VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP262/2021

CATCHWORDS

***Domestic Building Contracts Act 1995*:** claim for damages for breach of domestic building contract; claims for liquidated damages, general damages for delay, damages for incomplete works, damages for defective works, costs and reimbursement of fees; election required between claim for liquidated damages and claim for general damages; finding that judicial notice could be taken of inflation.

FIRST APPLICANT	Chetan[redacted]
SECOND APPLICANT	Pragnaben[redacted]
RESPONDENT	[redacted]Pty Ltd (ACN[redacted] trading as [redacted]Builders
WHERE HELD	By videoconference
BEFORE	Member[redacted]
HEARING TYPE	Final hearing
DATE OF HEARING	9 and 10 February 2023
DATE OF ORDER	27 March 2023
CITATION	[redacted] v[redacted]Pty Ltd (Building and Property) [2023] VCAT 324

ORDER

1 The respondent must pay to the applicants damages for breach of contract in the sum of $50,110.

2 The parties have leave to make applications for costs and fees. Any such application must be made in writing within 28 days. **The Principal Registrar is directed to refer any such application to Member Edquist who may determine the applications on the papers or may list the proceeding for a costs hearing**.

Member C

APPEARANCES

For the Applicant: Mr E solicitor

For the Respondent: r Mr N direct

REASONS

INTRODUCTION

1. Mr Chetan [redacted] and Ms Pragnaben [redacted] (**the Owners**) signed a major domestic building contract (**the Contract**) for the construction of a two storey brick veneer home at their property in Cranbourne, Victoria on 5 September 2017. Formation of the Contract was completed when the builder, [redacted] Pty Ltd (ACN [redacted]) trading as [redacted] Builders (**the Builder**), signed the Contract on 7 September 2017.

2. The Owners have come to the Tribunal seeking damages for breach of the Contract. They claim liquidated damages, general damages for delay, damages for incomplete works, damages for defective works, costs and reimbursement of fees.

3. The hearing began before me on 9 February 2023 and continued into the next day. The Owners were represented by their solicitor, Mr E [redacted] but both Mr and Ms [redacted] appeared to give evidence. To prove the quantum of the case, they called an expert. The Builder was represented by its director, Mr Nickolas [redacted]

AGREED FACTS

4. The Contract was in the form of an amended HIA New Homes Contract (August 2017 Edition) and comprised special conditions, schedules and attachments. It also incorporated by reference a 7 page specification supplied by the Builder, 17 sheets of plans supplied by the Builder and 4 sheets of engineer's designs prepared by [redacted]

5. A building permit was issued and works began on 29 March 2018. An occupancy permit was issued on 22 July 2020.

WAS THE CONTRACT NOVATED TO ANOTHER BUILDER?

6. This issue arose because it had been alleged by the Builder at a directions hearing in August 2021 that the Builder had engaged another builder to continue to carry out the works for the Owners.

7. When Mr [redacted] gave his evidence at the hearing, he deposed that in 2018 the Builder had got into difficulties following the failure of a developer. Some of its projects were assigned to other builders. Two men apparently known as [redacted] and [redacted] who operated a separate company, offered to take the remaining jobs out of the hands of the Builder. Mr [redacted] went on to say that each of his company's other clients had agreed to accept an assignment of their contract to this new builder but Mr [redacted] declined to accept an assignment of his contract. He did not want to change builders. He accordingly missed the opportunity to obtain a new contract and to obtain new insurance. From this evidence it is clear, and I

find, that no assignment or novation of the Contract occurred and the correct respondent to this application is the Builder

THE ISSUES

8. The issues I have to determine are the claims for delay, damages for incomplete work, damages for defective work and the amount to be credited to the Builder for the balance of the contract sum.

THE DELAY CLAIMS

9. The Builder was allowed 360 days under the Contract to complete the works. The Builder has claimed a 4 day extension of time for inclement weather and 80 days delay in respect of variations. The Owners contest the Builder's entitlement to 84 extra days in which to complete the works. They say the project was delayed by 72 weeks and they are entitled to liquidated damages at the rate of $250 per week for that delay.

