VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. **BP1443/2016**

CATCHWORDS

BUILDING CONTRACTS–STAGED PAYMENT REGIME–Section 40(1)-(5) *Domestic Building Contracts Act 1995*–builder found to have made claims for relevant percentage of the contract price not directly related to the progress of the building work being carried out under the contract, in breach of section 40(3) of the *Domestic Building Contracts Act 1995*, without having first secured the owner's agreement for him to do so pursuant to section 40(4) *Domestic Building Contracts Act 1995*–builder also in breach of payment claims procedure in the contract-substantial breach by builder, entitling the owner to end the contract pursuant to its terms.

BUILDING CONTRACTS–owner claims completion and rectification costs pursuant to HIA New Homes contract–whether the owner proved her entitlement pursuant to clause 44 of the contract–no direct evidence of required reasonableness–inference drawn that claimed costs were reasonable so as to sustain such a finding.

APPLICANT	Mr Dejan Vlahovic t/as VTN Homes
RESPONDENT	Ms Jasmina Jovanovic
WHERE HELD	Melbourne
BEFORE	Member A. Kincaid
HEARING TYPE	Hearing
DATES OF HEARING	27-30 November 2017, 26-28 February 2018 and 1 and 2 March 2018
DATE OF ORDER AND REASONS	19 July 2018.
CITATION	Vlahovic v Jovanovic (Building and Property) [2018] VCAT 1095

ORDER BY CONSENT

1. The respondent must pay to the applicant $54,441.29 (but see order 4).

FURTHER ORDERS

2. The respondent must pay to the applicant $52,738 (but see order 4).
3. On the counterclaim, the applicant must pay to the respondent:
   (a) $269,500 as the reasonable costs of completing the building works under the contract and fixing defects;
   (b) $12,558 general damages.

(c) $10,200 as restitution of monies overpaid in respect of the amended contract sum (but see order 4).

4. Taking into account the cross-liabilities of the respondent to the applicant referred to in orders 1, 2 and 3, the applicant must pay to the respondent $185,078.71.

5. Costs reserved. Should there be an application for costs, the principal registrar is directed to list the hearing before Member Kincaid, allow 2 hours.

A. Kincaid
Member

APPEARANCES:

For Applicant	Mr J Levine of Counsel.
For Respondent	Mr D Petrovic, Solicitor from 27 November 2017; Mr B Carr of Counsel, from 26 February 2018

REASONS

1. Under the *Domestic Building Contracts Act 1995* ("**the DBC Act**") the entitlement of the builder to progress payments is dependent on the builder having achieved stipulated progress on the works. In the absence of the parties agreeing in the manner prescribed in the DBC Act that its requirements are not to apply, the builder is not entitled to depart from them. This proceeding presents another example of the consequences to a builder who has had little regard to the statutory regime.

2. I heard this proceeding for 4 days in November 2017, and resumed it on 26 February 2018 for a further 5 days.

BACKGROUND

3. The disputes between the parties arise out of the construction by Mr Vlahovic (the "**builder**") of a 3 town-house development at a property in Faye Street, Reservoir owned by Ms Jovanovic (the "**owner**").

4. The builder was introduced to the owner in late 2014. Another builder had quoted $660,000 including GST for the proposed works, but he was subsequently unable to proceed with them. The builder subsequently agreed with the owner to complete the works for the same price.

5. The parties entered into a building contract dated 3 February 2015 ("**the contract**").

6. The works were not started by the builder until September 2015, as a result of the owner being required to renew the planning permit.

7. At the time of the contract, the owner lived in an apartment in Marine Parade, St Kilda (the "**St Kilda property**"), which she sold in about August 2016 to assist in her funding of the works.

8. The owner purported to terminate the contract on 18 October 2016 pursuant to clause 43.3 of the contract for a claimed substantial breach by the builder, having given 10 days' notice to the builder to rectify the claimed breach.

9. The builder submits that the owner's purported termination was improper, and that the owner repudiated the contract by acting in this way. The builder claims damages.

10. The gist of the owner's counterclaim is that the builder made progress claims for "lock-up" and "fixing" stages of the works when he was not entitled to make them,[1] giving her a right to terminate the contract for substantial breach pursuant to the terms of the contract.

11. The owner alleges that the builder also repudiated the contract at law.

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[1] The owner paid a deposit of $15,000 by way of deposit (not the required $16,500), $118,579.35 on 6 October 2015 for "base stage" (not the required $138,600), $138,600 on 28 October 2015 for "frame" stage, $211,200 on 26 November 2015 for "lock-up" stage and $135,300 on 22 April 2016 for "fixing" stage.

Parties' subsequent agreement, during the hearing, on amounts payable by owner.

12. The amount of the builder's claim against the owner, put on day 1 of the hearing, was $328,154.

13. One of the elements of the builder's claim was $28,994.29,[2] being a claim for repayment of borrowings from the builder made by the owner. The owner, it is accepted, had limited funding to undertake the development, and this led to the builder agreeing to pay many of the development costs which would otherwise have been the responsibility of the owner. The exact amount payable by the owner because of this arrangement was in dispute. The parties agreed during negotiations on day 6 of the hearing that the amount payable by the owner in this respect stands at $19,094.29.

14. The builder also made a claim for variations in the amount of $36,770,[3] but on days 6 and 7 of the hearing, the parties agreed that the amount payable by the owner in this respect was $13,826. I was informed that there are only 2 variations claimed by the builder in a total amount of $9,636 still in contention.

15. The third sum agreed between the parties during negotiations as due and owing by the owner to the builder is $21,521 being the total amounts by which the owner short-paid the builder in respect of his progress claims for the deposit and base stages.[4]

16. These 3 agreed amounts add up to $54,441.29.

17. The owner seeks to set off this amount against her counterclaim.

Builder's revised claim

18. In addition to the agreed amount of $54,441.29, the builder makes a claim for $100,875 made up as follows:

Claim 2 in the Jeffery report Variations Claim 2.05 $3,443.00 Claim 2.06 $6,193.00	$9,636
Claim 3 in the Jeffery report **Retaining wall works** Payment of respondent's sub-contractors and suppliers in connection with retaining wall works	$14,165

[2] "Claim 5" described in a report by Mr Jeffery, registered building practitioner (registered Quantity Surveyor) ("**the Jeffrey report**") obtained by the applicant.

[3] "Claim 2" described in the Jeffrey report.

[4] "Claim 1" described in the Jeffrey report, comprising a $1,500 shortfall in the deposit and a $20,021 shortfall in the base stage progress payment.

Claim 4 in the Jeffery report **Retaining wall works** Other costs incurred to complete retaining wall	$38,573
Claim 6 in the Jeffery report Liquidated damages for delay	$11,500
Claim 7 in the Jeffery report Damages for wrongful termination by the owner (20% of unpaid completion stage payment of $19,800)	$3,960
Claim 8 Interest on late progress claim payments	$3,241
Outstanding progress payment Completion stage	$19,800
	$100,875

19. The owner counterclaims in the total sum of $291,958, calculated as follows:

ITEM	Description	Amount Claimed	Particulars
1	Alleged completion and rectification costs	$269,500	($245,000 plus GST) Amount required to pay completing builder Mr Durovic under a contract dated 10 November 2016 allegedly to complete the works and rectify allegedly defective work.
2	Liquidated damages	$9,900	Payable by builder from 28 July 2016 to 18 October 2016. 82 days = 11 weeks at $900 per week
3	Interest on premature progress payments wrongly demanded by the applicant	$12,558	Lock up stage payment of $211,200 paid on 26 November 2015. Lock up allegedly not achieved until after 20 April 2016 (exhibit R8). $211,200 less $21,520 = $189,680 for 147 days 9.5 % = **$7,242** Fixing stage payment of $135,300 paid on 22 April

			2016. Fixing allegedly not achieved before termination on 18 October 2016. $135,300 less $21,520 = $113,780 for 180 days "9.5 % = **$5,316.**
	TOTAL	**$291,958**	

ISSUES

20. The issues for determination in the proceeding are as follows:

    (a) Is the builder entitled to be paid any and if so what amount in respect of his construction of a retaining wall?

    (b) Because it is relevant to whether the owner properly ended the contract, did the owner agree to repay to the builder any, if so what, amounts owing to the builder upon her sale of her St Kilda property?

    (c) Was the builder in "substantial breach" on 26 September 2016 and, if so, did the owner properly terminate the contract on 18 October 2016 pursuant to clause 43.3 of the contract?

    (d) If yes to (c), does the builder owe any and, if so, what amount to the owner pursuant to clause 44 of the contract?

    (e) Does either party owe the other party liquidated damages for delay caused to the works?

    (f) Does the builder owe the owner damages for his prematurely claiming stage payments and, if so, how much?

    (g) Does the owner owe the builder $9,636 for alleged variations to the works?

    (h) Does the owner owe $3,241 to the builder pursuant to clause 31 of the contract for late payment of progress claims?

Issue (a)–Is the builder entitled to be paid any and if so what amount in respect of his construction of the retaining wall?

21. The builder completed the retaining wall works, together with the fence works.

22. To determine whether he is entitled to be paid for these works, in addition to the contract price, it is necessary to construe the obligations of the builder as set out in the building contract and relevant plans, as modified by a subsequent "loan agreement" signed by the parties.

The contractual provisions

23. Included in the contract were "37 sheets of PLANS that were prepared and supplied by Sansa (sic) Building Designs"[5] (the "**architectural drawings**"). Also forming part of the contract were "20 sheets [of] ENGINEER'S DESIGN/S…prepared by D Laov Engineering Building Designs (sic)"[6] (the "**engineering drawings**").

24. I find that the architectural drawings are the 37 pages of drawings attached at "JJ-5" to the witness statement of the owner dated 3 November 2017. The architectural drawings plainly refer to the construction of a retaining wall.[7]

25. In addition, the engineering drawings referred to in the contract also refer to the construction of a sleeper retaining wall.[8]

26. The builder's wife, Ms Vlahovic gave evidence that at the time the contract was signed, the designer Mr Mitevski of Shansa Building Designs had not released the final construction drawings to the owner, because the owner had not paid for them. Ms Vlahovic gave evidence that the builder called Mr Mitevski to determine the number of pages of architectural drawings and engineering drawings respectively, and that these numbers were subsequently inserted on page 4 of the contract.

