

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP797/2017

CATCHWORDS

Domestic Building Contracts Act 1995; ss 8 and 42: incomplete work; defective work; breach of warranties; whether contract varied by agreement; assessment of damages; final invoice sent before completion.

APPLICANT	Guan-Nan Yang
RESPONDENT	Mega Constructions (Aust) Pty Ltd (ACN 120 510 410)
WHERE HELD	Melbourne
BEFORE	Member F Marks
HEARING TYPE	Hearing
DATE OF HEARING	18, 19, 20 July and 27 August 2018, 25, 26 February and 7 March 2019.
DATE OF ORDER	24 June 2019
CITATION	Yang v Mega Constructions (Aust) Pty Ltd (Building and Property) [2019] VCAT 938

ORDER

- 1 The respondent must pay the applicant \$289,304.23.
- 2 The respondent must reimburse the applicant, the filing fee of \$751.40 and hearing fees of \$885.20.
- 3 The respondent's counterclaim is dismissed.
- 4 Costs reserved.

MEMBER F MARKS

APPEARANCES:

For the Applicant

Mr L Hogan, of Counsel

For the Respondent

Mr Ming (Scott) Lei, director.

REASONS

INTRODUCTION

- 1 The applicant (**Owner**) owns a property in Surrey Hills. In January 2014 the Owner entered into a building contract with the respondent (**Builder**) to construct a second house on his property for \$512,000 (**Contract**). A dispute arose over the construction of the House.

THE OWNER'S CLAIM

- 2 The Owner claims that:
 - a the building works are defective;
 - b the Builder varied the works without consent;
 - c the building works do not comply with the plans and specifications;
 - d he has paid for items which have not been supplied;
 - e he has paid for Council infringement notices; and
 - f the builder is liable for liquidated damages.

THE BUILDER'S DEFENCE AND COUNTERCLAIM

- 3 The Builder admits that the building works are incomplete and that some of the building works are defective but says:
 - a it did not complete the building works because of the Owner's actions;
 - b it did not terminate the Contract;
 - c the Owner agreed to the variations;
 - d the Owner has not paid its final invoice of \$51,200; and
 - e the Owner is liable for liquidated damages.

THE HEARING

- 4 At the hearing the parties and the Tribunal were assisted by Mandarin interpreters. In particular I thank Mr Bo for his many hours of assistance over a number of days of the hearing.
- 5 Mr Hogan, of Counsel, represented the Owner. I received into evidence the Owner's witness statement dated 29 March 2018, which was in English. Mr Hogan took the Owner through his witness statement with the assistance of the mandarin interpreter. Mr Lei asked the Owner questions about items and issues in the Owner's witness statement. Again, each of the questions and answers were translated from Mandarin into English. I am satisfied that the Owner and Mr Lei understood the Owner's evidence.
- 6 Mr Lei, director of the respondent builder, represented the builder. Mr Lei filed an undated witness statement in English which I received into evidence. I am satisfied that Mr Lei understood the content of his witness statement. At the hearing the Owner and Mr Lei gave further evidence, which extended

beyond the content of their witness statements. Where necessary, documents in Mandarin were translated into English by Mr Bo to assist Counsel for the Owner and the Tribunal.

- 7 The Owner called the following experts: Mr Salvatore Mamone, building consultant, who prepared a report dated 23 May 2016 (revised on 27 March 2018), Mr Ean Power who prepared costings on the rectification works dated 12 April 2018, and Mr Paul Boyson, training and installation manager for Seeley International.
- 8 The Builder did not rely on independent expert evidence. Mr Lei addressed the issues raised in the expert reports, gave evidence and made submissions on each of the issues raised by the Owner. The experts and Mr Lei gave concurrent evidence. At the start of the hearing, Mr Hogan produced a Scott Schedule for the use of the parties and the Tribunal. Mr Hogan filed closing submissions on which he addressed the Tribunal. Mr Lei made oral submissions on each of the issues, including the defective items set out in Appendices A to D of the Owner's submissions.

