

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D1327/2012

CATCHWORDS

Domestic building dispute under the Domestic Building Contracts Act 1995 - alleged defective work – work alleged not to be done in a proper and workmanlike manner – work alleged to be incomplete – alleged delays in completion of building works – alleged breaches of s30(7) and 40(3) of Domestic Building Contracts Act 1995 – counterclaim by builder for monies owed under building contract.

APPLICANT	Li Ping Xiao
RESPONDENT	Eliana Construction and Development Group Pty Ltd
WHERE HELD	Melbourne
BEFORE	Member F. Marks
HEARING TYPE	Hearing
DATE OF HEARING	21, 22 and 23 May, 3, 4, 9 and 31 July 2014 (applicant's submissions filed 20 August 2014 and respondent's submissions filed 28 August 2014)
DATE OF ORDER	19 December 2014
CITATION	Xiao v Eliana Construction and Development Group Pty Ltd (Building and Property) [2014] VCAT 1589

ORDERS

- 1 The applicant must pay the respondent \$43,301.
- 2 Costs reserved. Liberty to apply. **Direct the Principal Registrar to list any application for costs before Member Marks and allow 2 hours.**

MEMBER F. MARKS

APPEARANCES:

For the Applicant	Ms Li Ping Xiao in person
For the Respondent	Mr J. Stavris of Counsel

REASONS

Background

- 1 The applicant owner and the respondent builder entered into a contract dated 14 July 2010 for the construction of a new house in Brunswick (**'the contract'**). The contract price was \$348,000. The owner lived in her home at the front of her property during the construction of her new house at the rear of her property.
- 2 The builder commenced works in August 2010. The work was completed in approximately July 2012. The certificate of occupancy issued on 20 July 2012. The owner took possession of her new house prior to handover and without paying the builder the balance owed under the contract.

The owner's claim

- 3 On 19 December 2012 the owner issued proceedings against the builder. The owner now claims that the building works are defective and have not been carried out in a proper and workmanlike manner and are incomplete. The owner claims that the builder delayed the completion of the building works, has repudiated the contract, has breached sections 30(7) and 40(2) of the *Domestic Building Contracts Act 1995* (**the Act**) and performed variations without her consent.
- 4 The owner claims damages of \$134,229 for breach of the statutory warranties and breach of contract and liquidated damages of \$13,500 for delay in completion of the building works.

The builder's claim

- 5 On 7 August 2013 the builder issued a counterclaim for \$74,751.66 against the owner for monies it claimed were outstanding under the contract.

The hearing

- 6 The matter came before me for hearing on 21 May 2014 with three days allocated, which proved to be insufficient. The hearing continued over 7 days, taking into account the availability of the parties and their experts, the Tribunal dealing with various applications including allowing amendments to the owner's claim. The owner was assisted by interpreters during the course of the adjourned hearing. Unfortunately, it was not possible to arrange for the same interpreter to assist the owner on each day of the hearing.
- 7 Although the owner was legally represented when she commenced proceedings, and at various times during the interlocutory stages of the proceeding, she was not represented at the final hearing. The owner gave evidence herself. The owner also called evidence from Dr Ian Eilenberg, a building consultant and Mr Rosier, a quantity surveyor. Mr J Stavris of counsel represented the builder. The builder called evidence from Mr Magdy Sowiha, director of the builder and Mr James Campbell, building consultant.

- 8 Prior to the start of the hearing the owner gave the respondent Mr Rosier's report dated 8 August 2013, which had been updated on 6 November 2013, (**'Mr Rosier's report'**), on which she intended to rely. The owner filed Mr Rosier's report on 18 December 2013. The builder submitted that Mr Rosier's report was not included in the owner's list of documents dated 16 October 2013 (**'owner's list of documents'**) and that it had been made aware of the existence of Mr Rosier's report at the directions hearing on the previous Friday. The builder sought time to review Mr Rosier's report.
- 9 At the hearing the owner relied on the following expert reports: Dr Eilenberg's report dated 12 June 2013 (incorporating his report dated 19 November 2012) (**'Dr Eilenberg's report'**), his supplementary report dated 30 September 2013 (**'Dr Eilenberg's supplementary report'**) and Mr Rosier's report. The builder relied on Mr Campbell's report dated 11 June 2013 (**'Mr Campbell's report'**). These reports were in evidence.

Inspection of the owner's property

- 10 On the afternoon of the first day of the hearing, I visited the owner's house with the parties, their representatives and Dr Eilenberg and Mr Campbell. The alleged defects were pointed out to me. I observed that all of the doors to the rooms were shut and had locks on them, the dining room and the lounge rooms were being used as bedrooms, there was a second fully operational kitchen upstairs and the inside of the garage was plastered. It appeared as if the house was being used as a rooming house.

Orders for the experts to prepare a Joint Report and concurrent evidence

- 11 On the first day of the hearing I directed Dr Eilenberg and Mr Campbell, to prepare a joint report following our visit to the owner's property. I made orders that they list the items which they agreed were defective, the items on which they did not agree and their reasons for their disagreement. I also ordered Dr Eilenberg and Mr Campbell to give their evidence concurrently on the second day. Following a delay in the giving of concurrent evidence on the morning of the second day of the hearing, the experts gave concurrent evidence on the afternoon of the second day of the hearing.

The owner's applications

- 12 During the hearing the owner made various applications to adjourn the hearing, amend her claim and obtain further documents from the builder.
- 13 On the second day of the hearing, I was given an undated joint report prepared by Dr Eilenberg and Mr Campbell on 21 May 2014 (**'Joint Report'**). Mr Campbell attended the hearing in order to give evidence concurrently with Dr Eilenberg. However, Dr Eilenberg did not appear. The owner said that she had told him not to attend, although aware of the Tribunal's order.
- 14 The owner then made an application to adjourn the hearing. She submitted that she required some documents and correspondence held by her former solicitors

- who had ceased acting for her in December 2013. The owner confirmed that her former solicitors had handed files over to her in December 2013 and that she had made no attempt to contact her former solicitors to obtain the documents that she said she now required.
- 15 Counsel for the builder opposed the application. He submitted that the owner had legal representation during the proceeding and that the owner's former solicitors had prepared the owner's list of documents and given discovery. He submitted that the owner had said previously that she obtained all the files from her former solicitor. Further, he submitted that the relevant documents were contained in the folder that the builder had given the owner and produced to the Tribunal at the hearing.
 - 16 At 12 noon I adjourned the hearing until 2.15pm to give the owner an opportunity to contact her former solicitors and obtain legal representation for the hearing, including her application for an adjournment. I made orders that Dr Eilenberg attend the hearing in the afternoon to give concurrent evidence in the event that the owner's application for an adjournment was not granted.
 - 17 When the hearing resumed at 2.15pm, the owner advised that she had not contacted her former solicitors and did not intend to obtain legal representation. After hearing submissions from each of the parties, I was not satisfied that the owner should be granted an adjournment based on the principles in *Aon Risk Services Australia Ltd v Australian National University*.¹ I refused the adjournment for the reasons given orally at the hearing.
 - 18 On the second day of the hearing, the owner sought leave to obtain numerous documents from the builder which she listed in a document entitled Documents and evidence required by the applicant dated 22 May 2014 ('**owner's request for documents and evidence**'). Counsel for the builder opposed the application. He submitted that the documents requested were not relevant to the issues or had been produced, that the owner's former solicitors had prepared the owner's list of documents and all relevant documents had been exchanged during the interlocutory stages of the proceeding.
 - 19 Having reviewed the owner's request for documents and evidence and heard submissions, I refused the owner's application for the reasons given orally. I found that the parties had filed lists of documents and exchanged relevant documents when the owner had been legally represented.
 - 20 On the commencement of the fourth day of the adjourned hearing, on 3 July 2014, the owner made an application to amend her claim. A number of the owner's proposed claims were already included in her claim. I gave the owner leave to amend her claim to include a claim for \$12,650 for the replacement of an air conditioning unit which she says does not comply with the specifications.
 - 21 The owner also sought to amend her claim to include a claim for leaking bathrooms which she said she had discovered on 6 June 2014. I indicated to the owner that if she were to be granted an adjournment then she would have to pay