10. The issues relating to liquidated damages are:

    (a) what was the initial date for completion under the Contract?

    (b) to what date has a date for completion been extended?

    (c) when did the Owners' entitlement to damages for delay come to an end; and

    (d) what sum are the Owners entitled to in respect of damages for delay?

Commencement, completion and the claims for extension of time

11. Under the contract, the "Commencement" means the day on which the Building Works commence on the Building Site. "Completion" means that the Building Works have been completed in accordance with the Plans and the Specifications.

12. The Builder formally issued a Notice of Commencement which confirmed that the Building Works began on 29 March 2018. As the Building Works were to be completed within 360 calendar days from the Commencement date, the date for Completion was 24 March 2019.

13. Under clause 34 of the Contract, the Builder is entitled to an extension of the date for Completion if the Building Works are delayed due to a range of reasons including a variation, inclement weather or conditions arising from inclement weather, in excess of the days allowed for inclement weather set out in Schedule 1.

14. The Builder put in a claim for a number of variations. In respect of eight of those variations, the Builder claimed on each occasion 10 days extension of time. The variation claims were analysed during the course of the hearing. Mr [redacted] deposed that he was not on the site after the middle of 2018, and so he could not give evidence in relation to the variations or their impact upon the progress of the Building Works. However, the Builder did not call [redacted] or [redacted] or any other person who might have had knowledge of

the variations. Thus, there was no primary evidence as to how the variations might have affected the network of critical activities required to be performed to bring the Works to Completion so as to justify an extension of time.

15. Moreover, it was not clear why many of the variations would give rise to a claim for an extension of time in any event. For instance, variation No.1 involved deletion of floor tiles from the Contract. Accordingly, the Builder had to do less work rather than more work. Other variations merely consisted of a list of items in respect of which the specification was being confirmed. They were not variations at all.

16. Another point which gave rise to suspicion as to the legitimacy of the delay claims was that, for each variation, ten days extension of time was sought. In the circumstances, the conclusion is inescapable that the claim for extension of time was generated on a pro forma basis, and not on the basis of a proper consideration of how the sequence of critical works might be affected.

17. For all these reasons, I find that the claims for extensions of time based on the variations were bogus, and I reject the claim for an 80-day extension of time of the date for Completion based on them.

18. It remains to deal with the last extension of time which was for four days inclement weather allegedly sustained in excess of the allowance for inclement weather specified in Schedule 1. No one on behalf of the Builder gave evidence as to the number of days wet weather occurred during the course of the Building Works. There was accordingly no evidence before me to justify the proposition that the allowance for inclement weather in the Contract had been exceeded. The claim for four days extension of time for inclement weather is also rejected.

19. Because all the claims for extensive time have been rejected, the date for Completion of the Building Works remains unadjusted as 24 March 2019.

When did the Owners' entitlement to damages for delay come to an end?

20. The next issue to be considered is when the Owners' entitlement to damages for delay came to an end. The parties agreed that this entitlement came to an end when the Builder took possession. However, they had radically different views as to when this occurred.

21. Mr [redacted] highlighted evidence from Mr [redacted] that he had received a key to the front door from the site supervisor and asserted that the Owners were in possession from that point. Mr [redacted] said that this occurred in in January 2020.

22. Mr [redacted] disputed that date and said that he got the key later. He made several attempts to identify the month, suggesting on different occasions March, April or May. Mr [redacted] said that he was given permission by the site supervisor to have access to carry out works even though the

Builder was still in possession of the site and continued to work on the project from time to time. Accordingly, he disputes that he had sole possession from the time he received the key.

23. The Owner's position is that they did not get possession until *after* the occupancy certificate was issued. This was on 22 July 2020 and occurred after a final inspection place on 16 July 2020. Even then, the Owners submit that they did not take possession until they were given a key to the garage at a meeting with [redacted] and the site supervisor [redacted] They moved in on 15 August 2020.

24. As I did not have the benefit of hearing any evidence from [redacted] or [redacted] or [redacted] or any other representative of the Builder regarding the circumstances in which the Owners came to have a key to the front door of the house, or the purposes for which they had a key, I am not prepared to make a finding that possession was taken by the Owners at that point.