COURT APPOINTED LIQUIDATOR TO BUILDER

- 9 The hearing concluded on 7 March 2019 and I reserved my decision on the Owner's claim and the Builder's counterclaim. Subsequently, it has come to the Tribunal's attention that a liquidator has been appointed to the Builder.
- 10 On 17 May 2019 the Tribunal made orders that the proceeding be listed for an administrative mention on 19 June 2019 at which time the parties were to advise the principal registrar in writing whether they wished further steps to be taken in the proceeding, namely the handing down of orders, and if so the legal basis on which they submitted the Tribunal could do so.
- 11 The Owner requested the Tribunal to hand down its decision so that he could provide the decision to the liquidator and the Builder's insurer. The Owner notified the Tribunal that the Builder is still in possession of the Owner's property. As at 19 June 2019, the liquidator had not responded to the Tribunal.
- 12 S 471B of the *Corporations Act 2001* (Corporations Act) provides that while a company is being wound up by the Court, a person cannot begin or proceed with (a) a proceeding in a court against the company or in relation to property of the company or (b) enforcement process in relation to such property, except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- 13 I have heard the evidence and submissions and there is nothing further for the parties to do. In my opinion, neither party is proceeding with, or otherwise taking a step in, the proceeding. Section 471B (b) of the Corporations Act does not allow a party to enforce the Tribunal's orders without the leave of the Supreme Court of Victoria or the Federal Court of Australia. In the light of the Owner's request I now give my reasons and make orders. However, the Owner cannot enforce these orders without leave of a Court.

WHAT HAPPENED?

- 14 The relevant timing of events was that:
- a On about 14 January 2014 the parties signed a building Contract based on the Builder's quotation dated 7 July 2013.
 - b On about 8 May 2014 the Builder started the building works.
 - c On 15 May 2014 a building permit was issued.
 - d The building works were carried out in 2014 and 2015.
 - e An occupancy permit was issued on 14 July 2015.
 - f On about 4 November 2015 the Builder issued an invoice for \$51,200 for the final stage payment which the Owner has not paid.
 - g The Builder has not carried out any further building works and remains in possession of the property.

THE DEFECTS

- 15 The parties agreed on a number of items listed in the Scott Schedule and the Owner's closing submissions. The defects were categorised as follows:
- (a) liability and quantum admitted by the Builder;
 - (b) liability admitted but quantum denied by the Builder;
 - (c) liability denied but quantum admitted by the Builder; and
 - (d) liability and quantum denied by the Builder.
- 16 The Owner's expert witnesses and Mr Lei gave concurrent evidence about defective items. At the end of the hearing Counsel for the Owner filed closing submissions and attached Appendix A to Appendix D which listed each of the defects in the relevant categories.

BUILDER ADMITTED LIABILITY AND DAMAGES: \$17,463.70

- 17 Mr Lei admitted that the Builder was liable for defective work and damages of \$17,463.70 listed in Appendix A. The damages are inclusive of the following agreed by the parties: contingencies (10%), builder's margin (25%) and GST (10%). Mr Lei agreed to Mr Mamone's costing of \$2,760 to repair the brickwork [item 32].
- 18 In closing submissions counsel for the Owner submitted that the Tribunal should allow \$19,740 for the costs of rendering the entire brickwork, recommended by Mr Power, and not Mr Mamone's estimate of \$2,760. He submitted that Mr Power provided the most appropriate method of rectification [item 32]. In Mr Power's opinion there was a very slim chance of matching the colour of the mortar which he said could result in a patchwork effect. Mr Mamone said it was unnecessary to render the entire brickwork. While he agreed that there may be slight variances in the colour

of the mortar, he considered the colour could be matched if the rectification work was done with care.

- 19 I observed the brickwork when I went on a view of the site with the parties. I am satisfied that Mr Mamone's suggestion is reasonable and that the brickwork can be repaired in the manner suggested by him.
- 20 I find that the Builder is liable for the damages of \$17,463.70 arising from the defects set out in Appendix A.

