agreement, thereby evincing an intention not to be bound. Mr Ciro says that he did not do this.

Tevans’s Case

112. Tevans submits that an attempt by a party to add new terms to a contract can amount to a repudiation of a contract, as can the maintenance of an indefensible position in relation to the terms of a contract or other conduct repugnant to the original agreement.¹⁸ It refers to:
 - (a) the submission by Mr Ciro of the tax invoice and “quotation”;

¹⁸ See *Lennon v Scarlett & Co* (1921) 29 CLR 49; *Paynter v Willems* [1983] 2 VR 377; *Morris v Baron & Co* [1918] AC 1 and *Summers v Commonwealth* (1918) 25 CLR 144; *Botros v Freedom Homes Pty Ltd* (1999) 15 BCL 351

- (b) the statement in the tax invoice to the effect that the contract was a “lump sum” contract (as opposed to a “schedule of rates” contract, by which Mr Evans regarded his payment obligation as being dependent on a fair measure of work in fact carried out);
- (c) charging \$4,500 GST in the tax invoice, and \$9,921 on the alleged contract lump sum, when an all inclusive rate of \$75 per square metre had been agreed, and when Mr Ciro had no entitlement at law to charge GST whilst not registered for GST; and
- (d) the “quotation” used by Mr Ciro to support the tax invoice:
 - (i) purporting to differentiate between the rendering of “standard walls” (for which the agreed contract rate of \$75 per square metre was proposed to be charged) and “non-standard walls” (for which a “time and difficulty” charge was proposed);
 - (ii) making an extra charge for additional window protection and taping, and for render and finish coats to mouldings and outside returns of mouldings when, on Tevans’s case, the \$75 per square metre rate included such works;
 - (iii) charging for applying fibreglass mesh to reveals, heads and sills, and the building up the reveals and associated works, when, on Tevans’s case, the \$75 per square metre rate included such works; and
 - (iv) charging for voids and openings in the walls as if they had been rendered.

Finding

113. The relevant legal principles in relation to repudiation include the following:

- (a) a party repudiates a contract by evincing an intention not to be bound by it or refusing to perform a fundamental obligation under it;¹⁹ and
- (b) repudiation of a contract is a serious matter and is not to be lightly found or inferred.²⁰

114. I find that Mr Ciro was not entitled to seek to differentiate between standard rendering and non-standard walls in the way that he did, having agreed to do the works later to alleged to be “non-standard walls” without informing Mr Evans at the time that the \$75 per square metre rate would no longer be applicable to such further works.

115. It follows from my findings above that Mr Ciro was fairly entitled to seek an extra charge for the works around the windows, including additional

¹⁹ *Shevill & Anor v Builders Licensing Board* [1982] HCA 47; (1982) 149 CLR 620 at 625-6

²⁰ *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 71; *Shevill & Anor v Builders Licensing Board* at 633

window protection and taping, and for render and finish coats to mouldings, and applying mesh and building up the reveals.

116. It also follows from my findings that Mr Ciro was not entitled to make a charge for voids and openings in walls, as if they had been rendered.
117. It is always open to a party to seek to renegotiate the terms of a contract to take account of events subsequent to the date of the contract. Whether an attempted alteration of terms by a party amounts to a repudiation depends on the circumstances.²¹ The charges that Mr Ciro was proposing to make, inconsistent with what I have found were the terms of the contract, are arguably sufficient to support a conclusion that Mr Ciro was proposing not to perform fundamental obligations under the agreement, such as to give rise to a repudiation on his part.
118. I find that Mr Ciro repudiated the contract. In addition to the above matters, I attach primary importance, in coming to this conclusion, to the fact that throughout the period between his email of 1 January 2013 (attaching the tax invoice) and his email dated 9 January 2013 (also attaching the tax invoice), Mr Ciro never resiled from his insistence that the parties rights and obligations were regulated by a “lump sum contract”. On any view, this was not the case. A bona fide but incorrect belief as to the correctness of the interpretation sought to be placed by a party on the terms of a contract, where there is an ambiguity, may not lead to a conclusion that a party does not intend to perform a contract according to its terms.²² In this case, however, I accept the submission that there were no reasonable grounds upon which Mr Ciro could reasonably have held the view that a lump sum contract characterised the contract.
119. Following repudiation of the contract by Mr Ciro, it was duly rescinded by Mr Evans on behalf of Tevans on 9 January 2013. Mr Ciro’s claim for loss and damage on a *quantum meruit* fails. Mr Ciro is entitled to be paid pursuant to the contract for such of the work performed by him to the date of termination for which he has not been paid. I consider below whether he is also entitled to an uplift factor for works undertaken by him which were not covered by his \$75 per square metre rate.
120. Mr Evans is entitled to set off against any amount found to be owing to Mr Ciro damages that have been incurred by Mr Evans as a result of Mr Ciro’s repudiation.