25. The Occupancy Permit was not issued until 22 July 2020. It is also clear from an email sent by Mr [redacted] to Mr [redacted] on 30 July 2020 that there was a meeting on 27 July 2020 by Mr [redacted] and Mr [redacted] [redacted] and [redacted] This email records that they discussed all outstanding works and reached consensus regarding what had to be done and the balance to be paid to the Owners after taking into account liquidated damages (of $14,500). An agreement was proposed that if the Builder finished by 10 August 2020, the Owners would waive the money owed and not take proceedings. However, the Building Works were not finished by 10 August 2020 and the opportunity to avoid litigation was lost.

26. There was a handover meeting on 15 August 2020 at which the Owners were handed a remote control to the garage door. In circumstances where, only days before, an arrangement had been discussed under which the Builder would complete the Works, I find that the Builder still had effective control of the site at that time. On this basis, I find that the Owners became entitled to possession only on 15 August 2020. I also find that this is the date upon which the Owners' entitlement to damages for delay came to an end.

General damages for delay

27. During final submissions, the Owners made it clear that they were claiming general damages for delay based on the cost of mortgage payments during the period overrun as well as liquidated damages. When it was pointed out to them that they had to make a choice between general damages or liquidated damages for delay, they opted for liquidated damages.

The calculation of liquidated damages for delay

28. The relevant period for the assessment of liquidated damages for delay is 24 March 2019 until 15 August 2020. The Owners at the hearing submitted that that entitled them to damages of 72 weeks. My calculation is that the

Owners are entitled to damages for a slightly longer period but, in fairness to the Builder (because the longer period was not raised at the hearing), I will limit the period for the purpose of calculation of damages to 72 weeks.

29. The rate stipulated in the Contract for liquidated damages for delay in completing the Building Works is $250 per week. I find that the Owners are entitled to liquidated damages in the sum of **$18,000.**

INCOMPLETE AND DEFECTIVE WORKS

30. In respect of incomplete and defective works, the Owners relied on a report prepared by Mr Maison Azdari. Mr Azdari holds a degree in civil engineering and a number of building qualifications, including in estimating. He is a Registered Builder-Unlimited in Victoria. He gave evidence that he had been in the construction industry in excess of 20 years and has prepared approximately 1000 reports in respect of defective buildings. In the last 12 months or so, he has resided in [redacted]

31. [redacted] accepted Mr Azdari's qualifications and expertise qualifying him as an expert witness and, at the hearing, was very generous of his assessment of Mr Azdari's evidence. In particular, he said that he had done "a great job" and that his report was "perfect"

32. In his report, Mr Azdari identified a number of items of incomplete work and another set of items of defective work. He said that he identified these items by reference to the contract specifications and the plans. He worked independently and did not rely on a list of completion items or defects supplied by the Owners.

33. The items Mr Azdari identified were discussed in detail between pages 20 and 86 of his report. Mr [redacted] was not in a position to dispute the existence of incomplete works or defects as he had not inspected the site since the preparation of the report. His comments were limited to questions concerning quantification of costings which arose from the text of the report. For this reason, it was not necessary for Mr Azdari to spend much time establishing the existence of defects. With limited exceptions, they were conceded. As a result, most of Mr Azdari's evidence at the hearing was concerned with his costings.

Mr Azdari's methodology

34. Before addressing individual items in his report, Mr Azdari had set out the hourly rates he had used in forming his assessments. He postulated that labour would cost $50 an hour and that special trades such as painters, plumbers and electricians would be in the range $75-$100 per hour. These ranges were not challenged by Mr [redacted] They are not out of the range of rates which were being proposed to the Tribunal in 2021 in my experience, and I accept them.

35. Mr Azdari said that when assessing an item, he allowed for a callout fee where a tradesperson was required to attend. In respect of most items, he

suggested a range in respect of which the work could be completed. Typically, each range was rounded off to the nearest $50, and only occasionally did he a round off to $25. Only once, in respect of a minor item (caulking) did he suggest a figure of $10.