BUILDER ADMITTED LIABILITY BUT NOT DAMAGES

- 21 Mr Lei admitted that the items listed in Appendix B were defective but disputed the rectification costs. On the admission of Mr Lei I find that the items listed in Appendix B are defective and I must now assess the damages.
- 22 The Owner claims damages for defective building work of \$32,814.50 or \$49,631.93 inclusive of contingencies (10%), builder's margin (25%) and GST (10%).
- 23 Mr Lei agreed with Mr Mamone's scope of rectification work but disputed the hourly cost of labour and the cost and quantity of materials. Mr Mamone considered that an hourly rate of \$70 to be reasonable for a painter whereas Mr Lei allowed \$40 per hour. As to the defective concrete driveway and paths, Mr Lei agreed with Mr Mamone's labour rate of \$65 per hour but disagreed with the time allocated to cut, break up and remove the concrete and relay the paving [item 29.10]. I accept Mr Mamone's evidence in relation to the items listed in Appendix B.
- 24 I prefer the evidence of Mr Mamone to Mr Lei. Mr Mamone is an independent expert who gave independent expert evidence based on his years of experience as a building consultant. He gave a detailed explanation of the scope of works and costs to rectify.
- 25 In contrast, Mr Lei is a director of the Builder and is not independent. I found his evidence to be inconsistent, lacking analysis and at times, not to be responsive to Mr Mamone's evidence. Further, the Builder did not call any independent experts to give evidence to support his claims.
- 26 I find Mr Mamone's cost estimate of \$49,631.93 inclusive of margin allowances, contingencies and GST, to be reasonable. I assess damages in respect of this item as \$49,631.93.

BUILDER DENIED LIABILITY BUT ADMITTED DAMAGES

- 27 Mr Lei denied that the items listed in Appendix C were defective. However, he said if I found the items to be defective, he agreed with the Owner's rectification costs and damages of \$94,180.35 as itemised in Appendix C.
- 28 The damages of \$94,180.35 are inclusive of defects of \$62,268; contingencies of \$6,226.80 (10%), builder's margin of \$17,123.70 (25%) and GST of \$8,561.85 (10%).

29 The issue for determination is whether the Builder is liable for these items listed in the table below.

Item	Description	Agreed valuation	Evidence and Findings of the Tribunal
3.00	Living Room		
3.10	Incorrect door installed west wall of room	\$5,134	<p>Mr Lei admitted the contract required the Builder to install a bifold door in the living room but said Mr Yang asked him to install a sliding door instead. He admitted that Mr Yang's request was not in writing and the contract price was not reduced to reflect the change. Mr Yang said he did not instruct Mr Lei to change the doors.</p> <p>Conclusion</p> <p>I prefer the evidence of Mr Yang to Mr Lei. The contract provides for the installation of a bifold door. The procedure for varying the terms of the contract, as required by clause 12.1, or s38 of the <i>Domestic Building Contracts Act 1995</i>, has not been followed. I find it implausible that Mr Yang would agree to a negative variation of the contract without receiving a deduction to the contract price. I find that Builder has breached the terms of the contract and that the Owner is entitled to be compensated for having paid for but not receiving the bifold door (<i>Strong v Milanovic</i> [2016] VCAT 1225 at [141]-[142]).</p> <p>I will allow this item</p>
3.20	No lock on door leading to garage	\$250	<p>Mr Mamone said there should be a lock on the door between the garage and living area of the house. I accept his evidence. Mr Lei did not contradict Mr Mamone. However in closing submissions Mr Lei denied that the works were defective and said the lock was not needed.</p> <p>Conclusion</p> <p>As Mr Lei's evidence did not contradict Mr Mamone's, evidence I find that there should be a lock on the door between the garage and living area. I will allow this item.</p>
4.00	Kitchen		
4.20	Incorrect door installed on north wall in contravention of contract drawings.	\$3,334	<p>Mr Lei admitted the contract required the Builder to install French doors on the north wall of the dining area but said Mr Yang asked him to install a sliding door instead. His evidence about this item</p>