WHAT IS OWED TO MR CIRO UNDER THE CONTRACT UP TO THE DATE OF TERMINATION?

Were One Or Two Base Coats Applied by Mr Ciro?

121. I turn first to the issue whether Mr Ciro applied one or two base coats of render.

²¹ See *Lennon v Scarlett* (supra)

²² See *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423

122. Mr Ciro sent Mr Evans an email on 9 August 2012 stating that “the majority of the house [not the pool house] had been rendered (two coats)”. Consistent with this, Mr Ciro gave evidence that at the date of the email, two coats had been applied.
123. Mr Evans disputes that two coats of render were applied to the concrete tilt panel surfaces.
124. Mr Vincetic, Mr Ciro’s assistant, also gave evidence during cross-examination that two base coats were applied to the wall surfaces, but that not all of the reveals received two coats.
125. Mr Byrne gave evidence that two base coats had already been applied to the concrete tilt up panels (but not to all the window reveals) when he arrived on site. He consequently applied the finish coat to the walls. He thought that one-third of the reveals had two coats of render, but that two-thirds of the reveals had only one coat. In addition, he gave evidence that pre-fabricated moulds that had been fixed into position by Mr Ciro at the date of termination, would not have been fixed unless two coats had been applied to the concrete tilt panels.
126. Mr Croucher states in his report dated 5 February 2013 that a two coat application would, in his view, have resulted in a total render thickness of 5mm-6mm, and, that upon his inspection, he estimated render thickness at approximately 3mm at most. He also observes that the reveals had been only partially coated, and that mouldings around windows and doors were still being attached, and some had not been rendered at all. Mr Croucher was however prepared to defer to the opinion of Mr Byrne as to whether two coats had been applied.
127. Mr Hamilton, the quantity surveyor engaged by Tevans, gave evidence that, in his view, only one coat had been applied. This is because, as he was measuring the areas, he thought there were quite a few spots where he could see the panel behind, and that this indicated to him that a second base coat had not yet been applied. He also confirmed by his evidence that some of the mouldings had not had their second coat.
128. Mr Hamilton conceded in cross-examination, however, that if the mouldings had been affixed, and assuming that they would not have been had two coats not been applied, then it is a reasonable assumption that two coats of render had been applied to the tilt panels.

Finding

129. I prefer the evidence of Mr Byrne in relation to this issue. He is an experienced renderer, who was engaged by Tevans to finish the rendering works. As such, I consider his evidence to be the most reliable. For the above reasons, I find that two base coats of render were applied by Mr Ciro.

Evidence of quantity surveyors on value of completed works

130. I now turn to the question as to what sum is due to Mr Ciro for works performed by him in accordance with the agreement (and such additional works as were requested by Mr Evans) at the date of termination.
131. Each party relied upon the evidence of a quantity surveyor.
132. Mr Hamilton was called by Tevans. Mr Vaughan was called by Mr Ciro.
133. Mr Hamilton calculated, during his site measurement on 10 January 2013, that the total area of the surfaces of the concrete tilt panels and chimneys, what he calls the “external render area” is 691 square metres. The calculation excludes the area of the window penetrations, but includes the area of the window reveals. Tevans concedes that Mr Ciro is also entitled to charge for the reveals.
134. Mr Vaughan took his measurements of the rendered areas from the drawings, and did not conduct a site measurement. He calculated that the render area of the residence and brick chimney is 726 square metres.
135. I prefer to adopt the measurements taken by Mr Hamilton, in preference to Mr Vaughan’s calculations from the drawings only.
136. In his report, Mr Vaughan costs the works on 3 alternative bases (called “Options”). Each is dependent on how the questions of construction of the contract are resolved. All three options assume that two base coats had been applied by Mr Ciro (which I have found to be the case), and that \$50 per square metre (being two-thirds of the agreed \$75 per square metre rate) can therefore be charged. In respect of the chimneys, \$75 is charged in Option 3.
137. The first calculation of \$47,022.50 (called “Option 1”) does not include the areas of the window voids. Mr Vaughan’s second calculation of \$58,122.50 (called “Option 2”) adds back the areas of the voids. His third calculation of \$67,158.75 (called “Option 3”) not only includes the voids, but also provided an uplift for types of work (referred to as “non-standard work of a more difficult type”) that Mr Vaughan considers are more difficult than the rendering of concrete tilt panels, such as for narrow bands and curved work. For this, he draws support from *Rawlinsons Construction Handbook* which prescribes a similar order of difference between say, cement render rates for standard areas such as brick walls and rates for narrow widths up to 250mm wide.
138. Mr Vaughan considers that an uplift factor would be reasonably charged by a contractor in the position of Mr Ciro for carrying out these further works.
139. Mr Ciro relies on the opinion of Mr Vaughan that the reasonable value of works performed by Mr Ciro is \$67,158.75 (being Option 3). Mr Vaughan considers also that GST of \$6,715.88 should be added to this total, giving a total of \$73,874.63. Mr Ciro claims the GST.