36. Mr [redacted] had no specific criticism of the costings of the incomplete items, but he made the general point that the items had been costed to the nearest zero.

37. Mr Azdari rejected this criticism, saying that it would not be cost-effective to the client to cost every item to the nearest dollar. He rejected a suggestion that his costings were excessive and confirmed that he considered them to be realistic.

38. I accept Mr Mr Azdari's costings generally and, based on my experience at the Tribunal, I do not regard them as excessive.

Inflation

39. The Owners contend that it will cost more to complete and rectify the Works now than it would have cost in November 2021 when Mr Azdari completed his report. Because of this, the Owners asked Mr Azdari at the hearing to nominate the percentage by which he considered costs had increased since he completed his report. Mr Azdari, to his credit, acknowledged that, because he now lives in [redacted] he did not have specific knowledge of the rate of inflation on building sites in Melbourne. All he could say was that inflation was occurring.

40. Mr [redacted] also to his credit, acknowledged that inflation was occurring in the domestic building industry here in Victoria and highlighted that a number of HIA builders had gone into liquidation because they were locked into fixed price contracts.

41. Had it not been for the general evidence of Mr Azdari that the domestic building industry was subject to inflation, and for [redacted] specific acknowledgement that inflation was occurring in the industry in Victoria, I would have taken judicial notice of inflation in any event.

42. In the circumstances, where there was no specific evidence before me regarding the loading for inflation that I should apply to Mr Azdari's figures, the Owners proposed that the appropriate course was for me to adopt the higher end of the range assessed by Mr Azdari. With one exception which I discuss below, I propose to adopt that course

COMPLETION ITEMS

43. Mr Azdari's costings regarding incomplete works are to be found in Annexure N of his report. The items, with the respective costings, are as follows:

INCOMPLETE TASKS COST ESTIMATE	$10,240	$12,540

S.1.2 + Eaves+ CAULKING/FILLING REQUIRED **9.7.1 + Skirtings / Architraves+ CAULK THE GAPS** **S.2.2 + Windows (External)+ CAULKING REQUIRED TO TOP/SIDES**		
Caulk all external joints throughout the dwelling	$250	$350
All internal joints to be caulked	$200	$250
S.2.3 + Windows (External}+ FLY SCREENS NOT INSTALLED		
Supply and install x23 flyscreens as per contract specifications @$140-$160 each	$3,220	$3,680
6.3.1 + Joints/lnlls/Caulking + SERVICE PENETRATIONS -TO BE SEALED/CAULKED		
Caulk the penetrations	$10	$10
7.1.1 + Automatic Roller/Sectional Door(s) - BRUSH SEAL REQUIRED		
Supply and install the brush weatherseal to protect the garage	$350	$400
9.4.1 + Doors (Internal)+ HANDLE NOT INSTALLED		
Supply and Install the door handle as per contract	$150	$200
Supply and install the lock as per contract	$100	$150
9.4.3 + Doors (Internal} NO LOCK ON TOILETS DOORS		
All rooms with toilet must be lockable - Supply and install lock as per specifications and regulations. 4 doors	$400	$500
9.10.4 + Lights/switches/downlights + GARAGE FRONT LIGHT NOT INSTALLED **Lights/switches/downlights PORCH DOWNLIGHT NOT INSTALLED· INCOMPLETE WORK**		

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL · VCAT

Electrician call out fee - one day work+ issuing certificate	$700	$800
Supply the garage front all mounted light	$100	$150
Supply x2 balcony outdoor downlights	$100	$150
9.12.1 Chute LAUNDRY CHUTE NOT INSTALLED		
Cut the floor, install the chute tube and lead, cut the laundry ceiling plaster and fix the chute outlet in place	$750	$1,000
9.13.1 Study SHELVES NOT INSTALLED		
Supply and install the shelves as specified in the drawings	$400	$500
10.1.2 + Stairs WALL NOT PLASTERED - INCOMPLETE		
Supply and install (and paint) plaster under stairs	$900	$1,100
11.1.1 +Plumbing/Mixer/Taps+ COVERPLATE(S) NOT INSTALLED		
all cabinet holes to be covered by cover plate	$10	$25
11.2.3 +Cabinetry+ SHELVES NOT INSTALLED		
Supply and install the shelves as per drawings and specifications - 21 lm	$1,800	$2,200
12.1.1 + Plumbing/Mixer/Taps + PLUMBING INCOMPLETE		
Supply and install the missing part of the shower - If cannot find the missed part, then replace the whole unit	$200	$300
12.3.1 + Exhaust Fan NOT ABOVE THE SHOWER		
Supply and install a shower exhause fan above shower	$300	$400
12.4.1 +Toilet+ TOILET ROLL HOLDER MISSING		
Supply and install the toilet roll holder	$50	$75
13.1.2 + Mirrors, windows and doors glassses NOT INSTALLED BED 3		