			<p>mirrored his evidence given about item 3.10. Mr Yang denied giving any such instruction.</p> <p>Conclusion</p> <p>For the same reasons as set out in item 3.10 I find that the Builder has breached the contract and I will allow this item.</p>
4.30	Two swing doors installed in storage room in contravention of contract drawings.	\$1,736.50	<p>Mr Lei admitted that the contract required the Builder to install bifold doors in the storage room but said Mr Yang asked him to install swing doors. His evidence about this item mirrored his evidence given about item 3.10. Mr Yang denied giving any such instruction.</p> <p>Conclusion</p> <p>For the same reasons as set out in item 3.10 I find that the Builder has breached the contract and I will allow this item.</p>
4.4.2	No ducted vacuum in storage room as required by contract	\$1500	<p>Mr Lei gave evidence which mirrored his evidence given about item 3.10, except he said he told Mr Yang they would settle the difference at the completion of the project. Mr Yang denied giving any such instruction of having such a conversation.</p> <p>Conclusion</p> <p>For the same reasons as set out in item 3.10 I find that the Builder has breached the contract and I will allow this item.</p>
6.00	Ground Floor Powder Room		
6.10	Vanity basin stainless steel waste installed with exposed waste pipe penetrating floor.	\$1,148	<p>Mr Lei gave evidence that Mr Yang instructed the plumber to install the pipe as located. Mr Yang said the Builder failed to plumb the pipe into the wall as required by the plans and he was forced to give these instructions to the plumber. Mr Mamone said the waste pipe should have been plumbed into the wall by the Builder as required by the plans.</p> <p>Conclusion</p> <p>I accept the evidence of Mr Mamone and Mr Yang and find that the Builder breached the contract and the warranties under s8 of the Act in failing to plumb the pipe into the wall. I will allow this item.</p>
7.00	Bedroom No. 3		
7.10	Wardrobes fitted out with only a single shelf with hanging rail underneath.	\$869	<p>Mr Lei admitted that the contract required the Builder to install drawers in the wardrobe but said Mr Yang asked him to install a single shelf. His evidence about this item mirrored his evidence given about item 3.10. Mr Yang denied giving any such instruction.</p> <p>Conclusion</p>

			For the same reasons as set out in item 3.10 I find that the Builder has breached the contract and I will allow this item.
8.00	Bedroom No. 4		
8.10	Wardrobes fitted out with only a single shelf with hanging rail underneath.	\$869	The parties gave evidence which mirrored their evidence in item 7.10. Conclusion For the same reasons as set out in item 7.10 I find that the Builder has breached the contract and I will allow this item.
9.00	Bedroom No. 5		
9.10	Wardrobes fitted out with only a single shelf with hanging rail underneath.	\$869	The parties gave evidence which mirrored their evidence in item 7.10. Conclusion For the same reasons as set out in item 7.10 I find that the Builder has breached the contract and I will allow this item.
12.00	Garage		
12.20	Builder has not installed two-way light switching with the garage.	\$400	Mr Lei admitted that the contract required the Builder to install a two-way light switching system in the garage but said Mr Yang asked him to install a single switch. His evidence about this item mirrored his evidence given about item 3.10. Mr Yang denied giving any such instruction. Conclusion For the same reasons as set out in item 3.10 I find that the Builder has breached the contract and I will allow this item.
13.00	Laundry		
13.30	Inappropriate light-switch poorly installed.	\$415	Mr Mamone gave evidence that the switch located on the architrave was too large. I accept his evidence. Mr Lei disagreed. When I view viewed the site with the parties I observed the switch which was far too big for the architrave. I will allow this item.
14.00	First Floor Powder Room		
14.10	Vanity basin stainless steel waste is installed as an exposed waste pipe discharging/penetrating through the floor.	\$1,148	This item is the same as item 6.10. The evidence of the parties mirrored their evidence about item 6.10. Conclusion For the same reasons as set out in item 6.10 I find that the Builder has breached the contract and I will allow this item.

16.00	First Floor Master Bedroom Ensuite		
16.20	Walk in robe: shelf support rails are glued on. No proper fastening.	\$822	Mr Mamone gave evidence that the support rails were not adequate to hold the weight of the rails and clothing. He did not observe nails. Mr Lei said that they were nailed not glued. Conclusion I prefer the independent evidence of Mr Mamone to Mr Lei who is a director of the respondent Builder and not independent. I will allow this item.
17.00	Windows		
17.10	All windows are dirty and require cleaning.	\$690	Mr Lei admitted that the windows needed to be cleaned but said the item was not a defect. Mr Mamone gave evidence that it was the responsibility of the Builder to clean the windows. I accept Mr Mamone's evidence. Conclusion I prefer the independent evidence of Mr Mamone. Mr Lie also admitted that it was the builder's responsibility to clean the windows. I will allow this item.
18.00	Heating & Cooling		
18.20 -40	Issues with the installation of the heating and cooling registers across the building which did not comply with plans and drawings.	\$2,903	Mr Mamone gave the following evidence: The Builder randomly installed heating & cooling registers across the ceilings which did not comply with the plans and drawings [A105.1 & A105.2.] The Builder randomly used circular & square registers for the heating & cooling. A number of the square registers have been installed not square with the walls of the building. Mr Boyson agreed with Mr Mamone's opinion and said they were not only spaced incorrectly but also the wrong size. Mr Lei did not give evidence to the contrary. Conclusion I prefer the independent evidence of Mr Mamone and Mr Boson to Mr Lei who did not give evidence to support his claim. I will allow this item.
19.00	Ground floor ceiling insulation		
19.10	No insulation between ground floor ceiling/first-floor structures.	\$11,327.50	Mr Lei admitted that the Builder did not install the insulation. He relied on an energy report in support of his claim that the building achieved a six star energy rating. I have placed no weight on this report which was not proved. Conclusion