140. Mr Hamilton, on the other hand, values the works at \$26,398 excluding GST. His calculations assume that only one base coat was applied by Mr Ciro, and that \$25 per square metre only can therefore be charged for the works to date (being one-third of the agreed \$75 per square metre rate).
141. Mr Hamilton's calculations make no allowance for the possibility that Mr Ciro will be found to be entitled to charge for the notional rendering of the total areas of the voids. As noted above, I have found that Mr Ciro has no entitlement to charge for these areas.
142. Mr Hamilton conceded in cross-examination that if he was to assume that two base coats had been applied, and that the area of the voids was to be included, then this would "basically double" his costing of \$26,398. He went so far as to agree in cross-examination that his adoption of both assumptions may well bring him closer to the \$58,000 representing Mr Vaughan's "Option 2".
143. The estimate of Mr Hamilton does, I think, suffer from the fact that some of the variations (the chimney works) were costed by him based largely on the information provided to him by Mr Evans, rather than being based on his own expert opinion of whether variation works of that nature may attract a different rate.
144. Unlike the 50% uplift applied by Mr Vaughan to take account of more difficult types of work, no such concession was made by Mr Hamilton in his estimate. In my opinion the estimate of Mr Hamilton does not recognize that there were further rendering works performed by Mr Ciro that were more labour intensive than simply rendering over the concrete tilt panels, and for which it would have been open to him (given that the contract was silent in regard to such further works) to have charged an appropriate higher rate.
145. Mr Hamilton has also adopted a \$55 per hour for "approved variations", set out on page 2 of his report. This is the hourly rate apparently adopted by Mr Evans for valuing those works. It is clear to me that that rate was quoted by Mr Ciro's email dated 12 February 2012 only for rendering the then proposed in-situ mouldings. There is no basis, in my view, for finding that that rate would fairly apply to all extra works carried out by Mr Ciro, regardless of their type and complexity.
146. On all the evidence, I am satisfied that it is reasonable to adopt \$56,058.75 as the value of the works completed by Mr Ciro at the date of termination. This is the \$67,158.75 "Option 3" estimate of Mr Vaughan, less \$11,100 that Mr Vaughan ascribes to the value of nationally rendering the voids.

Should there be an allowance for GST?

147. The evidence shows that Mr Ciro was registered for GST between 21 September 2004 and 15 January 2012, but that his registration for GST was cancelled from 16 January 2012.
148. Mr Ciro quoted \$75 per square metre for the rendering works without any stipulation that GST would also be added to that figure. Similarly, his quote

of \$55 per hour contained in his email dated 16 February 2012 was made without any such stipulation.

149. I am not satisfied in these circumstances that Mr Ciro is entitled to GST in addition to the amount assessed by Mr Vaughan as the cost of the works, and I do not allow it.
150. It is not in dispute that Mr Evans has paid Mr Ciro \$46,000.
151. Accordingly, for the reasons set out above, I find that Mr Ciro should be awarded on his counterclaim \$10,058.75, being \$56,058.75 less \$46,000 already paid by Tevans.