27. The builder provided his quotation dated 18 January 2015 for $660,000 including GST, "based on drawings provided by [the owner] completed by Draftmode Designs reference U85-07 dated July 2010". These drawings were not in evidence. This quotation was appended to the contract, and it was also signed by both parties. Where the terms of the contract are inconsistent with the attached quotation, the terms of the contract will prevail regarding scope.

28. The builder also gave evidence that he prepared his quotation based on an earlier set of architectural plans comprising 21 pages and marked PRELIMINARY.

29. It is, of course, no answer for a builder who signs a contract "blind" with regard to aspects of the scope of work described in the relevant plans, to say that he is not then obliged to carry out all elements of that scope of work.

30. I also note that the Site Plan of the preliminary architectural drawings upon which the builder quoted also referred to a SLEEPER RETAINING WALL. The builder maintained that he did not see this inclusion on the Site Plan.

31. In making a finding that the builder was required under the contract to construct the retaining wall, I also reject the builder's submission that the

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5 Which I take to be a reference to Mr Mitevski of Shansa Building Designs. See plans contained in Annexure "JJI" to the affidavit of the respondent.

6 Which I take to be a reference to the engineering drawings prepared by Laov Engineering Building Design.

7 See reference to SLEEPER RET WALL in drawings WD-02 of 37 and WD-04 of 37, and "Retaining Wall" referred to in 7 further drawings WD-13-WD-19 of 37,

8 See SLEEPER WALL DETAILS in engineering drawing 2498-CO5.

retaining wall works were expressly excluded by the words in the builder's quotation:

> Construction of three brick veneer units, two x double story, one x single story in accordance with plans provided by the [owner]…including extra height of bricks, driveways and paths, retention system, internal fencing & landscaping-**external boundary fencing not included**…(my emphasis).

32. The natural and ordinary meaning of "boundary fencing" does not, I consider, extend to a retaining wall. The builder's reference to "external boundary fencing not included" is entirely explicable by reference to the words TIMBER PALING FENCES AT DEVELOPERS COST" appearing in the preliminary architectural drawings[9] upon which the builder says he tendered, and in the architectural drawings.[10]

33. In support of his contention that he was not obliged to construct the retaining wall, the builder also relied on the as-built design of the retaining wall and fence, evident from the ninth photograph in a bundle of photographs referred to in the owner's solicitors' letter to the builder's solicitors dated 26 September 2016. It shows the as-built design of the retaining wall (not evident in the CIVIL-SLEEPER WALL DETAILS drawing forming part of the engineering drawings), in which the upright posts of the retaining wall continue beyond the top of the land being retained, so as also to form the main posts of the boundary fence above. The builder therefore submits that the retaining wall, in the event, was physically part of the boundary fence above, so as to be excluded by the expression "boundary fencing not included".

34. I do not agree. The events on site, subsequent to the contract, by which the posts of the retaining wall were extended, so as also to form the fence posts above, contrary to the design apparent in the engineering drawings, cannot be used to construe the plain meaning of the contract.

The loan agreement

35. The builder also submits that whatever may have been the builder's contractual obligation with regard to the retaining wall works, the owner subsequently agreed to pay for these works pursuant to the terms of a "loan agreement" signed by the parties dated 20 April 2016 (the "**loan agreement**").

36. I find from the evidence that the loan agreement was drafted by the builder's wife Ms Vlahovic, and that it was brought by her to the owner for signing on 20 April 2016.

37. It is necessary for me to construe the loan agreement for the purposes of determining whether, notwithstanding what I have found was an obligation on the builder to undertake the retaining wall works as part of his

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9 WD-02 of 37

10 Also WD-02 of 37.

contractual obligations, it records a subsequent agreement by the owner to pay for these works.

38. The loan agreement reads:

> 20 April 2016
>
> To whom it may concern
>
> I, [the owner] of 4F, 12 Marine Parade St Kilda, confirm that further to the contract between myself and [the builder] dated 3 February 2015, all expenses not paid for by my mortgagor, NAB or me, will be settled by myself on sale of the first dwelling at 6 Faye Street Reservoir.
>
> It is agreed between myself & [the builder] that while the contract was signed for $660,000.00, I requested fixtures and fittings to be different qualities resulting in $30,000.00 reduction, leaving a balance of $630,000.00 under the contract payable. I agree that any cost above the $30,000.00 will be payable in full by me to [the builder] on the first sale at the property.
>
> Due to trust between us, [the builder] has agreed to lend me funds or pay expenses where required and where within his domain (ability) over and above the contract between us and over and above the amount of the reduced contract. I guarantee these expenses will be repaid in full.
>
> To date, the extra costs incurred on top of the inclusions in the building contract and including money personally borrowed by me to pay Body Corporate fees at another property, total $29,662.04. It is expected further costs will be incurred to complete the project, including the retaining wall and external boundary fencing and all costs relating to my property which are not included in the contract price, will be met by me also on sale of the first property.
>
> Extra costs will be presented by [the builder] regularly throughout the process of construction & agreed upon before hand over.

39. I find that the amount of $29,662.04 referred to in the loan agreement was particularised in a schedule that was also provided by Ms Vlahovic to the owner prior to the owner signing the loan agreement. I find that the schedule, being a contemporaneously prepared document prepared prior to the loan agreement, and referred to in it, forms part of the loan agreement.

40. The schedule sets out how the figure of $29,662.04 was calculated. In summary, the schedule set out all the sums lent by the builder to the owner amounting to $59,662.04, against which a credit of $30,000 was applied.

41. I also find that some of these costs described in the schedule-in particular, amounts payable to "Kennard's Hire" and "McDonalds"-were in respect of retaining wall works undertaken by the builder. I find that these costs are included in the gross amount of $59,662.04 in the schedule. I find that where the loan agreement refers to "the extra costs incurred **on top of the inclusions in the building contract**…total $29,662.04" (my emphasis),

such extra costs include these two items of works relating to the retaining wall. I have concluded, therefore, that the loan agreement specifically contemplates that the retaining wall works were to be paid by the owner in addition to the contract price.

42. Mr Carr, counsel for the owner, submitted that there is no reasonable basis for concluding that the words "…and all costs relating to my property which are not included in the contract price, will be met by me also on sale of the first property" mean that the works described immediately before it– that is to say, "retaining wall and external boundary fencing"–were not included in the contract price.

43. I disagree. I find that the phrase "expected further costs will be incurred to complete the project, including the retaining wall and external boundary fencing…which are not included in the contract price" make clear, on a fair reading, that the parties then agreed that the retaining wall works were to be paid by the owner in addition to the contract price. I also find that the words "further costs" contained in that phrase, on a plain reading, refer to the expression in the previous sentence "…the extra costs incurred on top of the inclusions in the building contract".

44. To the extent that there is any ambiguity as to whether the loan agreement, on a plain reading, excludes the retaining wall works from the works required to be undertaken by the builder for the contract price, I am entitled in the process of construction to have regard to certain circumstances and things external to the loan agreement. In particular, I may have regard to objective events, circumstances and things external to the contract which were known to both parties and which assist in identifying the purpose or object of the transaction.[11]

45. These mutually known events are as follows. The owner gave evidence that the brickwork was completed in about February 2016, without the retaining wall having been completed. She says that when she expressed her concerns about the building structure impeding access to the north boundary for the retaining wall works, the builder reassured her that "it was all-right and wouldn't be a problem". It was only in late March or early April 2016 that she says she received a call from Ms Vlahovic, to say that the builder was having trouble getting quotes to undertake the retaining wall works, and asked the owner whether she "knew anyone who could do it". She had a friend called "Tomo" who, at her request, came to site and subsequently expressed the view to her that because of the access issues, he did not think anyone he knew would be prepared to do it. The builder subsequently engaged Tomo to start the excavation, which required a lot of digging by hand.

46. The owner gave evidence that at about this time the builder asserted to her that she was liable for the cost of the retaining wall, to which she responded

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[11] See *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37 at [46]-[52] and per French CJ Nettle and Gordon JJ and [108]-[111] per Kiefel and Keane JJ.

that she did not have the budget for those works, and had made no allowances for them. She stated that rather than engaging in a protracted argument at that time, she left it on the basis that once the retaining works had been competed, she and the builder would go through the contract and plans to determine which party was responsible for paying for these works.

47. The builder says that in April 2016, the owner engaged Tomo to complete retaining wall works to one side of the property, and that the builder suspended works during this period, for fear that it was unsafe to have his own employees there. He says that Tomo left that side of the property in a destabilised and unsafe condition, allowing the owner to "manipulate" him into completing the retaining wall, on the basis that the builder was "legally responsible for the site." The builder says that he subsequently felt very pressured by the owner to complete the remaining retaining wall works, and that once he had done so, the owner again disputed that these works were her responsibility.

48. Who engaged Tomo is unclear. I find that the builder paid Tomo about $5,000 for his labour,[12] and about $4,811.92 for machinery and bin hire relating to Tomo's works.[13] I also find from the evidence that the owner also paid Tomo $5,000 directly. I find it most likely that that the parties were content to put to one side their dispute as to who was liable for the retaining wall works in the interests of getting the retaining wall works completed.

49. It is thus clear from the evidence of the builder and the owner that, notwithstanding my subsequent finding that the contractual obligation of the builder to construct the retaining wall, at the date of the loan agreement both parties were in dispute about whether it was within the builder's scope. This was a mutually known fact at the time of its signing.

50. I therefore accept the submission by Mr Levine, counsel for the builder, that one purpose of the loan agreement, apparent from its terms, was to put to rest the dispute that had arisen between the parties concerning who was to pay for the retaining wall, and that the terms of the loan agreement are to the effect that the owner agreed to pay.

51. It follows from my earlier finding that the retaining wall works formed part of the scope of work required to be carried out by the builder that by the terms of the loan agreement, the builder obtained a variation of the contract in his favour. This is because the loan agreement, in effect, varied the plans and specifications so as to delete the retaining wall works from the works required to be performed by the builder. Section 37 of the DBC Act is therefore engaged. That section provides:

37 Variation of plans or specifications-by builder

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12 See payment to "Stan Popovic" included in the builder's claim 3, referred to in paragraph 44 of the witness statement of Jodie Vladovic.