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL · VCAT

Supply and install the mirror as per specification	$250	$300

44. It is to be noted that Mr Azdari costs the completion of the Works in the range $10,240- $12,540.

45. Mr [redacted] challenged only one of the completion items, namely item 7.1.1, which was a brush seal to the automatic roller door. This item was assessed in the range $350-$400.

46. Mr [redacted] queried whether it was a regulatory requirement that a brush seal be fitted to an automatic roller door. Mr Azdari conceded that this was mandatory only in a bushfire zone and was merely recommended elsewhere. As the Owner's house was not in a bushfire zone, I find this item is not an item of incomplete work. Accordingly, this item is to be deleted from the list of completion items.

47. For the reason given above at [42], I will adopt the higher end of the range for completion items assessed by Mr Azdari. Before the exclusion of the brush seal to the roller door, the total of completion items was $12,540. When the brush seal is deleted, the total is reduced by $400. Accordingly, I find that the Owners are entitled to damages in respect of completion items assessed at **$12,140.**

DEFECTS

48. I turn now to defects. They are also set out in Annexure N to Mr Azdari's report. The respective items assessments are as follows:

DEFECTIVE ITEM COST ESTIMATE	**$23,345**	**$31,295**
5.1.1 +Eaves+ WATER STAINING/DAMAGE NOTED **5.1.3 +Eaves+ NOT LEVEL**		
Remove the existing balcony ceiling linings	$200	$250
Supply and Install new ceiling linings	$550	$650
Supply and install quads at wall/ceiling joints	$100	$150
Paint the new installed linnings	$100	$120
Provide safety rail/scaffold for the safety of working trades during repair	$500	$600
5.2.1 + Windows (External)+ RUBBER FLASHING ADJUSTMENT REQUIRED		
Get the Door manufacturer technician to adjust the door.	$350	$600

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL · VCAT

5.4.1 Metal corrosion - Brick acid wash ACID WASH		
Supply and apply the proper material to remove the deteriorated surface	$500	$700
Boom Lift Hire - one day - Drop off and pick up included	$900	$1,000
5.5.1 Plumbing PIPE CORROSION. WATER LEAK		
The damaged pipe to be replaced -qualified plumber	$250	$350
6.2.1 + Control Joints + RENDER COVERED CONTROL JOINTS **6.2.2 + Control Joints WRONG PLACE**		
Cut the control joints covered render by a grinder or any other safe method	$350	$400
Supply and apply a proper mastic sealant to all control joints	$400	$500
Cleaning the dusts resulted from cutting the render by a grinder	$250	$350
Boom Lift Hire - one day	$450	$550
7.1.2 + Automatic Roller/Sectional Door(s) - + DOOR/WALL GAP INCONSISTENT		
The door/rail to be adjusted by the door manufactorer's technician	$250	$350
8.1.l +Insulation+ LOOSE/OUT OF PLACE INSULATION **8.3.l Lights/Downlights/Cables + DOWNLIGHTS MINIMUM CLEARANCE REQUIRED**		
Place the insulations in the right place. **Note**: Ensure you maintain the minimum of 200mm clearance between the insulations and downlights - Fire Safety	$250	$350
9.1.1 + General Painting Defects+ GENERAL PAINTING DEFECTS THROUGHOUT THE DWELLING **9.1.3 + General Painting Defects BALCONY FACADE**		