TEVANS'S CLAIM FOR RECTIFICATION OF ALLEGED DEFECTIVE WORKS

152. Tevans claims the costs incurred in rectifying allegedly defective works undertaken by Mr Ciro.
153. After terminating the contract, Mr Evans engaged Mr Byrne, a renderer, at an hourly rate of \$55, to complete the works that would otherwise have been completed by Mr Ciro, and to undertake other works.
154. The alleged defective works are described in the report of Mr Croucher dated 5 February 2013 which, together with his evidence, I summarise as follows:

The render applied to the tilt panels:

- (a) appropriately constructed movement joints (whether articulation joints or express joints) have not been provided at all the junctions to tilt-up panels, and in other areas where changes in materials occur, resulting in random cracking caused by thermal movement of the sub-strate;
- (b) where express joints have been provided (and that is all the joints observed by Mr Croucher), they have not been cut through to the concrete substrate (or where they have been created at the joints between tilt panels, through to the caulking), resulting in random cracking around the defective express joint;
- (c) fibreglass reinforcing mesh has not been universally applied where express joints have been created, increasing the risk of breakdown of the render at these points;
- (d) express joints are not of sufficient width;

The render applied to the windows:

- (e) where window mouldings are affixed in line with the reveals, a self-adhesive lightweight fibreglass reinforcing tape has been used, which does not have sufficient body to withstand expected movement between the separate components;

- (f) the fibreglass reinforcing tape used has not been sufficiently embedded in a wet pre-applied base coat, such that the tape is not adhering to the concrete panels, causing bubbling of joints and lifting of render; and

Render coat lifting:

- (g) there are areas where the render appears to be lifting, as a result of the base coat not properly adhering to the tilt-up panels,²³ as a result of which “large sections of render will need to be removed and replaced”.

155. Tevans seeks a total of \$45,666 damages, calculated as follows:

Total cost of rectification/completion	\$63,824 ²⁴
Less cost of work performed by Byrne not the subject of the contract with Mr Ciro	(\$3,488)
Add amount paid to Mr Ciro	\$46,000
SUB-TOTAL	\$106,336
Less “agreed Price” (691square metres x \$75 psm)	(\$51,825)
Less value of variations	(\$8,845) ²⁵
	\$45,666

156. Of the total amount of \$63,824 charged by Mr Byrne, total labour charged was \$54,367. The balance of \$9,457.00 was charged by Mr Byrne for materials.

157. The following matters should be noted in relation to Tevans’s defects claim:

- (a) no complaint was made by Mr Evans in relation to any alleged defects throughout the course of the works;
- (b) Mr Evans did not mention defects in his termination later on 9 January 2013;
- (c) Mr Evans is well qualified to identify defective work;
- (d) Mr Vincetic gave evidence that Mr Evans never complained about the works;
- (e) Tevans did not ensure that Mr Byrne kept a record of the time he spent allegedly rectifying defects;

²³ Mr Croucher considered a the time of his report that this was due to the lack of a primer coat, but was since informed that the tilt up panels have a brush finish, as a result of which he concedes that there is no need for a primer coat.

²⁴ As particularised in a summary of labour and materials charges made by Mr Byrne, tendered on the first day of the hearing.

²⁵ Being the value of the “Pool House Items” and “Approved Variations” assessed by Mr Hamilton (see page 2 of his report dated 11 January 2013)

- (f) Mr Evans did not ask Mr Croucher to report upon the alleged cost of rectification of defects;
- (g) Tevans did not give Mr Ciro an opportunity to inspect the alleged defects or to obtain expert evidence in relation to them; and
- (h) Mr Ciro's services were terminated during the middle of the works. There is no complaint regarding the further areas that Mr Ciro was able to complete, being the internal areas of the pool house and chimneys.