13 See claim for $4,811.92 also included in the builder's claim 3.

(1) A builder who wishes to vary the plans or specifications set out in a major domestic building contract must give the building owner a notice that-

(a) describes the variation the builder wishes to make; and

(b) states why the builder wishes to make the variation; and

(c) states what effect the variation will have on the work as a whole being carried out under the contract and whether a variation to any permit will be required; and

(d) If the variation will result in delays, states the builder's reasonable estimate as to how long those delays will be; and

(e) states the cost of the variation and the effect it will have on the contract price.

…

(2) A builder must not give effect to any variation unless-

(a) the building owner gives the builder a signed consent to the variation attached to a copy of the notice required under subsection (1); or

(b) …

(3) A builder is not entitled to recover any money in respect of a variation unless-

(a) the builder-

(i) has complied with this section; and

(ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into; or

(b) the Tribunal is satisfied-

(i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship by the operation of paragraph (a); and

(ii) that it would not be unfair to the building owner to recover the money.

(4) If subsection (3) applies, the builder is entitled to recover the cost of carrying out the variation plus a reasonable profit.

52. I find that the builder did not comply with sub-sections 37(1) and, in breach of sub-section 37(2)(a), gave effect to the variation without having complied with the requirements of that sub-section.

53. I am satisfied, however, that given the amounts expended by the builder in carrying out the retaining wall works, the builder would suffer a significant or exceptional hardship (within the meaning of section 37(3)(b)(i) of the

DBC Act) by the operation of sub-paragraph 37(3)(a) of the DBC Act, and that it would not be unfair to the building owner (within the meaning of section 37(3)(b)(ii) of the DBC Act) for the builder to recover the amount claimed.

54. Included in the builder's total claim for $52,738 for retaining wall works is a claim for 20% for both overheads and profit in respect of the works. It is broadly accepted that overheads incurred by a builder are one of the costs of carrying out work. I find that the builder is entitled to be paid an amount for overheads as part of "the cost of carrying out the work" within the meaning of section 37(4) of the Act. I also find that a claim for 20% for both overheads and profit would give the builder no more than a reasonable profit within the meaning of section 37(4) of the Act. I find that the builder is therefore entitled to recover 20% on account of overheads and profit.

55. It follows from the above that I find that the builder is entitled to be paid for the retaining wall works, and that amount is $52,738, being the total of the amounts in Claim 3 and Claim 4 in the Jeffery report, but subject to the owner's counterclaim.

Issue (b)–Because it is relevant to whether the owner properly ended the contract, did the owner agree to repay to the builder any, if so what, amounts then owing to the builder upon the sale by the owner of her St Kilda property?

56. The builder contends that the owner had also orally undertaken, upon the sale of her St Kilda property, to repay amounts then owing to the builder pursuant to the loan agreement.

57. The owner denies that there was ever such an agreement.

58. The likelihood of there being such an agreement must, in my view, be assessed against any commitment by the owner, by the express terms of the loan agreement, concerning the promised date of repayment of the loan monies.

59. It is therefore necessary for me to construe the loan agreement to determine whether it states when the owner was to repay any, and if so what, amounts acknowledged as having been borrowed by her from the builder.

60. The drafting of the loan agreement is problematic. How it works in favour of the builder seems unclear at first sight. It was written in circumstances where the cost of the development had put financial stress on the owner, as evidenced by her loan account with the builder, and who therefore wished to lessen her exposure.

61. The meaning of a commercial contract is to be determined by what a reasonable business person in the position of the parties would have understood those terms to mean. Also, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial

contract a businesslike interpretation on the assumption that the parties intended to produce a commercial result.[14]

62. I have concluded that reasonable business people in the position of the parties would construe the loan agreement as recording loan payments paid by the builder to the owner prior to the date of the loan agreement, and in respect of which the owner had accepted (by the words "Jasmina to pay" appearing at the first line of the loan agreement) a liability to repay. As I have discussed, it includes a list of all such payments, amounting to $59,662.04.

63. Second, it records that the builder agreed to vary the $660,000 contract sum downwards by $30,000 to $630,000. To this end, it records that the builder was instructed by the owner, to reduce the "qualities" of the fixtures and fittings. I also find that it provides that insofar as the builder incurs costs above the renegotiated contract sum of $630,000 then these too would be payable upon the sale of the first townhouse.[15]

64. Importantly, however, this $30,000 reduction in the contract sum "freed up" an equivalent amount to be paid by the owner to the builder, not as part of the former contract sum, but in repaying to the builder part of the $59,662.04 total borrowings recorded in the loan agreement. I find, therefore, that words "difference in quotation to be allowed during or at end of project" appearing in the second page of the schedule would have been taken by business people in the position of these parties to record that $30,000 would also be paid by the owner to the builder upon the sale of the first townhouse in part diminution of the loan account.

65. As far as the remaining $29,662 borrowings were concerned, the loan agreement records that these would also "be met by [the owner] on sale of the first [townhouse]".

66. In summary, therefore, the loan agreement records an acknowledgment by the owner of monies lent to her by the builder, and the time when the owner agreed to pay these monies to the builder, that is to say, upon the sale of the first of the three town-houses, and not at any prior time.

67. Against this background, I will now examine the evidence led by the builder to the effect that the owner agreed to repay the borrowings upon the sale of her St Kilda property.

68. The builder's wife, Ms Vlahovic, stated in cross-examination:

You drew up the loan agreement?	I drew it up.
You took it over to where Ms Jovanovic was working?	Yes. She'd asked me to come to the house in Brighton where she was

[14] S*ee Electricity Generation Corporation v Woodside Energy and Ors* [2014] HCA 7 at [ ]

[15] see "I agree that any cost above the [a figure of $30,000 appears here, intended to be a reference to reduced contract amount of $630,000] will be payable in full by me …on the first sale of the property" in paragraph 2 of the loan agreement.

	cleaning.
She signed on the spot?	Yes
That agreement says that the builder wouldn't seek extra costs until after the sale of the first townhouse.	She said "I will have $100,000 in August after the sale of my Marine Parade townhouse"
You didn't amend the [loan] agreement to reflect this.	No. I always listened to what she said.
When she told you that she would be selling the property in Marine Parade, you thought you'd get the money then, even though she'd signed the [loan]agreement?	She told me "you'll get the money sooner than this [being the owner's commitment to repay in the loan agreement], because I've sold Marine Parade with settlement in August."
…Your demanding money by your email dated 1 September 2016 was contrary to [the owner's obligation] in the loan agreement.	No, it was not contrary to the loan agreement. Her assurances to me [after she signed the loan agreement] changed the written agreement.

69. When this evidence is assessed against the other evidence of the builder, I am unable to find that at the meeting in Brighton on 20 April 2016, the owner made such a representation.

70. Contrarily, in her witness statement, Ms Vlahovic gave evidence that the agreement had its genesis in a "verbal agreement" between the builder, the owner and herself prior to the builder advancing to the owner outstanding body corporate fees on the St Kilda property.[16] This evidence is also supported by the builder's own witness statement.[17] The builder advanced these fees on 4 November 2015.[18]

71. On the evidence of the builder and Ms Vlahovic, I find that if there was any such alleged agreement about the date of repayment, it was in late October 2015. If so, it was thus superseded by the express terms of the loan agreement providing, as I have found, for repayment of the borrowed monies no earlier than upon the sale of the first townhouse.

72. If, as alleged by Ms Vlahovic in cross-examination, these representations were made by the owner to Ms Vlahovic on behalf of the builder just after signing the loan agreement on 20 April 2016, I find that they were not intended by the owner to have the contractual effect of varying the owner's obligations under the loan agreement, just signed, to repay the borrowings upon the sale of the first townhouse. Further, there was no consideration from the builder, in respect of what would have been a subsequent variation to the loan agreement signed just prior to the alleged representation being made.

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16 See Ms Vlahovic's witness statement at [30]-[37].
17 See Mr Vlahovic's witness statement at [33]-[38].
18 See Annexure "JV-5" to Ms Vlahovic's witness statement.

73. It follows that the allegation by the builder that the owner agreed to repay the borrowings upon her sale of the St Kilda property has not been proved by the builder. Therefore, the owner was not in breach of the contract, as varied by the loan agreement, by failing to do so.

Issue (c)–Was the builder in "substantial breach" of the contract on 26 September 2016 and, if so, did the owner properly terminate the contract pursuant to clause 43.3?

74. Under the contract, the owner was required to make the following payments to the builder:

METHOD 1

STAGE	**PERCENTAGE**	**AMOUNT**
• Deposit (Refer to Clause 9)	2.5%	$16,500
• Base stage	21%	$138,600
• Frame stage	21%	$138,600
• Lock-up stage	32%	$211,200
• Fixing stage	20.5%	$135,300
• Completion	3%	$19,800
TOTAL CONTRACT PRICE (Excluding Variations)	100% (Including Deposit)	**$660,000**

75. The above percentages are more than what is permissible under section 40(2) of the DBC Act. The percentages set out in section 40(2) are the maximum percentages recoverable by a builder at the completion of a relevant stage of the works, unless the parties agree pursuant to section 40(4) of the DBC Act that section 40(2) of the DBC Act is not to apply, and do so in the manner set out in the *Domestic Building Regulations*.[19]

76. The builder failed to enter into an arrangement under section 40(4) of the Act as would have enabled him to depart from the percentages set out in section 40(2) of the DBC Act. One of the owner's claims for relief, however, was only in respect of improperly being required to pay the above lock-up and fixing stages prior to their being properly due, rather than arising out of the builder's failure to comply with section 40(2) of the DBC Act, and so I will not take this aspect any further.

77. The owner borrowed monies from her bank to fund the works. The terms of this construction finance facility required her to repay the borrowings in late January or early February 2016.

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[19] See section 40(4) DBC Act. See also Regulation 12 of the *Domestic Building Regulations 2007*, Form 1 in the schedule to the *Regulations*, Form 2 of the Schedule to the *Regulations* and *Imerva Corporation Pty ltd v Kuna* [2017] VSCA 168.