¹ (2009) 239 CLR 175

the builder's costs thrown away as a result of the adjournment. The builder's counsel opposed this application because he said it would have required the builder to obtain a further expert report and an adjournment of the hearing. The owner withdrew her application to amend her claim for leaking bathrooms because she was not prepared to pay the builder's costs thrown away as a result of an adjournment of the hearing to allow the builder to properly respond to the claim.

- 22 The owner sought leave to include a claim that the current Bonaire air conditioning unit was defective because it did not adequately heat and cool her new house. Counsel for the builder opposed this application. After hearing submissions from the parties I refused this application for the reasons given orally. Such an amendment would have required the further briefing of expert witnesses, the preparation of expert reports, the giving of expert evidence and an adjournment of the hearing and the payment of costs thrown away.
- 23 On the last day of the hearing, on 31 July 2014, the owner made two applications to amend her claim. Counsel for the builder opposed both applications. The owner sought to include new claims, including claims relating to the capacity of the power supply, storm water drainage and electrical fans. I dismissed the owner's application for the reasons given orally. I explained that this would require the preparation of expert reports and the giving of expert evidence. Again it would require an adjournment and the payment of costs thrown away.
- 24 At the end of the seventh and last day of the adjourned hearing, the owner sought leave to amend her claim to include a claim against the builder for installing a roller door in the garage without her consent. She claimed the costs of removing the roller door and installing a panel lift door.
- 25 I dismissed this application for the reasons given orally. I found that this claim was inconsistent with the owner's previous evidence, her expert's evidence and the documentary evidence. I said that it would require further expert reports and expert evidence and another adjournment of the hearing and the payment of costs thrown away.

Documents on which the parties relied

- 26 The Builder gave the owner and the Tribunal an arch lever folder of documents on which it relied at the hearing. The owner also relied on various documents in the folder. I have taken into account all of the documents to which the parties referred.

Has the builder repudiated the contract?

- 27 The owner claims that the builder has repudiated the contract. She claims that the builder refused to rectify the defects and acted in a manner inconsistent with its obligations under the contract. She relies on her emails to the builder dated 17 and 20 August 2012.
- 28 The owner's email dated 17 August 2012 is in response to the builder's letters requesting payment. In this email the owner complains about a number of issues.

She requests a contribution from the builder for the use of electricity from her home at the front of her property to construct her new house at the rear of her property. The owner requests the completion of what she claims to be incomplete work set out in the following reports: the architect's, Matthew Scully's report to her dated 9 February 2012, following his inspection of the property; the engineer's report from Furr Consulting dated 14 May 2012 to her following Mr Furr's inspection of the property dealing with structure and drainage; and the building surveyor's reports which she does not identify.

- 29 She also complains, amongst other things, about the leaking balcony resulting in water leaking onto the garage floor. The owner requests rectification of the defects and completion of the works. The owner's email dated 20 August 2012 encloses 2 lists of items which she claims to be defective. The first list includes 26 items and the second list includes items numbered 15 to 33 which appear to be the same as the items listed in Dr Eilenberg's report.
- 30 Mr Sowiha says that these emails are in response to his letter to the owner dated 13 August 2012. In his letter, headed "Final Notice" he confirmed his discussions with the owner on about 20 July 2012, in which he informed her that the occupancy certificate had issued and the owner had told him that she would not pay the outstanding amount under the contract. His letter addresses the three issues raised by the owner for refusing to pay the builder's outstanding account: the fact that the doors open inwards instead of outwards as shown in the drawings, the timber on the floor not being hardwood and partial leakage of water from the garage door.
- 31 The builder's letter responds to each of these issues raised by the owner. In the letter the builder states that the owner's intention was to use the garage as a bedroom and that a garage door cannot meet the conditions required for a bedroom. In the letter the builder states that it considers there is evidence which shows that over the last 8 months the owner has provided numerous excuses for not paying the outstanding monies. The builder confirms in the letter, the requests it has made to discuss any issues that the owner may have but that the owner has refused to meet with it. In the letter the builder considers that it is now forced to issue legal proceedings for recovery of the outstanding monies.
- 32 Counsel for the builder submitted that the owner's emails were sent after the Occupancy Permit issued on 20 July 2012 and that they cannot constitute an acceptance of a repudiation of a contract where the works, by that stage, were complete. Mr Sowiha says that he visited the owner's property a number of times when he was trying to handover the property to the owner but she refused to make any payment to the builder.
- 33 The onus is on the owner to prove that the builder's conduct was such that it repudiated the contract. On the evidence I am not satisfied that these letters sent after the Occupancy Certificate was issued and the building works completed, with some rectification work required, amount to a repudiation of the contract. The builder has not evinced an intention not to be bound by the terms of the contract. Accordingly, I find that the owner has not made out this claim.

The Joint report and concurrent evidence of Dr Eilenberg and Mr Campbell

- 34 The Joint Report of Dr Eilenberg and Mr Campbell filed on the morning of the second day of the hearing, lists the items of work which they both agree are defective or incomplete and the items on which they do not agree. Both experts gave concurrent evidence on the items listed in the Joint Report on the afternoon of the second day of the hearing.
- 35 The experts did not address the costs of the rectification work in their Joint Report although the experts had included costings in their reports. Dr Eilenberg estimated the cost of rectification at \$126,341 and Mr Campbell estimated the cost of rectification at \$5,205.09, if the works were performed by the builder and \$7,091.94, if a third party builder was engaged to do the works. Further, Dr Eilenberg and Mr Campbell did not give oral evidence nor were they tested on their written reports about their costings for rectifying the defective works.
- 36 Mr Rosier did not participate in the preparation of the Joint Report or give evidence concurrently with the other experts. On the fifth day of the hearing the owner called Mr Rosier to give evidence about his estimate of the costs of rectification. The builder relied on Mr Campbell's costs of rectification set out in his report.
- 37 I have prepared a table in which I describe each of the items listed in the Joint Report, which Dr Eilenberg and Mr Campbell agreed were defective. Where Mr Campbell included a cost estimate in his report, I have included his costing in the table. Where Mr Campbell did not provide any cost estimate in his report, I have not included any costing for Mr Campbell in the table.
- 38 I have also included Mr Rosier's cost estimates for the rectification works as set out in his report and noted any changes to, or qualifications of his opinion, which he made at the hearing. I have not included Dr Eilenberg's cost estimates set out in his report because the owner said that she did not intend to call Dr Eilenberg to give further evidence. The owner called Mr Rosier to give evidence of his cost estimates thereby confirming that she relies on his costs estimates. Given the owner's decision to rely on Mr Rosier's cost estimates and not Dr Eilenberg's, I have not taken Dr Eilenberg's cost estimates into account.
- 39 I have used the numbering system used in Dr Eilenberg's report and adopted in the Joint Report. I have considered each of the defective work, or categories, individually. I set out my assessment of the raw costs associated with the defective work that I have found proven. I have not included any amount in respect of preliminaries, margin, contingency fees or GST to these individual amounts but have added those costs to the aggregate raw amount found proven.