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL · VCAT

9.1.4 + General Painting Defects GARAGE/HOUSE DOOR **9.3.1 + General Cracks+ GENERAL CRACKS TO** **WALLS/CEILING/SKIRTINGS/ ARCHITRAVES** **9.3.2 + General Cracks BEDROOM 4** **9.4.2 + Doors (Internal) + DAMAGED** **9.5.2 + Ceiling/Wall plaster WATER DAMAGE - EXISTING MOULD** **(Painting Only)** **9.8.3 + Windows CRACKED FRAME**		
All internal walls, skirtings, architraves, door/window frames (excluding door leaves but including the damaged linen door} and dinning/kitchen/living area ceiling to be repainted to cover poor quality paint and cover the appearing cracks (One quote only - except where is required two quotes to cover the marks) - The cracks to be filled, patched and sanded prior to painting.	$7,000	$11,000
9.5.1 + Ceiling/Wall plaster + PLASTER DAMAGED **9.5.2 + Ceiling/Wall plaster WATER DAMAGE - EXISTING MOULD** **9.6.l Mould MOULD NOTED**		
Cut the dinning room ceiling plaster	$100	$150
Get a mould removalist to inspect the property to ensure no further mould is	$400	$500
Install new plaster, patch and sand	$600	$700
Note: Painting cost is already included in the painting estimate		
9.8.1 +Windows+ OPENING RESTRICTION (12SMM) REQUIRED - FIRST 9.8.2 + Windows + WINDER IS BROKEN **9.8.4 + Windows OPENING STOPPER IN GROUND FLOOR WINDOW BY MISTAKE**		

9.8.5 + Windows NOT OPENING **9.8.6 + Windows RUBBER FLASHING OUT OF PLACE** **9.8.7 + Windows NOT STRAIGHT** **9.8.6 + Windows RUBBER FLASHING OUT OF PLACE** **9.8.10 + Windows DAMAGED NOT CLOSABLE**		
Remove the damaged (curved) window panels and replace with new panels	$700	$900
Remove the ground floor opening restrictions	$250	$300
Install the first floor window opening restrictions	$400	$500
Replace the damaged winders ith (sic) new ones with the keys	$500	$600
Fix the master bedroom and Rumpus windows to be openable	$300	$400
Repair the damaged/out of place rubber (removing the glass might be required) **Note**: All above items to be done with the manufacturer's technician	$500	$600
9.8.8 + Windows FRAME DAMAGED		
Remove the architraves	$100	$150
Remove the window from the site	$300	$400
Supply and install a new window	$1,000	$1,200
Supply and install new architraves	$250	$300
Note: The painting cost is included in painting section		
9.8.9 + Windows FROSTED COVER TO BE REPLACED		
Replace the existing frost with a new cover	$350	$400
9.8.11 + Windows DAMAGED		
Replace the damaged panel - Supply and Install	$250	$350
9.9.1 + Flooring - Timber+ SQUEAKING/SPRINGY FLOORS		

Remove the carpet from the damaged area (Do not damage the carpet)	$100	$100
Remove the timber floor sheets	$500	$600
Supply new floor sheets (199mm tick Yellow tongue particle board), to cover the right handside of the master bedroom (Inc. delivery)	$550	$650
supply and apply adequet glue (liquide nail) on top of the jests and andder the timber sheets	$120	$150
Install the timber sheets using adequate nails (nails spacing: Internal: 300mm, Edges: 150mm)	$500	$650
Put the carpet back in place by an experienced carper installer	$350	$400
9.10.1 + Lights/switches/downlights + IMPROPER INSTALLATION Included in the painting section		
9.10.2 + Lights/switches/downlights + NOT WORKING		
9.10.3 + Lights/switches/downlights + WRONG TYPE		
9.11.1 + Smoke Detectors ALARMING ALL THE TIME. DEFECTIVE		
Supply the right model of side light	$75	$125
Electrician call out fee - one day work+ issuing certificate	$700	$800
10.1.1 + Stairs CRACKS		
Suuply and apply glue	$100	$150
10.2.1 + Balustrades/Handrails BALUSTRADE IS SHORT - TRIP HAZARD		
Replace the glass with a longer one to cover the first step	$1,200	$1,350
11.2.1 +Cabinetry+ DRAWERS NOT CLOSING PROPERLY		
11.2.2 +Cabinetry+ INCONSISTENT GAPS - ADJUSTMENT REQUIRED		
12.2.1 +Vanity/Cabinetry+ INCONSISTENT GAPS - ADJUSTMENT REQUIRED		