78. The building contract required the works to be carried out 310 days from the day of Commencement (as defined in the contract). The day of Commencement was not until 23 September 2015, when a building permit was issued. The reason for the late issue of the building permit was because the owner's planning permit had expired, and it was necessary to take steps to renew it during the period after signing the contract, which she did, with the assistance of the builder.

79. The owner alleges that the date for completion was 28 July 2016, and this is not in dispute.

80. The owner paid a part deposit of $15,000 only (being $1,500 short) on 13 May 2015, and $118,579.38 only (being $20,020.65 short) on 6 October 2015 for the slab and base stage. The builder accepted the owner's explanation that the short payment was because of her arrangements with her bank. He agreed not to press for payment, choosing instead to add them to the monies due for the owner under the loan agreement.[20]

81. The builder was involved in a serious motor vehicle accident on 20 May 2015, requiring him to spend several months in hospital, subsequently putting financial pressure on the builder and his business. For this reason, the builder gave evidence, he was only able to contribute $6,465.54 to the owner on 4 November 2015 towards the outstanding $14,465.54 body corporate fees for which the owner was liable in respect of the St Kilda property.

82. The owner paid $138,600 for the frame stage on 28 October 2015 and $211,200 for the lock-up stage on 26 November 2015. By then, she had paid $483,379.38, something a little less than 75% of the contract sum.

83. Interest payments on these borrowings quickly mounted up, and the owner gave evidence that this was the reason why she resolved to sell her St Kilda property. It is clear that the owner was also becoming increasingly indebted to the builder in respect of her loan account.

84. The loan agreement was entered into on 20 April 2016, as I have discussed.

85. The owner paid $135,300 for the fixing stage payment on 22 April 2016, with the result that only $19,800 was left payable under the contract.

86. The works were far from complete on the date for completion, 28 July 2016.

87. The owner gave evidence that at the end of August 2016, at a meeting on site, the builder demanded payment of $60,000 so he could "finish the works" and that, on her observation, the incomplete state of the works was such that she thought it highly unlikely that he could do so for this amount. She informed him that she did not have the funds to pay him.

88. By email dated 1 September 2016 (and reiterated in a text she sent on the same day), Ms Vlahovic emailed the respondent:

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[20] See first 2 entries in the schedule to the loan agreement.

> I am writing to confirm what you are intending to do with regards to payment for the invoices given to you last week. As discussed with [the builder] on site, with the amount of money drawn out for extras, we cannot finish the project unless some of the invoices are paid. [The builder] is currently on site, as are painters however, if no payment is made by the end of the week he will need to leave the site until some funds come in from you.
>
> [The builder] is very stressed by what you are doing so cannot contact you to speak about it anymore. We ask that you reply to this email instead confirming your intentions.
>
> …when I came to Brighton [on 20 April 2016] to discuss, you confirmed that when you sold the apartment in St Kilda & funds settled in August you would have $100,000 so would pay [the builder] whatever was owed. Now you are telling me you want to buy another house. That is really unfair & disrespectful after how much [the builder] has done for you & what we want is to finish your property which is for your benefit.
>
> You told [the builder] that if you paid him what was owed you didn't trust him to finish it. In reality, money has been owed since last year, $1,500 from deposit, $20,000 from second payment plus extras plus money loaned to you. [The builder] has trusted you with covering extra costs outside of the contract & also [lent] you money personally so what you are doing is really unfair and disrespectful.
>
> Unfortunately, the project cannot continue in this circumstance. You will need to make payment of at least $60,000 so the project can be completed along with a signed agreement that the balance will be paid on completion.
>
> Please respond by Friday so [the builder] can prepare his schedule.

89. The proposition in the email that the builder was still on site on 1 September 2016 is confirmed by a text that he sent the owner that day concerning the colours to be used by the painters on the architraves and doors.

90. Upon receiving the email, the owner gave evidence that she took the view that the demand for a $60,000 payment, ostensibly towards part payment of the monies lent to the owner (and recorded in the schedule to the loan agreement) was not in accordance with the loan agreement. It follows from my construction of the owner's obligations under the loan agreement, as set out above, that the owner's apprehensions were correct.

91. Further, she considered that the builder had no contractual basis for threatening suspension of the works.

92. Given that the date for completion had long passed, the owner sought legal advice.

93. By letter dated 13 September 2016, solicitors engaged by the owner wrote to the builder as follows:

> …We refer to your email to [the owner] dated 1 September 2016 in which you require [the owner] to "make payment of at least $60,000 so the project can be completed". Your demand is not in accordance with the terms of the building contract ("**the contract**") and the [loan agreement] you have with [the owner].
>
> You have also stated that you intend to suspend works pending payment of some invoices. Your suspension is in breach of contract.
>
> We are instructed that [the owner's] most recent payment to you was for the "fixing stage". A number of works required to have been completed up to and including the fixing stage remain outstanding. These works include but are not limited to:
>
> 1. Plastering;
> 2. Supply and install kitchens;
> 3. Supply and install architraves and skirting boards;
> 4. Supply and install internal doors;
> 5. Supply and install vanity cabinets and built in robes;
> 6. Supply and install shower screens and laundry troughs.
>
> Your actions are a substantial breach of contract [within the meaning of clause 43.1 of the contract]. [The owner] requires [pursuant to clause 43.3 of the contract] that you recommence works and satisfactorily complete all that was required to be completed up to and including the fixing stage within 10 days of this letter. A failure to comply with the aforementioned may result in termination of the contract without further notice to you…

94. The builder responded by text to the owner on 14 September 2016 to the effect that the owner had no right to do what her solicitors had threatened, and that he had not then suspended the works, alleging that the painters were still on site working on the "final stage" of the works.

95. The builder engaged solicitors, who on 21 September 2016 wrote to the owner's solicitors,[21] to the effect that by making only payment of the deposit and the slab and base stage the owner was in "substantial repudiation" of her obligations under the contract, and reserving the builder's rights. This cannot have been the case, however, as I have found that to the extent that there had been only a part payment made by the owner of these amounts otherwise due (and this was not contested by the owner), the parties had agreed, by the express terms of the loan agreement, that they would form part of the borrowings of the owner, repayable upon the sale of the first townhouse.

96. With respect to the owner's solicitors' allegation that the fixing stage had not been reached, the builder's solicitors contended that the builder had completed the works required to reach fixing stage, with the exception only

[21] The letter was marked "without prejudice save as to costs" but was tendered at the hearing, with the terms of the offer contained in it redacted.

of the kitchen units which were being installed at the earliest opportunity. They explained that the kitchen installation had been delayed "due to thefts in the area from building sites and that [the owner] has been made aware of this".

97. In their letter dated 21 September 2016 the builder's solicitors conveyed their instructions that the owner owed the builder $65,569.15 in "unpaid loans" and that, having by then sold the St Kilda property, the owner was required to repay that amount. They wrote that if the outstanding amount was not repaid, they reserved their right to terminate the contract under clause 42.3 of the contract.

98. Repudiation occurs when a party evinces an intention no longer to be bound by the contract, or to fulfil it only in a manner substantially inconsistent with the party's obligations. An actual intention to repudiate is not necessary. The issue is resolved objectively by reference to the effect that the breaching party's conduct would have on a reasonable person. Further, as has often been said, repudiation is a serious matter and is not lightly to be found.[22]

99. The builder's solicitors' letter to the owner dated 21 September 2018, requiring the owner immediately to pay both:

    (a) the deposit and slab and base shortfalls; and

    (b) monies otherwise payable on the loan account

    was, for the reasons I have found, inconsistent with the builder's rights under the contract, as amended by the loan agreement. However, it was not (as subsequently suggested by the owner's letter dated 18 October 2016) repudiatory, in the sense I have described. This is because although the letter was misconceived as to the builder's right to then make such a demand, it only reserved to the builder the right to terminate the contract if the owner failed to make the payment demanded, and only then under the express terms of the contract.[23]

100. By letter dated 26 September 2016 to the builder's solicitors, the owner's solicitors correctly denied the builder's solicitors' previous allegation that the owner had repudiated the contract as amended by the loan agreement, by the owner only part paying the builder in respect of the deposit and base stage.

101. The owner's solicitors' letter dated 26 September 2016 went further than their letter dated 13 September 2016. Not only did it deny the builder's allegation that fixing stage had been reached except for the installation of the kitchens. They claimed that neither the lock-up nor the fixing stages had then been reached. In particular, with the letter they provided

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22 *Shevill v Builders Licencing Board* (1982) 149 CLR 620, at 633-4; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17, at 32; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 622, 633, 643 and 757.

23 See *DTR Nominees Pty ltd v Mona Homes Pty Ltd* [1978] HCA 12.

photographs, in evidence, purporting to demonstrate the following incomplete works (as described in their letter):

1. Fixed external doors (lock-up stage);
2. External wall cladding (lock-up stage);
3. External eaves (lock-up stage);
4. Plastering (fixing stage);
5. Supply and install of kitchens (fixing stage);
6. Install skirting boards (fixing stage);
7. Install internal doors (fixing stage);
8. Supply and install vanity cabinets and built-in robes (fixing stage); and
9. Supply and install shower screens and laundry troughs (fixing stage)

102. By letter dated 18 October 2016, the owner's solicitors wrote to the builder's solicitors:

> …Your client remains in substantial breach of the building contract "**the contract**") and has made no attempt to remedy the breaches or perform as required under the contract. [The builder's conduct] constitutes a repudiation of the contract.
>
> Accordingly, this correspondence serves as written notice that [the owner] is exercising her right to end the contract.
>
> As stated in our correspondence to [the builder] dated 13 September 2016, [the owner] may make claim against [the builder] for any losses she may or has incurred as a result of incomplete or defective works and retains any other rights and remedies she is entitled to.

103. Whether the owner properly ended the contract by its solicitors' subsequent letter dated 18 October 2016 depends upon the owner establishing that on 26 September 2016 the builder was in "substantial breach" within the meaning of clause 43.1 of the contract, that the owner's solicitors' letter dated 26 September 2016 gave proper notice to remedy the claimed breach pursuant to clause 43.2 of the contract, and that the builder failed to do so.