CLAIMED DEFECTIVE OR INCOMPLETE WORK

Item no/ description by owner of claimed defect (Dr Eilenberg considers item to be defective or incomplete)	Builder expert Campbell	Rosier cost estimate (owner) \$	Campbell cost estimate (builder) \$	Tribunal allows (\$)

<p>1. Rainwater head outlet requires a larger overflow hole. As Mr Rosier has costed this item separately I will allow \$75.</p>	Agreed	75	81 (costed as part of item 2)	75
<p>2. The down pipe is too short but has now been fixed. On inspection it was apparent that the down pipe had been fixed. The owner did not give evidence about who fixed the down pipe. There was no evidence that the owner paid for the work. In the absence of such evidence I am not satisfied that the owner paid for the rectification work.</p>	Not seen	100	Costed as part of item no 1	Nil
<p>4. Top Flashing over the garage, which has a lapped joint, should be replaced with a single full length unit. Mr Campbell has not costed this work in his report. I will allow Mr Rosier's costing of \$380 for rectification of this work.</p>	Agreed	380		380
<p>5. A number of areas of brick work need to be completely cleaned. Mr Campbell has set out the size of the area to be cleaned. Mr Rosier has costed the work on the basis of 8 hours plus materials, at \$490 but has not specified the size of the area. I will allow Mr Campbell's costing of \$594.90 because he specifies the area.</p>	Agreed	490	594.90	594.90
<p>6. General brickwork defects- the window sills need to have an articulation joint completed at one end and require filling with flexible sealant to permit expansion. The experts disagreed whether there was any requirement to provide movement joints at brick sills other than where an articulation joint passes alongside an opening. The experts agreed that the articulation joint needed to be completed at the east window. Dr Eilenberg considered that expansion work was also needed at the end of the south window. The experts agreed that there was no evidence of movement. However, Dr Eilenberg considered that provision should be made for movement in any event. I prefer the evidence of Dr Eilenberg because he has made provision for movement occurring whilst accepting that it has not occurred to date. I find that that provision should be made for movement at the south and east windows and that the articulation joint should be extended and caulked at the east window. Mr Rosier has costed the rectification works to provide movement joints at the sills at \$720. I will allow Mr Rosier's costings. Mr Rosier has also costed the rectification of general brick work defects, which he does not identify, at \$1,240. Neither the owner, Dr Eilenberg nor Mr Campbell gave evidence about general brickwork defects beyond the window sills set out above. I am not satisfied on the evidence that that there is any basis for this additional costing and I will not allow it.</p>	Partly agreed	720	Nil	720
<p>8. The garage step missing and the work is incomplete. The experts agreed that the work is incomplete.</p>	Agreed incomplete	230	219.50	230

<p>Mr Campbell has costed the installation of a brick threshold sill at \$219.50. Mr Rosier has costed the rectification work to construct a concrete infill to the step which the experts agree is missing. I find Mr Rosier's costing of \$230 to be fair and reasonable.</p>				
<p>9. Structural support- there is a lack of external slab support for the brick walls and the overhang is excessive. On inspection it was apparent that some of the defective work had been repaired but that rectification work was still needed on the east side of the owner's home. The experts agreed that the work was defective and required rectification. Mr Campbell did not cost the rectification work in his report because the work had been done at the time of his inspection.</p> <p>Dr Eilenberg gave evidence that the defective work was set out in the report prepared by Mr Tony Furr of Furr Consulting Pty Ltd dated 14 May 2012 (Furr Report). Furr Consulting were the consulting engineers engaged by the owner. Their report set out the brickwork overhanging the slab edge which they considered to be defective as well as the loose foundation or void under the slab edge which they considered to be also defective. Mr Furr was not called by the owner.</p> <p>Dr Eilenberg agreed with the rectification work suggested by Mr Furr in the Furr Report. The Furr Report noted that both the south edge of the raft slab adjacent the kitchen and the south west corner of the powder room were poured short resulting in the brick not being supported completely. Mr Furr recommended that the corner be "scabbled" sufficiently and a concrete corner formed.</p> <p>Mr Furr stated in the Furr Report that in his opinion, the brickwork was satisfactory, other than the corner that he had noted.</p> <p>Mr Furr also recommended that the void under the slab edge at the re-entrant corner of the garage be excavated and the void filled with compacted cement stabilised sand to ensure that further foundation softening did not occur.</p> <p>Mr Rosier gave evidence about the costing of the rectification work. Mr Rosier's report stated the defective work was a lack of proper construction of a concrete edge beam going to the perimeter of the residence.</p> <p>Mr Rosier's report costed the rectification work at \$26,000 for the excavation to expose the edge beam and underpin or make good as required. Mr Rosier was unable to explain his costing methodology at the hearing.</p> <p>At the hearing Mr Rosier agreed that his costing of \$26,000 was excessive and he conceded that the rectification work was likely to be less than \$4,000.</p> <p>I find that Mr Rosier's costing goes beyond the rectification work recommended in the Furr Report and the concurrent evidence given by Dr Eilenberg and Mr Campbell. I am not</p>	<p>Agreed</p>	<p>26,000</p>	<p>Nil cost as rectified</p>	<p>2,000</p>