Articulation Joints

158. Tevans says that Mr Ciro failed to ensure that the express joints were cut through to the caulking in the joints between the concrete tilt panels, causing cracking of the render coat around the articulation joint. Tevans also claims that the articulation joints were of insufficient width. Photographs 1-5 on pages 6-7 of Mr Croucher's report dated 5 February 2013 provided some support for the existence of these defects.
159. In regard to the widths of the articulation joints, Mr Ciro says that he was expressly instructed by Mr Evans to minimise them as much as possible. The following evidence supports this:
- (a) Mr Ciro contends (and Mr Vincetic's evidence provided further support for this) that Mr Evans was attempting to create the look of a French villa. The photographs Mr Evans provided to Mr Ciro also indicate that this was the case. In order to do this, Mr Ciro contends, Mr Evans wanted to conceal the highly visible articulation joints that are usually a feature of concrete tilt panel construction;
 - (b) Mr Ciro gave evidence Mr Evans's request led Mr Ciro to experiment, in some measure, with the extent to which he could reasonably construct narrow widths, and that he was in the process of widening them where necessary, when he was prevented from completing the works;
 - (c) Mr Byrne gave evidence that he was told by Mr Evans that he didn't want to see the articulation joints; and
 - (d) it can also be inferred from Mr Ciro's 30 January 2012 email that Mr Evans had raised a concern regarding the visibility of control joints.
160. Mr Ciro also submits that it was more work and risk for him as an experienced renderer to try to minimise the articulation joints. It can be inferred from this, he submits, that he would not have performed the works in this way had he not been instructed to do so.
161. I find that Mr Evans did instruct Mr Ciro to attempt to minimise the width of the articulation joints. I am not satisfied that this circumstance Mr Ciro is liable for articulation joints lacking sufficient width.

162. In regard to the express joints not being cut through to the caulking below, I am satisfied that these are defective works. Mr Croucher says that rectification would require an angle grinder to be run down the joint in order to clear the render from the joint, to expose the caulking below.
163. Tevans also says that articulation joints were not installed at the internal corners of brickwork columns erected on the face of the concrete tilt panels. Mr Croucher also says that properly formed articulation joints (as opposed to express joints) should have been formed at these junctions. There is no evidence of such works having been undertaken. For the reasons given below, I make no award of damages in respect of this item.

Window Reveals and Mouldings

164. Mr Croucher is of the view that the reinforcing mesh used was self-adhesive lightweight fibreless mesh, for internal applications only such as plasterboard works.
165. He says that the mesh failed to adhere to the concrete tilt panels, by not being properly embedded in the wet base coat. Photographs 10 and 11 of Mr Croucher's report provide some support for this observation.
166. Mr Croucher also conceded in evidence that if the view is taken that an incorrect tape has been used, a different tape could be used on the second base coat. Accordingly, on one view there was no need to strip the render and tape from the window reveals. All that was required, if a different specification of tape was desired, was for this tape to be added to the second base coat.
167. Mr Byrne gave evidence that he could not tell whether the tape to the windows was sufficiently embedded.
168. I am not satisfied, on the evidence, that Mr Ciro is liable for the consequences of using a lightweight fibreglass mesh.
169. Photographs numbers 12-17 of Mr Croucher's report dated 5 February 2013 show works undertaken to the reveals. It was not entirely clear, on Mr Croucher's evidence, to what extent these works were undertaken by Mr Ciro on the one hand, or Mr Byrne, the rectification contractor, on the other. It was plain from the evidence that to the extent that Mr Ciro had undertaken work to the reveals, such work was not completed at the time he was terminated. I am not prepared to find in the circumstances that these works were defectively undertaken by Mr Ciro.
170. I also note the evidence candidly given by Mr Byrne to the effect that as a completion contractor, undertaking work for which he would remain liable, he took the view that he would strip back all work that had been done on the windows so as to provide himself with (in his own words) "peace of mind" that his task would be performed in accordance with his own methods. Mr Croucher also conceded that it would be usual for a rendering contractor, coming on to half-completed works and therefore not knowing "what is below", to "tear the whole lot down and take [the reveals] right back".

171. I am not able to find in the circumstances that defective rendering works were undertaken to the reveals, including the works associated with applying reinforcing mesh to the point where the mouldings about the reveals. For similar reasons, I also do not allow Tevans's claim for \$440 for rectifying allegedly defective work in the curved wall in the loggia and the bulkhead.
172. Mr Croucher also expressed an opinion that the apparent failure to use a primer coat has resulted in the render coat lifting off the concrete tilt panels in a number of areas. He was informed during the giving of his evidence that broom finished concrete tilt panels had been used, and he conceded that in this event it was not necessary for Mr Ciro to use a primer coat. I am unable to find that Tevans has proved any loss and damage resulting from this claim.