Whether substantial breach

104. Schedule 3 to the contract sets out the meanings to be attributed to the "lock-up stage" and the "fixing stage", which is a transcription of what appears in section 40(1) of the DBC Act:

Schedule 3

CONSTRUCTION STAGES APPLICABLE TO METHOD 1 PROGRESS PAYMENTS

'Base Stage' means	(a) in the case of a home with a timber floor, the stage when the concrete footings for the floor are

	poured and the base brickwork is built to floor level; (b) in the case of a home with a timber floor with no base brickwork, the stage when the stumps, piers or columns are completed; (c) in the case of a home with a suspended concrete slab floor, the stage when the concrete footings are poured; (d) in the case of a home with a concrete floor, the stage when the floor is completed; (e) in the case of a home for which the exterior walls and roof are constructed before the floor is constructed, the stage when the concrete footings are poured
'Frame stage' means	the stage when a home's frame is completed and approved by a building surveyor
'Lock-up stage' means	the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary);
'Fixing stage' means	the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position;
'Completion' means	the Building Works are complete in accordance with the Contract Documents.

105. I now provide three general observations about the extent to which a relevant stage must be completed before a builder may seeking payment for a relevant stage of the works.

106. First, as I have already stated, Section 40(2) of the DBC Act imposes restrictions on recovering more than a certain percentage of the contract price "at the completion of a stage".

107. For the reasons I have also discussed, the contract is a "major domestic building contract that is not listed in the Table [appearing at section 40(2) of the DBC Act]" within the meaning of section 40(2) of the DBC Act. This is because it seeks percentages of the contract price at the completion of

respective stages that are greater not set out there. To illustrate, the builder's percentages were as follows:

STAGE	**PERCENTAGE OF CONTRACT PRICE**		**AMOUNT**
Deposit (refer to Clause 9)	2.5%	*[Amount in accordance with clause 9 of the contract]*	$16,500
• Base stage	21%	*[Accrued total 23.5% including deposit, cf. 10% in section 40(2) TABLE]*	$138,600
• Frame stage	21%	*[Accrued total 44.5% including deposit, cf. 25% in section 40(2) TABLE]*	$138,600
• Lock-up stage	32%	*[Accrued total 76.5% including deposit, cf. 60% in section 40(2) TABLE]*	$211,200
• Fixing stage	20.5%	*[Accrued total 97% including deposit, cf. 85% in section 40(2) TABLE]*	$135,300
• Completion	3%		$19,800
TOTAL CONTRACT PRICE (Excluding Variations)	100% (Including Deposit)		**$660,000**

108. In the case of a contract not listed in the Table in section 40(2), such as the contract, section 40(3) of the DBC Act provides:

> …a builder must not demand or receive any amount or instalment that is not directly related to the progress of the building work carried out under the contract.
>
> Penalty 50 penalty units.

109. In other words, by this section the legislature has made clear that in the case of a building contract not of a type described in the Table to section 40(2) of the DBC Act, a builder, by making a progress claim for an agreed stage, represents that the stage has been completed within the meaning of the DBC Act. Any variance between this representation and the actual state of completion is severely countenanced by the attraction of a criminal pecuniary penalty.

110. Secondly, Clause 29.0 of the contract itself provided:

> The Builder must give the owner a written claim for each Progress Payment **when each stage has been completed**, as set out in Schedule 3. The claim must set out each of the following:
>
> - The amount paid or to be paid for the stage or stages completed to date;

- the amount paid or to be paid for, and details of, any variations made and other amounts paid or to be paid by the Owner under this Contract;
- the sum of those amounts;
- payments that have already been made by the Owner; and
- the total claimed, taking into account the amounts already made.

111. It has been held that a clause such as clause 29.0, requiring the builder to give the owner a written claim for each progress payment when each stage has been completed "as set out in Schedule 3" and also setting out "the amount paid or to be paid for the…stages *completed to date*:

> …suggests that the stages to be completed by the builder before a demand can be made for a progress payment are to mirror the progressive manner in which the stages are set out in Schedule 3, but also that when a demand is made, the builder will identify the earlier demands made for the preceding stages which have been completed. That is, one can infer that there is to be a successive undertaking of the building works. Most significantly, a written claim for a progress payment must also specify 'the total claimed, *taking into account the payments already made*'. This suggests that each progress payment claim does not stand in isolation but is intended to take account of, in a cumulative fashion, the claims and payments already made. This requirement indicates that, while the particular percentage entitlements of the contract price prescribed in the Table under s 40(2) are not cumulative, a progress payment claim is to specify, in a cumulative way, the total amount demanded of the owner including the previous payments already made. This supports the proposition that the five stages of construction under [section 40(1) of the DBC] Act are not to be treated as labels with separate statutory criteria which can be satisfied independently of each other, as though one stage bore no relationship to another. Rather, they are triggers for a cumulative set of payments, each payment being expressed as a separate and fixed percentage of the contract price, but being made in a fashion which takes account of the payments already made, and thus the stages of construction which have already been completed. From this, the inference can be drawn that the regime of progress payments is more than sequential; the regime is to reflect the fact that the works are to progress consecutively through stages in the construction of a home.[24]

112. In other words, it is open to an owner to establish, as the owner seeks to do in this case, that a builder has failed to reach a specified stage of construction necessary for a progress payment to be due by sole reason that an earlier specified stage of construction has not been reached. In this case, specifically, the owner contends that the fixing stage had not been reached

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[24] See *Cardona & Anor v Rod Brown & Anor* [2012] VSCA 174 at [69] per Tate JA, with whom Bongiorno JA and Osborn JA agreed.

because, among other reasons relied on, the lock-up stage had not been reached.

113. Thirdly, in regard to the extent to which a relevant stage must be completed before payment for the stage is due:

> It is necessary for there to be 'effective and satisfactory completion of the required stage…[as] a condition of any instalment payment' and …trivial failures, or failures borne of impracticalities, do not preclude effective and satisfactory completion…[25]

114. I take the view that the words set out in section 40(1) of the DBC Act as to when a stage of completion has been reached are clear and equivocal, and that subject to any such trivial failures, or "failures borne of impracticalities", they should be strictly interpreted.

115. I also agree with prior observations of Senior Member Farrelly of this Tribunal to the effect that this strict approach is necessary because whether a relevant stage has reached completion is the sole criterion for substantial progress payments being made by the owner under the contract.[26]

116. The extent to which Members of this Tribunal have strictly interpreted the plain words of section 40(1) of the DBC Act is that it is not sufficient, for instance that troughs, sinks, cabinets and cupboards are *ready* for installation (after say, painting and tiling); they must be *fitted and fixed in position* for the fixing stage payment to be properly due to the builder. That is to say:

> If a builder wishes to fix the skirtings, troughs, and sinks in position after he has done the tiling works, then unless expressly provided for otherwise in [the] building contract in a manner permitted by the Act and the regulations, the tiling works fall within the fixing stage.[27]

117. It always remains open to a builder who, intending for all practical purposes not to fix say cabinetry, skirting, baths or troughs until during the completion stage, to enter into an agreement with the owner to this effect pursuant to section 40(4) of the DBC Act, and to have the owner sign the prescribed Form 1 before the execution of the contract.[28]

118. Having made these preliminary observations, I now turn to consider whether at the time that the lock-up and fixing payments was sought by the builder (and thereafter paid by the owner), and in the absence of an

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25 See *Cardona & Anor* (ibid) at [74] per Tate JA, quoting *Hudson's Building and Engineering Contracts* (Sweet and Maxwell, 12th edition (2010) at 3-076). Followed in *Sumic v Muzaferovic* (Domestic Building) [2013] VCAT 1862 per SM Walker at [223]. Also "'Extreme exactitude' is not required in assessing whether a stage has been reached…[and] would not extend to a trivial shortfall in completion": *Pratley Constructions v Racine* [2004] VCAT 2035 at 4.4-4.7 (per Senior Member Young)

26 See also *Alpha Developers and Promoters Pty Ltd v Advance Building & Engineering Pty Ltd* (Building and Property) [2015] VCAT 317 at [90]-[96] and [131]-[142] per SM Farrelly.

27 See *Alpha Developers and Promoters Pty Ltd v Advance Building & Engineering Pty Ltd* (ibid) at [95].

28 See Regulation 12(a) of the *Regulations* and *Imerva Corporation Pty Ltd v Kuna* (ibid fn.21) at [93]-[97] per Tate JA.

agreement between the parties pursuant to section 40(4) of the Act, the respective states of completion were as required by the table in Schedule 3 to the contract (being the stages described in section 40(1) of the DBC Act).

119. Mr Petrovic, the owner's solicitor, submitted to the Tribunal that the various matters upon which the owner relied in order to demonstrate that the works had not reached the relevant stages of completion were:

    (a) The photographs attached to the owner's solicitors' letter to the builder dated 26 September 2016;

    (b) a video of the premises taken by Mr Petrovic on 27 November 2016;

    (c) a report dated 20 August 2017 of Mr Zoran Durovic, the completing builder, with attached photographs which I find were taken on 6 November 2016;[29] and

    (d) a report dated 19 May 2017 by Mr Nick Kukulka, a senior inspector employed by the Victorian Building Authority (particularly items 1 and 6 thereof) arising from his inspection on 3 May 2017 with both parties present.

120. In addition, the owner relies on a photograph taken on 28 November 2015 on the occasion of a celebratory lunch on the site, attended by the owner, the builder and others. This was just after payment by the owner of the lock-up claim on 26 November 2016. I find from the photograph that roof works had not then been completed. The owner also relies on a photograph taken on 7 December 2015, from which I find that external cladding works and lower roof works had not then been undertaken.

121. For his part, the builder relied on a report of Mr Trevor Jeffery dated 21 May 2017 to which I have referred, but which was largely in response to an earlier report of Mr Durovic dated 31 October 2016 rather than containing an analysis of the whether the builder had, at relevant times, reached the required state of completion.

122. Mr Petrovic extensively cross-examined the builder for most of days 2 and 3 concerning the former's contention that the works had reached the necessary stage of completion at the date of the lock-up and fixing stages.

Photographs attached to the owner's solicitor's letter dated 26 September 2016 to the builder's solicitor

123. I have reviewed the photographs attached to the owner's solicitor's letter dated 26 September 2016 to the builder's solicitor, and find that they are generally representative of the photographs subsequently taken by Mr Durovic, with particular regard to:

    (a) lack of lavatory installation;

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[29] An earlier report of Mr Durovic dated 31 October 2016, written only a fortnight after the owner's termination of the building contract, is written only in broad terms, making general comment on the poor quality of the works.