<p>satisfied that Mr Rosier's costing accurately reflects the rectification work on which Dr Eilenberg and Mr Campbell gave concurrent evidence. Nor am I satisfied that it is reasonable or necessary to carry out all of the rectification work on which Mr Rosier has based his costings.</p> <p>I accept Mr Rosier's evidence that the rectification work would be less than \$4,000. As part of the work has been rectified and the owner has not provided any evidence that she paid for this work I will allow \$2,000 towards the work that requires rectification.</p>				
<p>10. The outside power point (GPO) required for the pump has been installed in the incorrect location</p> <p>On inspection it was apparent that the work had been rectified.</p> <p>The owner did not provide any evidence that she had arranged for the rectification work to be done and/or paid for that work. The owner did not provide any proof of payment to any person. I am not satisfied that the owner has paid for this rectification work.</p>	Agreed but it has been fixed	100	Nil	Nil
<p>12 The kitchen cupboard has penetrations that need to be filled.</p> <p>Both Mr Rosier and Mr Campbell have costed the sealing of these penetrations. Mr Campbell has allowed for a carpenter to seal the penetrations.</p> <p>Mr Rosier has allowed for a carpenter and plumber to seal the penetrations. No evidence was given that a plumber was required to do the rectification works. I will allow Mr Campbell's costing for a carpenter to seal the penetrations in the kitchen at \$44.50</p>	Agreed	380	44.50	44.50
<p>13. The kitchen sink is missing clips and needs to be properly sealed to stop water leaking.</p> <p>The experts agreed that the installation of the kitchen sink was defective. Mr Campbell costed the work to rectify the kitchen sink at \$158. Mr Rosier costed the defective work to remove and reinstall 6 sinks and/or basins. No evidence was given about defective basins.</p> <p>I will allow Mr Campbell's costing of \$158.</p>	Agreed	720	158	158
<p>16. There are penetrations in the bathroom vanity that need to be sealed.</p> <p>The experts agreed that these penetrations were defective and needed to be sealed. Mr Campbell costed the rectification works at \$44.50. Mr Rosier costed the installation of a new shelf with the correct penetrations.</p> <p>As no evidence was given of the need for a new shelf, I will allow Mr Campbell's costing of \$44.50 for the sealing of the penetration.</p>	Agreed	165	44.50	44.50
<p>17. The electrical conduit in the laundry is untidy and needs to</p>	Agreed	125		125

<p>be reinstalled in hard conduit.</p> <p>The experts agreed that this work was defective. Mr Campbell did not provide any costings. Mr Rosier costed the concealing of the conduit. I will allow Mr Rosier's costing of \$125.</p>				
<p>18. There are penetrations in the laundry cupboard that need to be sealed.</p> <p>The experts agreed that this work was defective and that the penetration needed to be sealed. Mr Campbell costed the sealing at \$44.50. Mr Rosier costed the installation of a new panel. No evidence was given about a new panel. I will allow Mr Campbell's costing of \$44.50.</p>	Agreed	410	44.50	44.50
<p>19. Handles need to be installed in the units in the bathrooms and laundry.</p> <p>The experts agreed that this work was defective.</p> <p>Mr Campbell did not cost this item. Mr Rosier costed the supply and fitting of the handles at \$155. I will allow \$155.</p>	Agreed	155		155
<p>20. The light in the garage needs to be reinstalled.</p> <p>Mr Campbell did not cost the rectification work. Mr Rosier costed the refitting of the light by an electrician at \$75. I will allow \$75.</p>	Agreed	75		75
<p>23. A smoke detector is inoperative as it has a plastic cover over it. This item has now been fixed.</p> <p>Mr Campbell has not costed the rectification work. Mr Rosier has costed the rectification work at \$19 for an electrician to remove the seal and check its operation. The owner did not give any evidence about who carried out the rectification work. Nor did she provide any evidence of proof of payment for the work.</p> <p>I am not satisfied that the owner has arranged for this work to be done and has paid for the work.</p>	Agreed	19		Nil
<p>24. The balcony hand rail is unsafe and requires strengthening at least, and the ends of the hand rail need to be fixed to the building.</p> <p>The experts agreed that the handrail is defective.</p> <p>Mr Campbell did not cost the rectification work. Mr Rosier costed the removal and replacement of the handrail. He agreed that his costing of the rectification work, which included labour to remove and replace the handrail, was also included by him in the rectification work to demolish and rebuild the upstairs rear balcony (see item 34). He agreed that this was a double up. Consequently, I will not allow the labour cost of \$260.</p> <p>On inspection I observed that the handrail on the balcony looked unsightly as the builder had added an external support to strengthen it, as recommended by Mr Furr in the Furr</p>	Agreed	2,135		1,875

<p>Report.</p> <p>I find that a new handrail of acceptable quality should be installed, when the rear balcony is replaced. Mr Rosier has costed a new handrail at \$1,875.</p> <p>I will allow the costing for the installation of a new handrail at \$1,875. I will allow this costing as part of the rectification work to remove and rebuild the rear balcony which I deal with in item 34 below.</p>				
<p>25. The balcony does not have any drainage.</p> <p>The experts agreed that this was a defect. Mr Campbell has costed this defect at \$195.</p> <p>I am satisfied that drainage will have to be provided when the rear balcony is replaced. Mr Rosier has costed the cost of providing overflows at \$360. I will allow \$360.</p>	Agreed	360	195	360
<p>26. The quality of the carpentry is of poor workmanship and includes splits in the doors around the hinges and poorly installed latches.</p> <p>The experts agreed that this work was defective. Mr Campbell costed the rectification of the carpentry at \$1,400 for 16 hours of work. Mr Rosier has costed the work at \$870 for 4 hours of work. On inspection it was apparent that there were a number of items that needed to be rectified. I will allow Mr Campbell's costing of \$1,400.</p>	Agreed	870	1,400	1,400
<p>27. Winder handles are missing from windows and need to be replaced.</p> <p>The experts agreed that this work was defective. Mr Campbell did not cost the replacement of the winder handles.</p> <p>Mr Rosier costed the replacement of winder handles at \$115 for labour and materials. He also costed a locksmith and the supply of keys at \$200. As no evidence was given about the need for keys or a locksmith I will allow the cost of the replacement of the winder handles at \$115.</p>	Agreed	315		115
<p>28 and 29.</p> <p>The wall tiles in the bathroom have been badly cut in 2 places and the tap flanges do not cover the penetration cut. The tiles need to be removed and replaced.</p> <p>On inspection it was apparent that a couple of tiles needed to be replaced. The experts agreed that the work was defective. Mr Campbell costed the work at \$574 for 8 hours work and materials. Mr Rosier costed the work at \$310 for 4 hours work and materials.</p> <p>I am satisfied that Mr Rosier's costing of \$310 is fair and reasonable.</p>	Agreed	310	574	310
<p>31. The light in the upstairs cupboard would not turn off and the electrical installation requires checking.</p>	This has been	75	Nil	Nil