			I find that the Builder failed to install insulation as required by the contract and I will allow this item.
20.00	Polystyrene First Floor Cladding		
20.10	50mm polystyrene cladding installed to all lightweight first floor walls.	\$10,520	<p>Mr Lei admitted that the Builder did not install 100 mm polystyrene cladding as required by the contract and plans. He said Mr Yang instructed him by email to render the cladding and install a screening product over the render. He admitted the variation process required by the contract and the Act was not followed. Mr Yang said he did not instruct Mr Lei to install thinner polystyrene cladding. Mr Power gave evidence that 100 mm cladding could have been installed if longer screws had been used.</p> <p>Conclusion</p> <p>I accept the evidence of Mr Power that installation of the correct sized cladding was achievable. I find that the Owner has paid for an item which he did not receive. I will allow this item.</p>
21.00	Drainage		
21.10 -20	Drainage has not been installed within the driveway & garden area between the existing building & the new building.	\$4,458	<p>Mr Mamone gave evidence that the Builder was required to install a strip drain as per drawing No.161543-C1 produced by TD & C Consulting Structural & Civil engineers. He said the drain was not installed. I accept his evidence.</p> <p>Mr Lei claimed that the drainage works were not part of the contract but did not provide any evidence to support his claim.</p> <p>Conclusion</p> <p>Having accepted Mr Mamone's evidence and having no evidence to support the builder's claim I will allow this item.</p>
25.00	Hot water unit		
	The hot water unit has not been installed in the location shown on building permit and endorsed working drawings. Architectural Drawing No. AIOI.1	\$720	<p>Mr Lei admitted that the Builder was required to comply with Architectural Drawing No.AIOI.1 but said Mr Yang instructed him to install the unit in a different location. He admitted that the variation was not in writing. Mr Yang denied giving Mr Lei such instructions.</p> <p>Conclusion</p> <p>For the same reasons as set out in item 3.10 I will allow this item.</p>
26.00	Electric meter box		

	The Builder has installed the electric meter cabinet too high & inconvenient to adequately access and not safe to access.	\$1,160	Mr Lei admitted that the meter box was not installed in the location set out in the contract. He said Mr Yang instructed him to move the meter box. Mr Yang denied giving such instructions. Conclusion For the same reasons as set out in item 25, I will allow this item.
28.00	Front gate entry		
28.10 -30	Gates as built do not comply with Architectural drawing NO.A104.1 & Drawing 3 of 3 of the House development plans	\$5,130	Mr Lei admitted that the gates as built did not comply with the plans and the contract. He said Mr Yang instructed him to install a narrower gate than that set out in the plans. His evidence mirrored the evidence that he gave about item 3.10. Mr Yang said he gave no such instruction to Mr Lei. Conclusion For the same reasons as set out in item 3.10 I will allow this item.
30.00	Cracked and damaged roof tiles		
30.10	Damage to roof tiles.	\$6,000	It was not disputed that photos of the roof supplied by the Owner showed cracked and damaged roof tiles requiring replacement and repair. Mr Yang said the photos were taken by the gutter cleaner who alerted him to the damaged roof and that he did not authorise people to go onto the roof. Mr Lei claimed that damage to the tiles was caused by the gutter cleaner or other tradesmen engaged by Mr Yang but not by the builder. Conclusion I prefer the evidence of Mr Yang to Mr Lei. I find it implausible that Mr Yang would have authorised people to go onto the roof during construction by the builder. Mr Lei did not provide any evidence to support his contention. I will allow this item.
33.00	Storage Shed		
33.10	Storage Shed has not yet been installed	\$865	Mr Mamone gave evidence that the drawings required the construction of a shed which has not been built. I accept his evidence. Mr Lei said there was no shed referred to in the contract but agreed that it was shown in a drawing. Conclusion The parties have agreed that a shed is shown in the relevant drawings. I will allow this item.
	TOTAL		\$62,268

30 I have found that the Builder is liable for the defects set out in Appendix C. I will allow \$94,180.35.

BUILDER DENIED LIABILITY AND DAMAGES

31 The Owner claims that the Builder is liable for the defects listed in Appendix D. The Owner claims damages of \$109,898.25 which comprise \$72,660 for the defects plus \$7,266 for contingencies (10%), \$19,981.54 for the builder's margin (25%) and \$9,990.75 for GST (10%).