(b) wardrobe doors not fixed;

(c) external door to laundry not hung;

(d) plasterboard to unit 1 stairwell not fixed, and instances of plasterboard elsewhere not completed;

(e) skirting not fixed;

(f) upper level cladding not complete;

(g) unit 2 garage ceiling and wall plastering incomplete;

(h) unit 2 soffit lining incomplete;

(i) unit 3 eaves incomplete; and

(j) baths not fixed into position;

Photographs taken on 6 November 2016, attached to report of Mr Durovic dated 20 August 2017

124. I have read the observations of Mr Durovic contained in the first 6 pages of his report dated 20 August 2017, made with specific reference to photographs also taken by Mr Durovic on 6 November 2016. I set out his findings in tabulated form below:

Unit 1	**Location**	**Status**
External wall cladding (lock up requirement).	Side of unit 1.	Eaves incomplete (2 locations).
Flooring (lock up requirement)	Laundry. Living room. Upstairs bedroom 1. Upstairs bedroom 2. Kitchen.	No flooring. Flooring incomplete. Flooring incomplete. Flooring incomplete. Flooring incomplete.
Doors (fixing requirement)	Front door entrance. Downstairs bedroom. Laundry. upstairs bedroom 1. upstairs bedroom 2.	No door. Doors not in place. Doors not hung. Door handles not fitted off. Door handles not fitted off.
Internal cladding (fixing requirement)	Front porch. Bathroom under stairs. Stairwell.	Plastering incomplete. Plastering incomplete. Plastering incomplete (see, in particular, photograph 27 showing no plasterboard in a

	Internal garage.	section of the stairwell. Ceiling and wall plaster incomplete.
Skirting (fixing requirement)	Front door entrance. Front foyer entrance. Downstairs bedroom. Living room.	Internal skirting incomplete. Skirting incomplete. Skirting incomplete. Skirting incomplete.
Baths, basins, troughs and sinks (fixing requirement)	Ensuite under stairs. Ensuite under stairs. Upstairs bathroom. Laundry	No lavatory. No waterproofing. Bath installation incomplete. No trough.
Cupboards (fixing requirement)	Downstairs bedroom. Upstairs bedroom 1. Upstairs bedroom 2.	Wardrobe incomplete. Wardrobe incomplete. Wardrobe incomplete.
Cabinets (fixing requirement)	Ensuite under stairs. Ensuite under stairs. Upstairs bathroom.	No vanity. No shower screen. No vanity, no shower screen.
Cabinets/Cupboards (fixing requirement)	Kitchen.	Kitchen not installed.
Garage door		Not hung.
Unit 2		
External wall cladding (lock up requirement)	Upper level. Exterior upstairs.	Cladding incomplete. Eaves incomplete (see, in particular photos 56-58). External cladding incomplete.
Flooring (lock up requirement)	Interior entrance. Downstairs bedroom. Living room. Kitchen. Laundry. Upstairs bedroom 1. Upstairs bedroom 2.	Flooring incomplete. Flooring incomplete. Flooring incomplete. Flooring incomplete. Flooring incomplete. Flooring incomplete. Flooring incomplete.
Doors (fixing requirement)	Front door entrance.	Door not hung.

	Interior entrance. Toilet under stairs. Laundry. Exterior laundry entrance.	Door not hung. Doors not hung and handles not fitted off. Door not hung. Door not hung.
Internal cladding (fixing requirement)	Lavatory under stairs. Stairwell. Internal garage.	Plastering incomplete. Plastering incomplete. Ceiling and wall plastering incomplete.
Skirting (fixing requirement)	Interior entrance. Downstairs bedroom. Living room.	Skirting incomplete. Skirting incomplete. Skirting incomplete.
Baths, basins, troughs and sinks (fixing requirement)	Ensuite under stairs. Toilet under stairs Upstairs bathroom. Laundry	No lavatory. No lavatory. No lavatory, bath installation incomplete, no waterproofing No trough.
Cupboards (fixing requirement)	Downstairs bedroom Upstairs bedroom 1 Upstairs bedroom 2	Wardrobe incomplete. Wardrobe incomplete. Wardrobe incomplete.
Cabinets (fixing requirement)	Ensuite under stairs. Upstairs bathroom.	No shower screen, no vanity, No vanity, no shower screen.
Cabinets/Cupboards (fixing requirement)	Kitchen.	Kitchen not installed.
Unit 3		
External wall cladding (lock up requirement)	Front porch	Eaves lining incomplete (see, in particular photos 103-105)
Flooring (lock up requirement)	Kitchen Living room Bedroom 1 Laundry Bedroom 2	Flooring incomplete Flooring incomplete Flooring incomplete Flooring incomplete Flooring incomplete

	Bedroom 3	Flooring incomplete
Doors (fixing requirement)	Front door entrance Bedroom 1 Laundry External laundry entrance	Door not hung. Door handles not fitted off Doors not hung. Door not hung.
Baths, basins, troughs and sinks (fixing requirement)	Upstairs bathroom Laundry	No lavatory No trough.
Cupboards (fixing requirement)	Bedroom 1 Bedroom 2 Bedroom 3	Wardrobe incomplete Wardrobe incomplete Wardrobe incomplete.
Cabinets (fixing requirement)	Upstairs bathroom	No vanity
Cabinets/Cupboards (fixing requirement)	Kitchen	Kitchen not installed

Video of the premises taken by Mr Petrovic on 27 November 2016

125. The video taken on 27 November 2016 was played by Mr Petrovic during his cross-examination of the builder, which has also assisted me in assessing the state of completion of the works at that time.

The report of Mr Kukulka dated 19 May 2017

126. Mr Kukulka of the Victorian Building Authority inspected Unit 3 on 3 May 2017, at which time the completing contractor Zoran Group Pty Ltd (Mr Durovic's company) had undertaken completion works in respect of all 3 units for which it had then claimed 60% of its contract price.[30]

127. Mr Kukulka stated, in his view:

(a) the soffit linings to the eaves of unit 3 had not been completed, and that that required part of the lock-up works remained outstanding at the date of his inspection (Item 1 of his report). I find that this was the case when the builder made his claim for the lock-up stage;

(b) the laundry tops and bench tops had not been installed, and that therefore a required part of the fixing stage had not been reached (item 5 of his report). I find that this was the case when the builder made his claim for the fixing stage;

(c) small sections of eaves adjacent to the north-east corner of bedroom 3, the north west corner of the garage and the north west corner of bedroom 2 had not been completed, and that therefore a required part of the lock-up stage had not been reached (item 6 of his report). I find

[30] See its "Stage 3" payment claim dated 3 April 2017.

that this was the case when the builder made his claim for the lock-up stage;

(d) the skirting boards in the eastern end of the family/lounge area had been cut and put into position, but had not been fastened by nails or tacks into position (item 10.1 of his report). I find that this was the case when the builder made his claim for the fixing stage.

128. The builder gave evidence that his failure to complete the eaves in respect of unit 3 related to a requirement of the building surveyor to construct 2 150mm x 45mm beams, bolted together, which would have involved a cutting of the rafters, rather than a smaller 150mm x 67mm beam suggested by the builder. The issue was still ongoing at the time of the lock-up payment claim, and was still unresolved at the date of the builder's termination.

129. In respect of his failure to have fixed skirting at the time of the fixing stage progress claim, the builder gave evidence that this is best done after the laying of the floating floor in the downstairs areas of the units, thus avoiding the need for a quad finish between the skirting and the floor.

130. The builder gave evidence that the reason he had not completed the plasterboard in the stairwell in unit 1, was that he was awaiting the owner's direction in regard to whether she wanted an internal window in the gap.

131. Concerning his failure to fix the baths and the lavatories, the builder gave evidence that the need for tiling works during the completion stage made this impracticable.

132. The builder gave evidence that his failure to fix wardrobe doors was that at the date of termination the doors had been fixed, but that they were subsequently removed for painting purposes.

133. Concerning his failure to hang the garage door to unit 2, the builder gave evidence that this was not required for lock-up stage.

134. In response to his failure to install soffits to the porch at unit 2,[31] the builder claimed that soffit was not required for lock-up stage.

135. Concerning his failure to install troughs, shower screens and cabinets, the builder gave evidence that these items can get damaged by the following trades in the completion stage, and that he therefore held back their fixing until later.

136. In respect of the outstanding kitchen cabinetry and cupboards, the builder gave evidence that it is common practice for these to be installed after internal painting works, which are carried out during the completion stage, so as to avoid paint spray and damage from painting trades using benchwork as scaffold to reach the ceiling.

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[31] Durovic photos 56,57 and 58.

137. I find, by reference to the incomplete state of the eaves lining, the external wall cladding and the garage door to unit 1,[32] the builder was in breach of his contractual obligation in clause 29 of the contract to complete the lock-up stage before making the lock-up stage progress claim.

138. In making this finding, I exclude from my consideration any failure by the builder to complete "flooring" as identified in the completing builder's report: in my view, the reference to "flooring" in the lock-up stage definition in section 40(1) of the DBC Act does not relate to floor *coverings*, such as tiles, carpets, floating floors, timber flooring and the like. I am satisfied that at the time of making his lock-up progress claim and being paid for it, the builder had completed the flooring as described in the lock-up definition in section 40(1) of the DBC Act.

139. I have also concluded that although the builder chose, for his own practical reasons, to defer much of the works that were required to be completed at fixing stage until completion stage, the extent of the outstanding works otherwise required to be competed at fixing (in particular, internal cladding, skirting, doors, basins, troughs, sinks cabinets and cupboards) resulted in the builder being in breach of:

    (a) his contractual obligation in clause 29 of the contract to complete the fixing stage (and, it follows from my finding above, the lock-up stage) before making the fixing stage progress claim; and

    (b) therefore, his legal obligation set out in section 40(3) of the DBC Act not to demand or receive any amount or instalment of the contract price that is not directly related to the progress of the building work being carried out under the contract.