<p>On inspection it was apparent that the light had been fixed. Dr Eilenberg considered that the installation should be checked. Mr Campbell considered that the issue had been fixed.</p> <p>Mr Campbell had not costed this work. Mr Rosier has costed this work at \$75. I am not satisfied that it is reasonable or necessary to carry out these works.</p>	fixed.			
<p>32. The insulation in the roof has been poorly installed or disturbed by other tradesmen and needs to be respread evenly.</p> <p>The experts agreed that the insulation needs to be respread evenly. Mr Campbell has not costed this work.</p> <p>Mr Rosier has costed the resspreading of the insulation together with the supply and installation of down light covers. The experts did not refer to the issue of down light covers in the Joint Report or in their concurrent evidence. However when Dr Eilenberg dealt with the issue of insulation in his report, he stated that he did not see any protective covers for down lights. As I have not heard any evidence about this item, I make no finding as to whether protective covers are required or whether they have been installed.</p> <p>Mr Rosier's costing of \$1,010 includes the cost of a carpenter for 8 hours at \$65 per hour, to install 24 down light covers and respread the insulation. I will allow \$100 for the carpenter to respread the insulation.</p>	Agreed.	1,010		100
<p>33. The builder has not supplied the owner with various certificates which need to be supplied.</p> <p>The experts agreed that the relevant certificates must be supplied to the owner. Having heard the evidence of the parties I find that the builder has given the owner the relevant certificates.</p>	Agreed.	Included in item 32	Nil	Nil
<p>34. The rear balcony is leaking and needs to be replaced completely.</p> <p>On inspection I observed water leaking from the balcony into the garage underneath the balcony. The experts agreed that the rear balcony is defective and needs to be removed and replaced.</p> <p>Mr Rosier has costed the rectification works at \$9,807. In his costings, Mr Rosier has provided for the removal and reinstatement of the handrail. As I have stated at item 24, I find that the builder should also replace the handrail rather than reinstalling it. I have allowed for the cost of the replacement of the hand rail in item 24.</p>	Agreed	9,807		9,807

ITEMS NOT AGREED BY THE EXPERTS

Was the builder required to install a corner guard to protect the corner of the garage?

- 40 This item is listed as item 3 in the Joint Report. At the hearing the experts and the parties agreed that the plans and drawings did not include any form of corner guard to protect the corner of the garage from cars using the two laneways that border the owner's property. The owner said that she did not ask the builder to install a corner guard to protect the corner of the garage. I find that the builder did not agree to install a corner guard. I find that the owner has not made out this claim.

Did the builder damaged the electrical pit in the laneway?

- 41 This item is listed as item 7 in the Joint Report. On inspection it was apparent that the electrical pit had been repaired. The experts agreed that looking at Dr Eilenberg's photo no 13 at page 9 of his report, the pit cover needed to be repaired. The experts agreed that the pit cover was located in the laneway and not on the owner's property. The owner's claim is that the builder's workman damaged the cover of the pit when looking for the electrical cable.
- 42 There was no dispute that the owner was responsible for arranging for the connection of the electrical and other services to her property, that the power company dug up the laneway to install the pit and that the laneway was reinstated by the council. In the owner's email to Mr Sowiha dated 14 August 2012, she stated that the builder had repaired the corner of the pit, but that it required further repair work. Mr Sowiha gave evidence that as far as he was aware, his workman had not done any work at or near the pit because they did not need access to the pit.
- 43 Having heard the evidence of the parties I am satisfied that the builder caused some damage to the corner of the electrical pit in the laneway outside the owner's property. However, it appears to have carried out repairs to the pit. I am not satisfied that the work was not carried out by the Council at no cost to the owner. Also, I am not satisfied that the owner has paid for the repair work. Consequently, I find that the owner has not made out her claim for any damages.

Should the doors open outwards rather than inwards?

- 44 This item is listed as item 11 in the Joint Report. The owner claims \$14,160 for the cost of the rectification work. There was no dispute between the parties that the plans showed the doors opening outwards and that the plans used to obtain the permits showed the doors opening outwards.
- 45 At the hearing the owner conceded that her claim for new doors which complied with the plans, was limited to the French doors noted on her architect's drawings as W5, and W7 (both downstairs doors at the meals area), W26 (upstairs balcony doors) and the garage pedestrian door opening inwards (instead of outwards as shown on the plans).

- 46 The builder disputed the owner's claim. Mr Sowiha gave evidence that during construction, the owner requested him to vary the contract so as to change the doors W5, W7 and W26, from opening outwards, to opening inwards for security reasons. His evidence was the owner wanted to install security doors in the future.
- 47 Mr Sowiha relied on various documents to support his evidence. In particular, he relied on his undated handwritten note, which he said showed the agreed change to the doors. He said that he and the owner had initialled his note. Mr Sowiha's handwritten note listed various items. His third entry states: *# cancel the 2 windows beside the W7 (W6 and W8) missing and add one security door in W7 & W5 & W26 with no variation in cost. W7 & W5 & W26 is (are) French doors and not sliding doors.* The letters MS and Li appear at the end of this item. Mr Sowiha said that the builder created a variation from his handwritten note and in turn, invoice no 202 dated 1 July 2011.
- 48 The owner gave evidence that she did not have any discussions with Mr Sowiha about security issues or request him to vary the contract at any time. She also said that she did not initial or sign any variation or handwritten note relating to any change to the doors from opening outwards to opening inwards.
- 49 I have reviewed all of the relevant documents on which the parties relied. The builder's letter dated 31 May 2012, to BSGM Consulting Building Surveyors, attached a copy of a plan with the builder's stamp affixed, dated 30 May 2012. The attached plan shows a change to the original plans. The attached plan shows doors W5, W7 and W26 as having been sketched as opening inwards.
- 50 I find that the owner gave inconsistent evidence and that her evidence did not accord with the documents in evidence, including Mr Sowiha's undated handwritten note. I also find that the owner's evidence was inconsistent with the marked up plan which the builder sent to the building surveyor on 31 May 2012, showing a change to doors W5, W7 and W26, marked up by hand, where the doors are marked to open inwards, in contrast to the original plans.
- 51 I find that the owner requested the builder to change doors W5, W7 and W26, from opening outwards to opening inwards, for security reasons giving the owner the ability to allow for the installation of security doors in the future. I find that the owner has not made out her claim in relation to these doors.

Windows

- 52 At the hearing the owner conceded that her claim for defective windows was limited to the window appearing in photograph 24 in Dr Eilenberg's report at page 11. Although the experts did not address this issue at the hearing, they addressed the issue in their reports. In his report, Dr Eilenberg considered that the window was short and there was a gap at the top. He considered the gap to be the result of the incorrect sized window for the height in the brick courses.
- 53 In his report, Mr Campbell considered the gap above the window to be consistent with normal building practice. He considered that window frames were known to settle with the settlement of the wall frame and any settlement

would be addressed at the builder's maintenance period. In his opinion the window was a standard manufacturer's size and suitable for its purpose.

- 54 Mr Campbell considered that the gap could be rectified without removing the window. I am not satisfied that the window is the wrong size or that there is any requirement to remove this window.
- 55 I find that the window is defective as the gap at the top needs to be filled. Mr Campbell costed the rectification work of putting infill over the window at \$80. Mr Rosier did not provide a separate costing for this rectification work. I accept Mr Campbell's costing of \$80.
- 56 In their reports, Dr Eilenberg and Mr Campbell also agreed that the window, in photograph 23 at page 11 of Dr Eilenberg's report, was defective. A cavity flashing was required over the window with weepholes formed to drain the cavity. I find that this window is defective. Mr Rosier did not provide a separate costing of this item. Mr Campbell costed the rectification work at \$159.50 and I will allow this costing.

Did the builder supply benches or a stove that were the incorrect height?