32 At the hearing Mr Lei denied liability for the defects and the damages claimed. I now deal with the items listed in Appendix D.

Item	Description	Mamone's estimate of costs	Evidence and Findings of the Tribunal
4.40	Pantry storeroom		
4.4.1.3	Inconsistent and wide gaps in shelving system	\$1,341	Mr Mamone said the gaps amounted to a defect. Mr Lei disagreed but did not give reasons why this item was not a defect. Mr Lei said the gaps could be fixed with gap filler. Conclusion I prefer the independent evidence of Mr Mamone to Mr Lei who is a director of the respondent Builder and not independent. I find Mr Mamone's costs of \$1,341 to be reasonable.
5.00	Timber floor		
5.40	Timber floor boards to be 19mm and not 12mm depth as installed.	\$2,440	Mr Lei admitted that the contract required timber floor boards of 19 mm depth, there was no variation in writing and he did not discount the contract price. He said Mr Yang instructed him to provide thinner floorboards. However Mr Lei said he was asked to install thinner floorboards after the thinner boards had been installed. I found Mr Lei's evidence to be implausible. Mr Yang denied giving any such instructions. Conclusion For the reasons set out in item 3.10 I will allow this item. Mr Mamone allowed rectification costs of \$2,440 and Mr Lei allowed \$1,680. Mr Mamone allowed a higher cost for timber which he based on market rates. Mr Lei said he could get a lower rate for the timber but did not explain how he calculated the costs. I will allow Mr Mamone's costs of \$2,440 based on his independent assessment.

17.00	Windows		
17.2.3.1 -17	Windows are single glazed and not double glazed as per the contract	\$52,279	<p>Mr Lei's evidence mirrored his evidence given about item 3.10. Mr Yang said that he gave no such instruction to Mr Lei.</p> <p>Conclusion</p> <p>I reject Mr Lei's evidence. I find it implausible that Mr Yang would agree to the installation of single glazing when the contract specified a far superior product - double glazing with no alteration to the contract price. For the reasons as set out in item 3.10 I will allow this item.</p> <p>Mr Mamone allows \$52,279 and Mr Lei allows \$24,600. Mr Lei said he took into account three windows installed with double glazing but did not identify those windows. I will allow \$52,279 as a reasonable cost of installing double glazed windows throughout the Owner's home.</p>
18.00	Heating & Cooling		
18.10	Builder installed undersized heating & cooling units	\$16,600	<p>It was not disputed that the quotation required the Builder to supply and install a Braemar duct heat system. It was not disputed that the Builder allowed a provisional sum of \$6,000 for an air conditioner/cooler.</p> <p>Mr Lei admitted that the Builder installed one heating/evaporative cooling unit which did not comply with the contract.</p> <p>Mr Boyson, an employee of Seeley international, a supplier of heating and cooling equipment, and a licensed plumber and gas fitter with 30 years industry experience, gave evidence that the unit installed was undersized and inadequate for its purpose. I accept his evidence.</p> <p>Conclusion</p> <p>I find that the Builder installed a heating and cooling unit that did not comply with the contract and which was undersized and not fit for its purpose. I will allow this item.</p> <p>Mr Mamone allowed \$16,600. Mr Lei initially agreed to the quotation provided by the Owner. He later said he would only allow \$10,000.</p> <p>For the reasons that I have already given, including the fact that Mr Mamone gave independent evidence of market costs, I will allow 16,600.</p>
	TOTAL		\$72,660

- 33 Having found that the Builder is liable for the defective building works in Appendix D, I will allow damages of \$109,898.25.

OTHER ITEMS

Provisional items

Items purchased by the Owner

- 34 The Owner said he paid for the following items which were to be provided under the Contract. Mr Lei admitted that the Builder was liable to pay for the following items paid for by the Owner:
- (a) a clothes line: \$299;
 - (b) 2 powder room basins: \$284;
 - (c) laundry basin: \$620;
 - (d) tap ware: reimbursement of \$500; and
 - (e) white goods including a cooktop (\$2,000), and oven (\$2,000) and a range hood (\$1,500).
- 35 I will allow \$7,203 for these items.