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL · VCAT

Adjust all cabinet doors and drawers	$400	$500
13.1.1 + Mirrors, windows and doors glassses + DAMAGED/CRACKED		
Replace the damaged glass	$200	$250

49. It is to be noted that Mr Azdari assesses the cost of the rectification of defects in the range $23,345-$31,295.

50. Mr [redacted] made only limited comments in relation to defects. The first item that Mr [redacted] challenged was the allowance of 7,000-$11,000 for painting. This assessment was arrived at after considering a number of defects.

51. To start with, Mr [redacted] honed in on cracks which were shown in photographs to have developed in a window frame (item 9.8.3). There was a debate about whether these were hairline or were visible for the purposes of the VBA Guide to Standards and Tolerances, given that the photographs were clearly not taken from a distance of 1.5m. I consider this to be an arid debate. The VBA Guide to Standards and Tolerances is exactly that, a guide. It does not bind the Tribunal. As the cracks were clearly present in the photographs, I have no hesitation in taking them into account.

52. When Mr Azdari was questioned regarding his conclusion that the whole house needed to be repainted, he gave a comprehensive answer. He referred to cracks which had appeared in architraves. He referred to cracks in other places including a bedroom, the laundry, the pantry, in the stairs and in the rumpus room. He also referred to blemished painting in the kitchen. On the basis of all this evidence, I find that it is necessary for the house be repainted internally.

53. However, the range within which the repainting was assessed was $7,000-$11,000. Mr [redacted] questioned even the lower end of the range and made reference to 2 points.

54. The first related to the quality of paint to be used. Mr [redacted] said that the specification was silent as to the brand of paint to be used and the painting should be assessed on the basis that Haynes paint was to be used. He said 12 buckets would be required to apply three coats to the walls and ceilings of the house. At $110 for 10 litres, the cost would be $1,320. He highlighted that Mr Azdari had assumed that Dulux paint would be used, and this is much more, costing $245 for 15 litres, which equates with $163.33 for 10 litres.

55. Mr Azdari said he had allowed for the painter to carry out full preparation and to return to the house to apply the second and third coats on different

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL · VCAT

days. Mr [redacted] disputed that this was necessary, pointing out that a second coat could be applied only two hours after the first coat. Having regard to my finding that the interior of the house needs to be repainted, and accepting Mr Azdari's evidence that preparation will be required such as filling cracks (which will involve subsequent sanding back), I do not accept that it will be possible to apply three coats of paint to the whole house in a day, even assuming that this was acceptable practice. In the circumstances, I accept Mr Azdari's assessment of what is required in preference to that of Mr [redacted] However, in the absence of a more detailed costing, I adopt the lower end of Mr Azdari's range. I find that repainting is to be assessed at $7,000, not $11,000, notwithstanding the likely impact of inflation on the cost.

Cabinetry

56. Mr [redacted] also made an attack on the allowance for cabinetry, even though this was a relatively minor item. Mr Azdari had allowed a figure between $400-$500 to adjust all the cabinet doors and drawers. Mr [redacted] submitted that even this was too much, given that there were only 6 drawers in the kitchen and there were only 3 vanities in the house. Mr Azdari's was that he had allowed for a full day's work by a cabinet maker, noting that $400-$500 would be the minimum that would be charged for an attendance. I accept this evidence, and because of inflation will allow the top end of the range, namely $500.

Replastering of the living room ceiling

57. Mr Azdari had noted that the living room ceiling has been water damaged and that mould was now showing. He had allowed for removing the dining room ceiling plaster, getting a mould specialist in to inspect the property in order to ensure that no further mould existed, and then to re-instate the plaster and patch and sand. The lower end of the range for these three activities was $1,100 and the higher end was $1,350.