- 57 This item has been dealt with as item 14 in the Joint Report. On inspection it was apparent that this issue had been rectified. The owner said she arranged for the legs of the stove to be replaced at no cost, so that the stove is now the same height as the kitchen benches. Mr Campbell said that on his inspection, the legs of the stove had not been replaced but had been adjusted to bring the height of the stove into line with the height of the benches. In cross examination the owner conceded that this item had been fixed before Dr Eilenberg prepared his report dated 12 June 2013. I find that neither the bench tops nor the stove are defective. I find that the owner has not made out this claim.

Does the shower unit comply with the specifications?

- 58 This item has been dealt with in item 15 in the Joint Report. The owner originally claimed that the builder had installed the incorrect shower unit. The experts agreed that the shower complied with the specifications. At the hearing the owner claimed that the diverter, which formed part of the shower unit, was too high for her to reach and should not have been installed. The owner agreed that she did not give the builder any installation instructions. Mr Sowiha said that the builder installed the shower unit in accordance with the manufacturer's instructions.
- 59 I find that the builder has installed the specified shower unit in accordance with the manufacturer's instructions and that the owner did not give the builder any instructions about the installation of that unit. I find that the owner has not made out her claim.

Has the garage door been installed incorrectly?

- 60 This item is item 21 in the Joint Report. On inspection it was apparent that there was a small gap between the ceiling of the garage and the top of the roller door.

- 61 Mr Campbell considered that the garage roller door had been installed correctly and that the gap at the top was not a defect. In Mr Campbell's opinion the gap between the top of the roller door and the garage ceiling was consistent with industry standards, it did not breach any regulations and was installed in accordance with the heights in the drawings.
- 62 Further, Mr Campbell said that there was no mandatory requirement for concealing the roller door in the open position. Dr Eilenberg agreed that there was no Australian Standard dealing with this issue.
- 63 I am satisfied on the evidence before me that the garage door has been installed correctly and that it is not reasonable or necessary to carry out rectification works.

Is the conduit on the garage wall defective?

- 64 This item has been dealt with as item 22 in the Joint Report. Dr Eilenberg considered that the conduit on the garage wall, which led to the motor to the roller door, was untidy. He considered that it should be concealed or taken up behind the architrave and across the wall at the ceiling, in a square conduit, to conceal it as much as possible. Mr Campbell considered that the conduit was not a defect and had been placed on the wall as a result of a variation to the contract.
- 65 Mr Sowiha's evidence was that the specification provided for a panel lift door, which, when opened, sat under the ceiling of the garage. He said that the builder intended to place the power point for the panel lift door in the ceiling near the door motor, which was also located in the ceiling.
- 66 Mr Sowiha said that at a late stage in the construction, the owner requested him to install a roller door instead of a panel lift door, because she said that the panel lift door, when open, lowered the height of the ceiling. He said that at the time of the owner's request for the change to the roller door, the builder had installed the cable for the panel lift door but not the power point or the roller door.
- 67 He said the builder placed the conduit containing the electrical cable on the wall because the plastering had been done already at the time of the request. He said he did not know whether his staff had spoken to the owner about the need to put the conduit on the wall.
- 68 The owner at first denied but then agreed that she had requested the builder to change the garage door from a panel lift door to a roller door. She said that she was concerned that when opened, the panel lift door would sit under the ceiling, resulting in a lowering of the ceiling height. She disputed the builder's claim that the current location of the conduit was the only place where the builder could run the conduit.
- 69 On inspection it was apparent that the conduit looked untidy and was very noticeable on the garage wall. If, as Mr Sowiha said, the builder had completed the plastering of the garage wall by the time that the owner made her request, no evidence was given as to why the conduit did not run either along the top or the bottom of the garage wall, where it would have been far less conspicuous.

70 I find that the builder should have concealed the cable in a square conduit and placed it in a position which was far less unsightly. I find that the conduit is defective. Mr Campbell has not costed the rectification work. Mr Rosier has costed the relocation and concealing of the conduit at \$225 which I accept.

Has the builder installed the incorrect timber on the ground floor?

71 The owner withdrew her claim for this item at the hearing.

Does the air conditioning unit comply with the specifications?

72 The owner now claims \$12,650 for the replacement of an air conditioning unit which she says does not comply with the specifications. She claims that the builder installed a Bonaire Model No BOO9 (1 phase cooling and heating unit when it should have installed a Fujitsu inverter reverse cycle ducted refrigerated system model number ARTC72LATU (3 phase) ('**Fujitsu air conditioner**') She says that quotation no 00419 dated 30 March 2011 from AH Airconditioning ('**Fujitsu quotation**') lists the air conditioner that the builder agreed to install.

73 The builder says that it obtained the Fujitsu quotation when it was requested quotations for different air conditioning systems during the contract. It says that it included the quotation in its list of documents dated 24 October 2013, which was discovered and provided to the owner. It says the owner first became aware of the Fujitsu quotation when she obtained a copy during the proceeding. It says that the owner wanted a refrigerated system but not one as expensive as the Fujitsu air conditioner. The although disputing the builder's evidence has not provided any documentary evidence to support her claim.

74 The onus is on the owner to prove that the contract provided for a Fujitsu air conditioner. On the evidence before me I am not satisfied that the contract provided for the Fujitsu air conditioner. I find that the owner has not made out her claim.

Summary of defects proven

75 As I have noted, the amounts which I have allowed in respect of defective works are raw costings. In relation to the *preliminaries and supervision*, Mr Rosier has adopted a flat percentage increase of 20% on the cost of the building whereas Mr Campbell has allowed a flat percentage increase of 9%. Given that a contingency allowance of 10% has also been added to the cost of building by Mr Rosier, I find that the lower of these two percentages better reflects the reasonable percentage to be added for preliminaries. I will allow 9% for preliminaries.

76 In relation to the *builder's margin*, Mr Rosier has allowed 30%, whereas Mr Campbell has allowed 25% for profits and overheads. Given that Mr Rosier has also added a contingency allowance of 10% to the overall cost of building, I find that the lower of these two percentages better reflects the reasonable percentage to be added for builder's margin. I will allow 25%.

77 I will allow a contingency fee of 10% which I accept as being reasonable.

78 The total amount which I find to be the reasonable cost of rectification and which I consider should be deducted from the sum payable to the builder is \$34,451 made up as follows:

Item	Description	Amount \$
1	Rainwater head outlet	75
4	Top flashing over garage	380
5	Cleaning of brick work	594.90
6	General brick work defects	720
8	Garage step missing	230
9	Lack of external slab	2000
12	Kitchen cupboard penetrations	44.50
13	Kitchen sink	158
16	Penetrations in bathroom vanity	44.50
17	Electrical conduit in the laundry	125
18	Penetrations in the laundry cupboard	44.50
19	Handles need to be installed in bathroom and laundry	155
20	Garage light	75
24	Handrail to balcony	1,875
25	No drainage to balcony	360
26	Poor quality carpentry	1,400
27	Missing winder handles for windows	115
28 and 29	Bathroom tiles badly cut	310
32	Insulation to be respread	100
34	Complete replacement of balcony	9,807
11	Windows	80 159.50
22	Conduit in garage	225
	Sub total	19,078