140. Were I to hold otherwise, by effectively granting the builder license to defer until the completion stage those works that are mandated by the express provisions of section 40 of the DBC Act to be completed in the fixing stage would, in effect, I would be re-writing these statutory provisions.

141. Given that a failure by the builder to comply with clause 40(3) exposes the builder to a criminal pecuniary penalty, I also find that to the extent that the owner may have knowingly paid the lock-up and the fixing stages prior to either of those stages having been completed, the law of estoppel is not available to preclude the owner from relying on the builder's contravention of the prescribed regime.[33]

142. I therefore find that on 26 September 2016 the builder was in substantial breach of the contract within the meaning of clause 43.1 of the contract.

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[32] See *Cardona & Anor v Brown & Anor* [2012] VSCA 174 at [77]-[86] per Tate JA.

[33] *Imerva Corporation Pty ltd v Anton Kuna and Jaga Kuna* [2017] VSCA 168 at [100]-[115] per Tate JA.

Whether the owners' solicitors' letter dated 26 September 2016 gave proper notice to remedy breach

143. I find that the owner's solicitors' letter dated 26 September 2016 to the builder's solicitors, providing 10 days' notice to the builder to "remedy his [above] breaches" within 10 days of the "receipt" of the letter failing which the owner "will end the contract and will make a claim against [the builder] for losses incurred" constituted proper notice to the builder pursuant to clause 43.2 of the contract to remedy the claimed breaches.

Whether the builder failed to remedy his substantial breach.

144. I find that the builder failed to remedy the substantial breaches within the required 10 day period.

Whether the owner properly ended the contract

145. I also find that the owner properly ended the contract by her solicitors' subsequent letter dated 18 October 2016.

146. It follows from my finding that the owner was not obliged to repay any loan monies to the builder at the time of the builder's improper demand for repayment of them, that the owner was not in substantial breach of the building contract within the meaning of clause 43.4 of the contract at the date the owner ended the contract on 18 October 2016. Therefore, the builder's defence that the owner was not entitled to do so fails.

147. I find that the owner is therefore entitled to make a claim pursuant to clause 44 of the contract.

Issue (d)–Does the builder owe any and if so what amount to the owner pursuant to clause 44 of the contract?

148. The owner seeks payment of the sum of $245,000 plus GST, a total of $269,500. This is the amount that was allegedly paid by the owner to the completing builder Zoran Group Pty Ltd under a contract dated 10 November 2016.

149. From this figure, the owner concedes that pursuant to clause 44.1 of the contract, the builder is entitled to a deduction of $19,800 as the unpaid balance of the contract price.

150. Clause 44 of the contract provides:

> **Owner May Get Another Builder to Finish Work**
>
> 44.0
>
> If the Owner brings this Contract to an end under Clause 43, then the Owner's obligations to make further payment to the Builder is suspended for a reasonable time to enable the Owner to find out **the reasonable cost of completing the building works and fixing any defects** (*emphasis added*).
>
> 44.1

The Owner is entitled to deduct that **reasonable cost** calculated under clause 44.0 from the total of the unpaid balance of the Contract price and other amounts payable by the Owner under this Contract if this Contract had not been terminated and if the deduction produces:

- a negative balance-the Builder must pay the difference within 7 Days of demand; and
- a positive balance-the Owner must immediately pay the difference to the Builder (*emphasis added*).

151. Mr Levine for the builder submitted that the owner has failed to prove the reasonable cost of completing the works and fixing the defects pursuant to clause 44 of the contract, and that her claim must therefore be dismissed.

152. An analysis of the material filed by the owner in support of her claim is therefore required.

153. As evidence of her cost of completion and fixing defects, the owner first relies on the completing builder's report dated 31 October 2016, which stated, in part:

[after commenting on the alleged untidy site]

Quality of Workmanship

[illegible] can be a difficult topic to discuss with most people in the building industry, but being completely honest, this was a major concern about the project when walking through.

The entirety of the project seems to be done incredibly rough, there [is] a section left incomplete where other trades have then begun, for example, there is an under-stair water closet, whereby when walking up the stairs, a section of plaster has been left incomplete and someone using the stairs could very easily look into the water closet, yet the painters have come in and started painting (see image).

Overall, a lot of the items used are quite low quality and have been matched with low quality installation which has overall provided the owner/client a poorly done, messy & low-quality finish.

Some specific items that we wanted to voice our concern with:

- the lack of appropriate in-fill to the neighbour's side where the new retaining wall has been built, there is a large and awkward drop that could seriously injure someone if they were to fall, in particular near the rear of the property, whereby the person who lives in that home parks their car right next to the fall, as he has no other place to park it.
- The incredibly large amounts of soil and rubbish removal that will be required, along with an appropriate site clean, inside and out of all units;
- The lack of proper installation of structural components to be able to hold the weight of an iron roof to cover the garage of unit 1.

- We believe the drainage pits installed in the driveway are too low, and could pose a problem in the future.
- Poorly installed stairs leave many gaps and issues need to be rectified too (sic) be able to provide an appropriate finish for the section.
- The roof tiles require a considerable amount of attention to be properly sealed and caulked to stop water penetration and future issues.
- Overall attention too (sic) all works to ensure a proper finish.
- A rendered wall needs to be created at the rear of unit 2, as per the plans provided.
- Water tanks need to be supplied and installed, as per the plans provided.

It is our opinion, that [the builder] has entered into this contract at what is relatively a cheap price for such a project. He has then encountered certain problems which have caused a financial strain on the budget of this build, and from there his control over the entirety of the project has diminished. Regardless, this does not mean for someone to leave the state of the building this way, with a budget of $660,000, he would have been able to complete the project appropriately, but from my understanding he has forwarded drafted amounts from the bank and left the work far from complete, and the owner only $20,000 to complete the works, something which is impossible.

…

It is of our opinion, to properly complete this project a total of $240,000 + GST would be required.

154. Secondly, the owner also relies for her claim on the photographs of the alleged incomplete and defective works, taken on 6 November 2016 by the completing builder, and the 5-page commentary to those photographs, to which I have referred.

155. Thirdly, the owner relies on the completing builder's contract dated 10 November 2016, in which the contract price was $269,000 including GST.

156. The owner also tendered the completing builder's progress claims, as follows:

Date	**Stage**	**Amount (including GST)**
12 January 2017	Deposit and stage 1 payment	$53,900
17 February 2017	Stage 2 payment	$53,900
3 April 2017	Stage 3 payment	$53,900
18 June 2017.	Stage 4 payment	$80,850

26 September 2017	Stage 5 payment	$26,950
	TOTAL	**$269,500**

157. I find from the owner's evidence that she paid the required progress payments to the completing contractor.

158. Notwithstanding a call for its production by Mr Levine for the builder, the owner did not however tender any specification of works required to be completed by the completing builder, notwithstanding that the completion contract refers to "7 pages of specifications that were prepared and supplied by Zoran Group Pty Ltd". The owner was not able to assist on the reason for the absence of this document.

159. The contract sum payable by the owner under the completing contract was incomprehensibly broken down in the contract as follows:

Stage	**Percentage of Contract Price**	**Amount (plus GST)**
Deposit (Refer to Contract Particulars)		
Base Stage	15%	$36,750
Frame Stage	20%	$49,000
Lock up stage	20%	$49,000
Fixing stage	30%	$73,500
Completion	10%	$24,500
Total Contract Price (Excluding Variations)	100% (including deposit)	**$245,000 (plus GST)**

160. It is common ground that the payments made to the completing contractor were not made in respect of the respective stages within the meaning of the DBC Act, as the above breakdown would otherwise suggest but was, as Mr Carr for the owner submitted, simply an arbitrary breakdown of the full contract price. When pressed, for instance, Mr Durovic the director of the completing contractor conceded that the amount allocated for "base stage" was in fact paid as a deposit and for the clean-up work undertaken by the completing contractor.

161. Mr Levine for the builder submitted that coupled with the shortfalls in owner's evidence, there was no invitation extended to the builder, after his termination, to inspect the works. He submits that Mr Jeffery, the quantity surveyor instructed by the builder, was only able to inspect the property on 16 May 2017, and that his subsequent report dated 21 May 2017 put the

owner on notice that the damages claim for alleged defective and incomplete works would be challenged. The reasons for this, he says, are contained in Mr Jeffery's report, which are to the effect that for the reasons set out in Mr Jeffery's report, the completing builder's report dated 31 October 2016:

> …generally lacks detail, backup calculations or adequate substantiation for comments made.

162. Further, Mr Jeffery stated in his report:

> [The completing builder] has failed to provide backup or calculations as a basis of how he has arrived at the amount of $240,000 + GST to properly complete the project. Adequate detail of how this value was arrived at is required in order to comment on its accuracy. $240,000 + GST represents 40% of the original Contract Sum, given the stage of the works is substantially complete the amount of 40% would appear to be excessive.

163. It follows, Mr Levine submitted, and I agree, that from the date of Mr Jeffery's report, the owner was on express notice that the lack of particularity concerning the works said to comprise her damages claim, and the failure to provide a breakdown of the amount claimed against alleged individual items of work was the subject of express challenge by the builder.

164. In response to this challenge, Mr Levine submitted, the owner submitted further insufficient evidence, contained in the witness statement of Mr Durovic, the completing builder, signed 9 November 2017, as follows:

> …
>
> 8. The following costs were incurred [by the completing builder] in completing the project [not including my [20%] margin charged to the owner];

(a)	Flooring (labour and materials)	$15,000
(b)	Roller doors	$5,630
(c)	Kitchen and appliances	$37,200
(d)	Electrician	$13,000
(e)	Plumbing (inc $2,500 water tapping)	$19,500
(f)	Tiling (labour and materials	$11,800
(g)	Toilets	$1,800
(h)	Plastering, eaves and external cladding	$8,000
(i)	Showers	$3,500
(j)	Vanities	$3,000

(k)	Taps	$2,000
(l)	Shower mixer trims	$500
(m)	Concreting	$30,000
(n)	Painting	$15,000
(o)	Site clearing/cleaning (at commencement)	$5,080
(p)	Water tanks and pumps	$3,000
(q)	Door fixtures	$2,400
(r)	Caulking	$1,000
(s)	Laundry troughs and cabinets	$3,000
(t)	Wardrobes	$2,000
(u)	Garages (rectification, plastering, painting)	$5,400
(v)	Fencing between each lot	$700
(w)	Waterproofing	$1,200
(x)	Split systems	$7,600
(y)	Hot water systems	$3,200
TOTAL		**$210,510**

165. Mr Levine submitted that this summary, together with the material to which I have referred, is insufficient to discharge the owner's obligation to prove, on the balance of probabilities, that the sum she now claims is "the reasonable cost of completing the Building Works and fixing any defects" pursuant to clause 44 of the contract in consequence of her bringing the contract to an end under clause 43.