Quantum

173. Even I were to find that Mr Ciro carried out the rendering works defectively I have concluded that Tevans has failed satisfactorily to demonstrate on the evidence any loss as a consequence. The only exception to this is the insufficient depth of the express cuts forming the articulation joints, on which I have found that Tevans incurred loss and damage in the amount of \$750.
176. Prior to the hearing Tevans did not quantify the loss and damage attributable to the alleged defects. Further Amended Points of Claim dated 2 August 2013 sought damages for "cost of rectification works" in the amount of \$61,778.90 with no apportionment between alleged rectification works and alleged completion works. On the first day of the hearing, amended particulars of loss and damage were filed, in which a "rolled up" claim for \$63,824 (being Mr Byrne's total charges) was made, described as "Costs of Rectification/Completion".
174. Mr Byrne gave evidence that about 60% of his total charge of \$63,824 (or \$38,294) related to his application of the third (or "finish") coat, being the coat that Mr Ciro would have applied but for the termination of the contract. Mr Byrne conceded also that of the amount of \$38,294 90% (or \$34,464) was for "true top coat work" and 10% was for "other work".
175. Mr Byrne also gave evidence that the remaining 40% of his charge of \$63,824 (or \$25,530) was for "rectifying" windows. Mr Byrne did not take notes while performing these works, as may have provided more persuasive evidence of these matters. I observe that Mr Byrne could therefore do little more than make his best guess concerning the time he spent undertaking these particular tasks.
176. It also became clear during Mr Byrne's cross-examination, that what he had earlier intended to suggest was that the remaining 40% of his charge of \$63,824 was for his work to the windows generally, only part of which involved the redoing of the work performed by Mr Ciro.

177. In fact, Mr Byrne also gave evidence that the work involved in scraping off the base coat applied by Mr Ciro and re-applying a base coat with reinforcing tape was only a “small part” of his total work around the windows. No satisfactory evidence was led as to the cost of that small part of the work to the windows.
178. There is further reason to be sceptical of the alleged rectification damages claimed. Mr Croucher, the expert engaged by Tevans expressed the view that the cost of rectification work to the articulation joints and around each window reveal would be about \$19,200. However, following further lengthy further cross-examination, Mr Croucher conceded that his estimate of the cost of was about \$2,000. This was in relation to the articulation joints (approximately \$750) and windows (approximately \$1,200). I allow \$750 in regard to the rectification of the articulation joints.
179. I cannot be satisfied as to what proportion of the 40% of Mr Byrne’s charges in relation to “windows” was, on the balance of probabilities, in relation to rectifying the alleged defects.
180. I find that Tevans has failed satisfactorily to prove the extent to which the works around the windows included rectification works.
181. I find that 40% of Mr Byrne’s charges related to his work around the windows. It follows from my finding that the “\$75 per square metre” agreement related only to the application of render to the concrete tilt panels, that Mr Ciro would have been entitled to charge for the further work around the windows. I find that 40% of Mr Byrne’s charges cannot now form the basis of a damages claim against Mr Ciro, and I do not allow it.

TEVANS’S CLAIMS FOR THE COST OF COMPLETING MR CIRO’S WORKS

182. This leaves for consideration the 60% balance of Mr Byrne’s charges. This amounts to \$38,294. Mr Byrne concedes that only 90% of this amount (or \$34,464) related to “true top coat work”. I make no deduction for this. This is because, I consider, it is satisfactorily taken into account by Tevans in the figure of \$3,488 in the table below.
183. I therefore find that \$20,886 should be paid by Mr Ciro to Tevans as damages, calculated as follows:

Total cost of completion by Mr Byrne (excluding work attributable to windows)	\$38,294
Less the cost of work performed by Byrne not the subject of the contract with Mr Ciro (being the chimney breast, the ceiling of the loggia and the brick garden wall)	(\$3,488)
Add amount paid to Mr Ciro	\$46,000
Add cost of rectification of articulation joints	\$750

SUB-TOTAL	\$81,556
Less “agreed Price” (691 square metres x \$75 psm)	(\$51,825)
Less value of variations	(\$8,845)²⁶
	\$20,886

184. I find that Mr Ciro must pay Tevans \$20,886 in relation to the claim by Tevans for damages arising out of Mr Ciro’s repudiation of the contract, and that Tevans shall pay Mr Ciro \$10,058.75 in respect of the balance owing to Mr Ciro for the value of works completed by Mr Ciro at the date of termination. I therefore make an order in favour of Tevans in the amount of \$10,827.25.

185. I draw attention to section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* about the Tribunal’s costs jurisdiction.

Member A T KINCAID

²⁶ Being the value of the “Pool House Items” and “Approved Variations” assessed by Mr Hamilton (see page 2 of his report dated 11 January 2013)