	Preliminaries (9%)	1,717
	Sub total	20,795
	Contingency (10%)	2,079
	Sub total	22,874
	Builder's Margin (25%)	5,718
	Sub total	28,592
	GST (10%)	2,859
	TOTAL	31,451

ALLEGED DELAY AND DAMAGES

- 79 The owner claims entitlement to liquidated damages of \$13,500, being agreed damages of \$250 per week, resulting from the late completion of the building works under clause 40 of the contract. The owner has the onus of establishing that the builder caused the delay in completion of the building works.
- 80 The contract required the builder to start the building works within 21 days after it received the building permit, the deposit and all other approvals and information from the owner. The builder had the necessary permits and information on 14 July 2010, the date the parties signed the contract. Therefore the commencement date for the works was 4 August 2010.
- 81 The owner has not provided any evidence of the date on which the building works started. Therefore the building works are deemed to have commenced on 4 August 2010. This means the due date for completion of the works was 30 June 2011, as the works were to be completed within 330 days of the start of the building works. There is no evidence of the builder seeking any extensions of time under the contract.
- 82 In any event, I am not satisfied on the evidence that on the balance of probabilities, any definable part of any delay is solely attributable to the builder. The builder's letter to the owner dated 7 May 2012, prepared after an investigation of the owner's property on that day, listed 5 items requiring immediate attention by the owner at that time.
- 83 In that letter, the builder stated the owner had cut the level of the soil for landscaping to a level that was much lower than, and not in compliance with, the architect's working drawings; had damaged the underground water or sewerage pipes; had failed to arrange for the connection of the electricity; was causing the builder delay in completing the electrical works; and would not meet with the builder to resolve the outstanding issues. In that letter the builder also stated the owner's delay would result in delay in the issuing of the Occupancy Certificate.

- 84 The owner conceded that she arranged for landscaping to be done by friends who had no landscaping or building experience. The owner said that she could not arrange for the service connections to be completed because she did not have the necessary certificates.
- 85 The owner's evidence about the builder's responsibility for delay was confusing. She said that the builder had failed to comply with the inspection reports provided by Boswell Shaw Giazi Marshall Pty Ltd, trading as BSGM, the building surveyor. She relied on the following BSGM reports: Pre Slab Inspection dated 24 August 2010; Slab Inspection Report dated 27 August 2010; Frame Inspection dated 13 December 2010; Re-Frame report dated 6 June 2011; Inspection Report dated 14 May 2012 (**'BSGM Inspection Report'**) and Final Inspection Report dated 11 July 2012 (**'BSGM Final Inspection Report'**).
- 86 She said that the builder's failure to provide the necessary documents to the building surveyor and complete the necessary work, was evident in the Final Inspection Report. The builder's evidence, which was both oral and documentary, contradicted the owner's evidence.
- 87 The builder said that it had not supplied the certificates to BSGM because it was waiting for payment of outstanding amounts from the owner. The builder said it sought the consulting engineer, Furr Consulting's assistance and followed up each of the items before responding to BSGM by letter dated 31 May 2012.
- 88 The builder confirmed that it had the necessary certificates, including the Occupancy Certificate, but was awaiting payment before release. It attached earlier correspondence relating to earlier queries, relevant material in the form of amended plans, provided Furr Consulting's response and relevant reports where required.
- 89 The builder, in its letter dated 31 May 2012, confirmed the work that needed to be done and listed the work which it had carried out. The completed work included repair to the concrete slab and to the soft spot under the corner of the slab. It also included altering the depth of the electrical cable conduit and external power point for the pump to meet electrical standards. It also referred to the landscaping work in which it said the owner had removed too much soil without its permission.
- 90 Mr Sowiha said that the owner did not need the certificates to arrange for the necessary work to be done. He said the builder complied with the BSGM reports and carried out the work as required. He said that he did not provide the owner with the Occupancy permit when he received it because the owner refused to pay the outstanding amounts under the contract. Counsel for the builder submitted that the builder gave discovery of all relevant certificates and that they have been provided to the owner. All necessary certificates are in evidence. I find that the builder has provided the owner with all necessary certificates.
- 91 The builder claims that the works were delayed to allow the owner to obtain finance for the project and that the owner delayed in making payments and has

refused to pay the outstanding amounts. The builder did not give evidence as to the specific period when the works were delayed.

- 92 The bank statements and the owner's transfer statements show that the owner paid the deposit and the base stage claims in instalments, on or within a couple of days of the due date. They show that the owner paid the frame stage claim in instalments, both just before and on the due date of payment.
- 93 However the bank statements also show that the owner was four months late in paying for the lock up stage. The owner paid the lock up stage claim in instalments between 28 February and 5 May 2011 although payment was due on 2 February 2010. The owner failed to make any further payments to the builder after 18 July 2011.
- 94 Having heard the evidence and reviewed the documentary evidence, I find that the owner has not made out her claim for liquidated damages.

THE BUILDER'S COUNTERCLAIM

How much does the owner owe the builder under the contract?

- 95 The builder has lodged a counterclaim for \$74,751.66 for the outstanding balance of the contract price. The builder relied on its statement to the owner dated 14 August 2012 (**builder's statement**) and the invoices and variations listed in the statement. The builder's statement lists each of the builder's invoices issued under the contract, the amount of each invoice and the amount paid by the owner under the contract.
- 96 The builder's claim of \$74,751.66 is calculated as follows.

Contract price	\$ 348,000
Plus Variations	\$51,240.52
Less credit	\$5,340
Less payments made by owner	<u>\$ 315,148.86</u>
Total amount outstanding	\$74,751.66

- 97 The variations totalling \$51,240.52 are made up of the following.

Invoice No	Date	Amount	Variation No
Invoice 102	30 August 2010	\$3,428.49	(invoice signed by the owner)
Invoice 103	30 August 2010	\$6,220.37	(excavation work)
Invoice 159	12 April 2011	\$3,300	signed variation no 159
Invoice 201	29 June 2011	\$23,851.30	signed variation no 37
Invoice 202	1 July 2011	\$7,687.68	signed variation no 36

Invoice 349	13 August 2012	\$3,245	(variation charges- upgrade roof tiles to terracotta burnt orange Marseille as listed in item 10.01 to the extras schedule of specifications of the contract)
Invoice 351	13 August 2012	\$1,100	(variation charges: alteration for bath and shower location phone message 7.7.11; 11.35am)
Invoice 353	13 August 2012	<u>\$2,407.68</u>	(variation charges: concrete driveway as per signed variation)
Total of variations		\$51,240.52	