58. Mr [redacted] deposed that when leaking into the living room ceiling had been noted, he had called back the Builder's plumber. The plumber had attended and applied some silicon without making any charge, on the basis that was covered by his warranty.

59. Mr [redacted] was not concerned about the cost of the replastering work, but he strongly disputed liability. His evidence was that the toilet in the bathroom above the living room had been installed properly. He relied on the plumber's certificate which had been issued prior to the issue of the Occupancy Permit. He pointed out that the tiling had been taken out of his contract and that the tiling of this bathroom had been carried out by a subcontractor working directly for the Owners. He suggested that the tiler or someone else on behalf of the Owners had removed the toilet temporarily to allow for waterproofing of the bathroom floor and the tiling and had then put the toilet back without doing the job properly.

60. I note that Mr [redacted] put forward no documentary evidence regarding this incident. In particular, he tendered no photographs of the leaking toilet or of the rectification work carried out by the plumber.

61. On the other hand, there is direct evidence in the form of a variation that the tiling was taken out of the contract and Mr [redacted] did not dispute that he, rather than the Builder, had had the bathroom tiled.

62. In these circumstances, I accept the thrust of the submission made by Mr [redacted] On the balance of probabilities, I find that the installed toilet was removed and then re-installed after the Builder left the site. I find for the Builder in respect of this particular item.

Summary regarding defects

63. The starting point is that I accept the higher end of Mr Azdari's range of costings for fixing the defects, except repainting. The higher end of the range is $31,295, which includes repainting assessed at $11,000. As I have adopted the lower end of the range for repainting of $7,000, a reduction of $4,000 is warranted. This adjustment brings the assessment back to $27,295.

64. The second adjustment to be made is the deletion of $1,350 which is the cost of removing the plaster from the living room ceiling, investigating the spread of mould, and reinstating the plaster ceiling. This deletion reduces the assessment for defects to **$25,945**. I will allow this sum to the Owners.

CREDIT TO BE ALLOWED TO THE BUILDER IN RESPECT OF BALANCE OF THE CONTRACT SUM

65. The parties agreed that the Builder is entitled to a credit for the balance of the contract sum. However, there is a major disagreement between them as to the amount involved. The disagreement appears to arise from their view of the adjusted contract sum, because they are agreed that the total amount paid by the Owners in respect of the Building Works is $367,979.65.

66. The parties agree that the original contract sum was $350,000 plus GST, a total of $385,000. The parties also agree that positive variations increased the contract sum by $7,723.23. This increased the contract sum to $392,723.23.

67. The parties also agreed that the contract sum is to be reduced by the deletion of the provisional sum for landscaping of $11,390. This adjustment reduces the contract sum to $381,333.23.

68. The parties do not agree about the treatment of negative variations. They were analysed at the hearing and total $7,378.60. In my view, they also are to be deducted from the contract sum. On this basis, my calculation of the adjusted contract sum is $373,954.63

69. As noted, it is agreed that the amount paid by Owners, namely $367,979.65, is to be deducted from the adjusted contract sum. The balance is $5,974.98.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL · VCAT

70. Mr [redacted] asserted that a higher figure of $8,110 was still due to the Builder. His explanation was that positive and negative variations had been addressed in a dynamic manner as progress claims were calculated and paid. I am not persuaded that he is correct.

71. In my view, the correct methodology is the one I have outlined, namely to identify the adjusted contract sum taking into account positive variations, negative variations and the adjustment of provisional sums, and then to deduct the amount paid by the Owners. On this basis, I find that the amount to be credited to the Builder in respect of the balance of the contract sum is $5,974.98, which I will round to **$5,975**.

SUMMARY

72. I have found above that the Owners are entitled to the following awards:

(a) liquidated damages of $18,000 -see [29 above];

(b) completion items of $12,140- see [47];

(c) defects of $25,945 see [64].

The total these three items is $56,085.

73. When the amount to be credited to the Builder of $5,975 – see [71] – is deducted, the balance due is **$50,110**. This is the sum which will be awarded to the Owners.

Member C Edquist