Damage to the Owner's tree

- 36 The Owner claims that the Builder had a duty not to damage trees on his property while undertaking the building works. The Owner gave evidence that a large tree in his garden died after it was damaged by the Builder. He said he was forced to arrange for the tree to be cut down and removed at a cost of \$3,685. I accept the Owner's evidence. Mr Lei disputed the claim but did not give evidence to the contrary. I will allow \$3,685.

Liquidated damages

- 37 The Owner claims liquidated damages of \$57,000. The Owner gave evidence that the building works started on 8 May 2014 and were to be completed by 1 July 2015. Counsel for the Owner submitted that the Owner was entitled to liquidated damages for a period of 420 days. He set out the way he calculated the damages in the Owner's closing submissions.
- 38 Mr Lei disputed the Owner's evidence and claimed that landscaping work and the building of a retaining wall, arranged by the Owner, caused a delay in construction. Mr Lei said he suspended the building works in late 2015 because the Owner did not pay his final invoice. He later reiterated that the building works were complete at the time the Builder suspended works and said he was waiting for the information about the retaining wall before completing the works.
- 39 The Owner disputed Mr Lei's evidence and said he gave Mr Lei the landscaping permit in about July 2015. He said Mr Lei asked for information

about the retaining wall on about 15 November 2015, after the Builder had suspended works and left the Owner's property.

- 40 I accept the evidence of the Owner which I prefer to the evidence of Mr Lei. I found Mr Lei's evidence to be vague, inconsistent and implausible. I find that the Builder was required to complete the building works under the Contract but failed to do so.
- 41 I find that the Owner is entitled to liquidated damages from 1 July 2015 to 25 February 2019. I will allow liquidated damages of \$57,000.

OWNERS CLAIM - CONCLUSION

- 42 On the evidence before me and for the reasons set out above I am satisfied that the Builder in unjustifiably suspending the building works, evinced an intention not to be bound by the terms of the Contract and repudiated the Contract. I find that the Owner accepted the Builder's repudiation and lawfully terminated the Contract. I find that the Contract is at an end.
- 43 I find that the Builder has unlawfully refused to allow the Owner entry to his own property.
- 44 I have found that the Builder has breached the Contract and has not complied with the warranties in s8 of the *Domestic Building Contracts Act 1995*. I have found that the Builder is liable to pay the Owner damages of \$340,504.23 comprising:
- (a) \$17,463.70 for the defects set out in Appendix A;
 - (b) \$49,631.93 for the defects set out in Appendix B;
 - (c) \$94,180.35 for the defects set out in Appendix C;
 - (d) \$109,898.25 for the defects set out in Appendix D;
 - (e) \$7,203 for items purchased by the Owner;
 - (f) \$3,685 for the cost of removing the dead tree from the Owner's property;
 - (g) \$1,442 paid to the City of Whitehorse for planning infringement notices; and
 - (h) \$57,000 for liquidated damages.

BUILDER'S COUNTERCLAIM

- 45 The Builder claims \$51,200 for non-payment of its final invoice dated 4 November 2015. The Owner admitted that he did not pay the final invoice but said that was because the building works were defective and incomplete.
- 46 Mr Lei provided a witness statement in English. He gave oral evidence on the relevant issues. I found Mr Lei's evidence to be confusing, inconsistent and at times, implausible. For the reasons already given I have preferred the evidence of the Owner to Mr Lei. I have found that the building works were defective and incomplete at the time when the Builder issued its final invoice.

- 47 Clause 10.3 of the Contract required the Builder to give the Owner a written final claim at completion. I have found that the Builder issued its final invoice prior to completion of the building works. I find that the Builder demanded final payment under the Contract before the work was completed in breach of s 42 of the *Domestic Building Contracts Act 1995*.

AMOUNT OF DAMAGES PAYABLE TO THE OWNER

- 48 In assessing the damages to be awarded to the Owner I must allow for the fact that the Owner has not paid the Builder's final invoice of \$51,200. In deducting the amount of \$51,200 from \$340,504.23 I find that the Builder is liable to pay the Owner damages of \$289,304.23.
- 49 I will order that the Builder must pay the Owner \$289,304.23 and I will dismiss the Builder's counterclaim.

MEMBER F MARKS