Variations

- 98 The builder has the onus of proving that it is entitled to the variations. The following variations are in writing and have been signed by the owner: Variation agreement no 36 dated 29 June 2011 for \$7,687.68 (invoice 202); Variation agreement no 37 dated 29 June 2011 for \$23,851.30 (invoice 201); Variation agreement no 159 dated 6 April 2011 for \$3,300 (invoice 159).
- 99 The owner initially claimed that she had not authorised any of the variations. However, in cross examination she conceded that she had agreed to both the work and the cost of the variations and invoices that she had signed. I accept that evidence.
- 100 The builder referred to each of the invoices for the variations referred to in paragraph 97 above. The owner was cross examined on the invoices and variations. I find that invoice no 102, which the owner signed was agreed to by her. I find that the owner agreed to both the work and the cost of the work.
- 101 I find that invoice 349 for a variation to upgrade the roof tiles to terracotta burnt orange Marseille as listed in item 10.01 in the extras schedule of specifications of the contract, was agreed to by the owner. I find that invoice 353 was for variation charges for the concrete driveway and that the invoice refers to the signed variation for that work. I find that the owner agreed to both the work and the cost of the work.
- 102 The owner said that she did not agree to invoice no 351 relating to the variation to alter the location of the bath and the shower. That invoice refers to a phone message dated 7 July 2011 at 11.35am. The invoice is initialled by Mr Sowiha. No evidence was given as to who requested this variation. I am satisfied that the owner agreed to this variation. I am satisfied that although ss 37 or 38 of the Act has not been complied with by the builder, that pursuant to s37(3)(b) or s 38(6)(b) of the Act, the builder would suffer a significant hardship if it were not entitled to charge for this work. I am satisfied that it would not be unfair to the owner for the builder to recover \$1,100 for the work set out in invoice no 351.
- 103 Invoice 103 was for excavation work. The variation agreement for this work was not in evidence. However, the owner was shown invoice no 103 for the work. In cross examination the owner agreed that she had signed the tax invoice for the

excavation work. The owner says that she was asked to sign for the variation after the work had been done. She says that she should have been asked before the work was done. The builder said that there was a need for the excavation work to be done and that they were unable to determine the amount of soil that needed to be removed prior to it being removed and the amount of concrete that needed to be poured, until they had done the excavation work. In cross examination, the owner agreed that she had benefitted from this work.

104 Having heard the submissions of the builder and the evidence of Mr Sowiha and the owner, I am satisfied that it was necessary for the work to be carried out. I am also satisfied that although the builder did not comply with s 37(1) of the Act that the builder would suffer a significant hardship if it were not entitled to charge for this work. I am satisfied that it would not be unfair to the owner for the builder to recover \$6,220.37 for the excavation work set out in invoice no 103.

Did the owner make a cash payment to the builder?

105 The owner disputed that she owed the builder \$74,751.66. First, the owner said that in addition to the amount that she had paid by way of bank transfer, she had paid the builder \$20,000 in cash for invoice no 203 (fixing stage progress claim). Later in her evidence, the owner said that she paid \$20,000 in cash for payment of invoice no 201 (variation no 37).

106 The owner agreed that she had made only one cash payment to the builder. The owner said that the builder had failed to take the cash payment of \$20,000 into account and had not given her any form of confirmation of the cash payment. The owner agreed that she had not raised the issue of paying cash to the builder prior to the hearing.

107 Mr Sowiha gave evidence that he did not receive \$20,000 in cash, or any amount in cash, from the owner. He said that the owner made payments by bank transfer and the builder relied on bank statements which showed the transfer of the monies from the owner to the builder.

108 Having heard the evidence of the parties, including their evidence in relation to each of the invoices, I am not persuaded that the owner made a cash payment to the builder at any stage.

109 I find that the owner's evidence was inconsistent with the builder's invoices and variations on which the parties' relied. The owner first denied agreeing to the variations but in cross examination she later conceded that she had agreed to the variations at the time. Having heard the oral evidence of the parties and having examined the documentary evidence I find that the owner agreed to the variations which the builder made under the contract.

110 I find that the amount outstanding and owed by the owner under the contract is \$74,751.66. Accordingly, I find that the builder has made out its counterclaim against the owner.

Has the builder breached s 30(7) of the Act?

- 111 The builder has made a claim for an additional amount over and above the contract price. The builder has issued invoice no 103 dated 30 August 2010 for \$6,220. 37 for extra soil excavation. The owner has paid the invoice.
- 112 The owner seeks reimbursement of \$6,220. 37 as she says that under section 30(7) of the Act, the builder cannot seek the additional amount if the additional amount could reasonably have been ascertained had the builder obtained all the foundations data required by this section.
- 113 Statewide Soil Laboratories Pty Ltd prepared a domestic soil report dated 31 October 2008 for Furr Consulting Pty Ltd, the owner's structural engineers ('**Domestic Soil Report**') which was in evidence. However, the owner did not call anyone from Statewide Soil or Furr Consulting to give evidence about the Domestic Soil Report.
- 114 I have not heard any evidence about this claim. This claim is based on the builder not having obtained all the foundations data required under s 30(7) of the Act. In this case the owner gave the builder the Domestic Soil Report which purports to contain the foundations data required by s 30(7) of the Act.
- 115 The owner bears the onus of proving that the builder has breached s 30(7) of the Act. On the evidence I find that the owner has not made out this claim.

Has the builder breached s 40(2) of the Act?

- 116 The owner claims that the builder required her to pay more than the percentage of the contract price prescribed for completion of each of the five stages in the contract. She claims that the builder has breached s 40(2) of the Act by requiring her make these payments. No submissions or evidence were given in relation to this claim.
- 117 Schedule 3 of the contract provided for payment of the contract price of \$348,000 by way of the following progress payments:

Stage	Percentage of contract price	Amount
deposit	5%	\$17,400
base stage	10%	\$34,800
frame stage	15%	\$52,200
lock up stage	35%	\$121,800
Fixing stage	25%	\$87,000
Completion	10%	\$34,800

Total contract price (including deposit) (excluding variations)		\$348,000
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- 118 Section 40(2) of the Act sets out the prescribed percentages up to which a builder may demand payment under a major domestic building contract, of which this contract is one. Section 40(2) of the Act provides that where a contract is to build all stages, as in this case, a builder may charge for the Base stage, Frame stage, Lock up stage and Fixing stage, no more than the amounts set out in the above table. The builder's invoices for each of these stages are in evidence. The builder has charged the owner the amounts set out in the above table.
- 119 There is no evidence that the owner has paid more for each stage than the amounts set out in the contract. I find that the owner has not made out her claim.

Has the builder carried out variations without the owner's consent?

- 120 The owner claims that the builder has carried out variations without her consent. In cross examination, the owner conceded that she had agreed to the variations and invoices that she had signed. On the basis of the signed variations, signed invoices and the builder and the owner's evidence, together with invoices that Counsel for the builder put to the owner, I find that the owner agreed to each of the builder's variations. For the reasons set out in paragraphs 97 to 104 above, I find that the owner has not made out this claim.

CONCLUSION

- 121 I have found that the amount payable by the builder to the owner for the cost of rectification of the defective works is \$31,451. I have found that the net amount payable by the owner to the builder for monies outstanding under the contract is \$74,751.66, which I have rounded off to \$74,752. I find that the net amount payable by the owner to the builder is \$74,752 less the cost of the rectification work of \$31,451 leaving a net balance payable by the owner to the builder of \$43,301.

ORDERS

- 122 I therefore order that the applicant must pay the respondent the amount of \$43,301. In the light of each party having some success I do not make any order as to the reimbursement of filing fees or hearing fees.

MEMBER F MARKS

19 December 2014