166. I agree with the submissions on behalf of the builder that it is difficult to determine, from the evidence relied on by the owner, what part of the $269,500 now claimed by the owner relates to (adopting the terminology of clause 44.0 of the contract) "the cost of completing the Building Works" and what part relates to the "[cost of] fixing any defects".

167. On the evidence available, I find from the 5 page report of the completing builder, which accompanies the photographs taken by him on 6 November 2016, that apart from the allegedly defective retaining wall, and allegedly poor finish of quad, beams and plaster items (including some "gapping"), the outstanding works listed were in the nature of completing works within the meaning of clause 44.0 of the contract.

168. The contractual obligation on the owner to prove damage set out in clause 44 of the contract is, I consider, analogous to the common-law position. In *Sovereign v Bevillesta (No 2)*[34] Austin J discussed the distinction between a

[34] [2002] NSWSC at [77] per Austin J.

case where it is difficult to assess damages, and a case where a plaintiff has failed to prove its case:

> There is an important distinction between a case where it is difficult to award damages, and to do so involves making an estimate as to which there cannot be mathematical precision and a case where the problems of assessment of damages are so great, or the plaintiff's evidence is so weak, as to lead the Court to conclude that the plaintiff has failed to prove its case with respect to the allegation of loss.
>
> …Where the case is in the latter category, the plaintiff has no ground to complain if the award of damages is too small to cover its loss, if it has failed to provide evidence upon which a more adequate assessment could have been made (*Minchin v Public Curator of Queensland* [1965] ALR 91,93), for in all cases where damages are claimed for breach of contract, actual proof of loss is required (*Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177,178)

169. Mr Levine contends that the applicant's claim in this case falls into the latter of the two categories described by his Honour.

170. In *Bonham-Carter* Goddard CJ also stated:

> Plaintiffs must understand that, if they bring an action for damages, it is for them to prove their damage: it is not enough to write down particulars and throw them at the head of the court saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.[35]

171. Mr Levine submits that the alleged completion works in paragraph 8 of the competing builder's witness statement, unsupported by proper discovery of documents relating to the alleged costs, stand as mere assertions of the type that are not countenanced by the authorities.

172. There is indeed little direct evidence on behalf of the owner from which I am able to make a finding that the amounts now claimed by the owner are "reasonable" within the meaning of clause 44.0 of the contract. A party in the position of the builder, wishing to challenge the amounts claimed by an owner under a provision such as clause 44.0 of the contract, would be assisted by having provided to him the completing builder's specification of works. Also usually to hand would be a detailed breakdown of the completion works, often by reference to the completing builder's contract price breakdown and, in a case such as this, invoices supporting the amounts listed compendiously in paragraph 8 of the completing builder's witness statement.

173. In the absence of direct evidence, the standard of proof for proving damages only requires evidence from which the existence of damage can be "reasonably inferred" and which provides adequate data for calculating its amount. [36]

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35 *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR at 178.

36 *Ashcroft v Curtin* [1971] WLR 1731.

174. What will be considered appropriate evidence from which the claimed damage can reasonably be inferred will be a matter left for the Tribunal to decide.

175. I am satisfied that an inference to the effect that the owner has incurred the claimed costs, and that they are reasonable, is open on the following facts:

    (a) There being no evidence that it was otherwise, I find that the completing builder's contract was a *bona fide* arm's length transaction;

    (b) the plans and specifications the subject of the completing builder's contract were the same as those the subject of the contract;

    (c) there is no evidence that the town houses were completed in a way that diverged from the requirements of the contract;

    (d) the categories of costs referred to in the summary contained in paragraph 8 of the witness statement of Mr Durovic signed 9 November 2017, the completing builder's director, are generally consistent with the categories of incomplete works shown in the photographs taken on 6 November 2016;

    (e) there was little cross-examination of Mr Durovic in respect of his summary in paragraph 8 of his statement signed 9 November 2017 of the costs incurred by the builder to complete the works, or in respect of his claimed 20% margin; and

    (f) notwithstanding, as is common ground, that there was no invitation from the owner for the builder to inspect the site following the owner ending the contract, it was always open to the builder to arrange to go to the site,[37] knowing that there would be a claim for the reasonable cost of completing the work under the contract and rectifying allegedly defective work.

176. I therefore find, on balance, that the owner has proved her entitlement to be paid $269,500 pursuant to clause 44 of the contract, as the reasonable cost of completing the building works and fixing defects.

177. As a result of my construction of the loan agreement, providing as it does for a reduction of the contract price from $660,000 including GST to $630,000 including GST, there is no unpaid balance of the contract price from which the owner's completion and rectification costs are to be deducted pursuant to clause 44.1 of the contract.

178. It also follows that the owner the owner having paid the builder $640,200 the builder has been overpaid $10,200. There will be an order for recovery of this amount.

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[37] And, if necessary, seek an order from the Tribunal allowing him to do so.

Issue (e)–Does either party owe to the other liquidated damages for delay caused to the works from the date for completion (28 July 2016) to the date of termination (18 October 2016)?

179. The building permit was issued on 23 September 2015. I find that the builder commenced the works on that date or, as the builder gave evidence, shortly thereafter.

180. The "time of completion" provisions in the contract required the builder to complete the works within 310 days of that date, or 28 July 2016.

181. The builder claims $11,500 liquidated damages from 28 July 2016 to 18 October 2016 at the contract rate of $1,000 per week.

182. Paragraph 13 of the Amended Points of Claim state that the builder "holds the owner liable for delays" incurred as a result of the owner delaying the works by "failing to provide proper plans and specifications from her agent Shansa Building Designs."

183. The builder claims that the carrying out of the Building Works was therefore delayed "by a cause that [was] beyond the builder's direct control" within the meaning of clause 34 of the contract.

184. The builder failed to give written notices of claimed delay to the owner, as required by clause 34.1 of the contract. There was also no evidence led by the builder from which it can reasonably be concluded that his failure to complete by 28 July 2016 was caused by the alleged failure on the part of the owner, as opposed to other causes of delay.

185. The builder's claim for liquidated damages is dismissed.

186. The owner claims $9,900 liquidated damages from 28 July 2016 to 18 October 2016 at the contract rate of $900 per week.

187. The builder gave evidence that he was "really disappointed" how things turned out with the owner. This is because he considered that he "did everything to help her, as [he] would his own mother". I find from his evidence, and that of Ms Vlahovic, that the builder provided considerable assistance to the owner by doing things which were, in the builder's words, "on top of the contract". The nature of the various payments summarised in the schedule to the loan agreement also demonstrates this.

188. I find that in these circumstances the owner is taken to have waived strict compliance with the conditions of the contract concerning the date by which the builder was required to complete the works.

189. The owner's claim for liquidated damages is dismissed.

Issue (f)–Does the applicant owe any and if so what damages to respondent for loss caused by improperly claiming lock up and fixing stages progress payment?

190. I find that the owner paid the lock-up payment of $211,200 on 26 November 2015, when owner alleges that it didn't occur until "some time

after 20 April 2016". The owner claims damages, calculated by the interest paid on a sum arrived at by deducting from the lock-up payment of $211,200 the sum of $21,250 being the total short payments by respondent in respect of the deposit and base stages. On the resulting sum of $189,680 interest at 9.5% for 147 days is claimed at $7,242.

191. I also find that the owner paid the fixing payment of $135,300 on 22 April 2016 when, I have found, fixing was not achieved before termination on 18 October 2016. The owner claims damages, calculated by the interest paid on a sum arrived at by deducting from the fixing payment of $135,300 the sum of $21,250 being the total short payments by respondent in respect of the deposit and base stages. On the resulting sum of $113,780 interest at 9.5% for 180 days is claimed at $5,316.

192. I find this loss and damage, amounting to $12,558, to have been incurred because of the builder's breach of clause 29 of the contract, entitling the builder to make a relevant stage claim only when the relevant stage has been completed, and there will therefore be an order in favour of the owner.

Issue (g)–Does the owner owe the builder $9,636 for alleged variations to the works?

193. One of the builder's two variation claims is for $3,443 for extra excavation costs over and above the sum of $5,000 claimed to have been allowed in the contract for such works. I am not satisfied that claimed provisional sum of $5,000 appears in the "provisional sums allowances" section of the builder's quote, and it is dismissed.

194. The second variation claim in dispute is for $6,193 for alleged extra concrete used by the builder to found the edge beam at a greater depth than shown on the plans. The builder relies on an exclusion in the contract, which states:

> Any issues due to the fall of the land resulting in extra concrete, mesh or blinding being required, resulting in the cost exceeding $88.00 inc GST per metre to be added as a variation to the quotation-quotation is based on minimum classification of "H" slab.

195. The engineer's drawing no 2498-S04 states that the minimum founding depth of the edge beam below the finished floor level was 500mm. I am satisfied that the builder was therefore on notice that a founding depth of the edge beam greater than 500mm may have been required as part of the required works, and the possibility of such further works formed an express builder's risk that was not subject to the exclusion.

196. The claim is dismissed.

Issue (h)–Does the owner owe any and if so what amount for late progress claim payments?

197. The builder claims interest as damages for the owner's short payments of the deposit and base stages claimed by the builder. I have found that by the

terms of the loan agreement, the amount of these short payments formed part of the loan monies advanced to the owner, and that they are expressly referred to in the schedule to the loan agreement. As I have construed the loan agreement, the parties agreed that the short payments were not to be paid by the owner until after the sale of the first town-house, without any requirement that interest should also be paid. At the time of sale, the owner had asserted her right to set off against her liability to pay these amounts against the builder's liability in respect of her completion and rectification costs.

198. The claim is dismissed.

199. I make the orders attached.

A. Kincaid
Member