VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D616/2007

CATCHWORDS

Domestic building dispute – distinction between works which were the builder's and owner's responsibility under the contract – variations – whether failure to prime end grains of weatherboards a defect – appropriate measure of damage – delay – whether liquidated damages specified in contract a penalty

APPLICANT	Nick Kotsiris
FIRST RESPONDENT	Georgina Kartsidimas
SECOND RESPONDENT	Chris Panayiotou
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	23 – 30 March and 6 April 2009
DATE OF ORDER	28 October 2009
CITATION	Kotsiris v Kartsidimas & Anor (Domestic Building) [2009] VCAT 2229

ORDER

1 I order the first respondent to pay to the applicant the sum of $25,972.97.

2 The applicant's claim against the second respondent is dismissed.

3 Costs reserved with liberty to apply.

4 This proceeding is referred to a further directions hearing before Deputy President Aird on 25 November 2009 at 10 a.m. at 55 King Street Melbourne to assess interest and hear any application for costs.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr A Beck-Godoy of Counsel
For the First Respondent	Mr P Baker of Counsel
For the Second Respondent	In person

REASONS

1 This contract, and the ensuing dispute are symptomatic of all that can go wrong when the parties are not truly at arms length. The builder, Nick Kotsiris was introduced to the owner, Georgina Kartsidimas by her brother-in-law – Tassos Panayiotou ('the plumber') with whom he had worked on a number of projects where Mr Kotsiris snr was the builder.

2 The parties entered into a standard form HIA domestic building contract in November 2005. The contract price, for the builder's works, was $272,970 inclusive of GST. The building period was 221 days. Delay damages were agreed at $600 per week, for both the owner and the builder.[1] There were no prime cost or provisional sum allowances as all items usually subject to these were to be provided by the owner.

3 It seems that initially the relationship was good. However, as time went on the parties fell into dispute about a number of issues. Matters came to a head after the builder rendered the fixing stage payment on 14 or 15 December 2007 for $68,242.50. When the parties were unable to resolve their differences, the builder instituted these proceedings in September 2007. The owner subsequently lodged a counterclaim in January 2008.

4 The builder claims $91,466.46. At the commencement of the hearing the owner was claiming $63,507. After taking into account the variations which have been conceded, any defect or completion claims which have been abandoned, and the balance of the contract price, the owner now claims $46,451[2]. The primary issues between the parties relate to the preparation and installation of the weatherboards and delay.

5 The builder joined the painter, Chris Panayiotou ('the painter'), who is the plumber's father, as a party to the proceeding, relying on Part IVAA of the *Wrongs Act* 1958[3]. In the alternative, the builder seeks contribution from Mr Panayiotou under Part IV of the *Wrongs Act*.

6 Mr Beck-Godoy of Counsel appeared on behalf of the builder, and Mr Baker of Counsel appeared on behalf of the owner. Mr Panayiotou was unrepresented. The owner relies on expert evidence from Kevin McDonald of New Home Inspections. Two experts gave evidence on behalf of the builder: Barry O'Meara, a building consultant, and Malcolm McKinnon of Master Painters. During the hearing I attended the property for a view with the parties, their lawyers and experts.

PREPARATION

7 Preparation by the parties left much to be desired. For instance, although there are a number of exhibits to the owner's witness statement, the references to documents in the witness statement are to the discovery

[1] Schedule 1 to the contract, items 9 and 12
[2] First respondent's final submissions - Schedule 1
[3] Points of Claim of the Applicant against the Second Respondent dated 27 May 2008, paras 7 and 8

numbers, not the exhibit numbers. The owner did not discover any photogrpahs, but black and white photocopies are exhibited to her witness statement in reply. On the third day of the hearing a folder with a selection of colour photos, being a sample of the black and white photos attached to her witness statement in reply, were handed up. They were not numbered and the hearing was adjourned so that each photo could be numbered for ease of reference and to avoid unnecessary delays during the hearing.

8 There are similar difficulties with the builder's witness statement. Further, on day 2 of the hearing counsel for the builder called upon the owner to prove that the $600 per week allowed in the contract for liquidated damages was not a penalty. This was the first time this had been raised. At the commencement of day 3 of the hearing leave was sought by the builder to file and serve an amended defence to counterclaim to include this defence, even though it was yet to be finalised. In the interests of progressing the hearing, leave was ultimately granted, after it was finalised.

THE CLAIMS

9 The builder claims $91,466.46 calculated as follows:

Unpaid variations	$ 4,844.60
Balance due on fixing stage	$23,242.50
Completion stage payment less cost to complete[4]	$16,177.00
Delay and disruption damages (51 weeks x $600 pw)	$30,600.00
Interest	$16,602.36

10 The owner initially claimed $63,507 but this has been adjusted in the final submissions where the amount claimed in Schedule 1 is $46,541 calculated as follows:

Defects and completion costs	$ 59,186
Adjustment to floor credit (conceded by the builder)	$ 2,630
Repaint (conceded by the builder)	$ 250
Temporary fencing 15 August 2007 to 16 March 2009 (continuing) at $55 per month	$ 935
Furniture storage fees (May 2008 to January 2009 at $110 per month)	$ 990
Insurance (Business insurance/contractors risk)	$ 1,526
Liquidated damages ($600 pw) 25 June 2006 to 15 August 2007	$ 35,657
	$101,174

[4] $27,297 less the builder's estimated cost of completion of $11,120

Less balance of contract sum	$ 50,539
Less variations conceded	$ 4,094
	$ 46,451

THE CONTRACT

11 The parties entered into a standard form HIA domestic building contract in November 2005. There are two sets of specifications: the standard form HIA specifications and a further set prepared by the builder. The total contract price, for the builder's works, was $272,970 inclusive of GST.

12 This was the builder's first project as a builder. He was not responsible for all of the works. Most of the contractors/sub-contractors were engaged directly by the owner. The owner was responsible for obtaining any necessary planning approval and the building permit. At the time the contract was entered into, the owner had obtained a building permit as an owner-builder on 22 September 2004. For reasons which are unclear to me, an amended building permit identifying Mr Kotsiris as the builder was not obtained until 6 February 2006**.** The conditions of the building permit remained the same, and required the work to be completed by 22 December 2006.

13 The owner was responsible for the following works as set out in clause 4 of the specification prepared by the builder:

- 4.1 kitchen cupboards and vanity units and cupboards in the laundry and bathrooms
- 4.2 plumbing fixtures
- 4.3 painting
- 4.4 tile supply and fixing (waterproofing) *(builder will complete waterproofing)**
- 4.5 roof plumbing
- 4.6 heating and cooling
- 4.7 glass roof Conservatory
- 4.8 pergola and decking
- 4.9 paths and driveway
- 4.10 front fence
- 4.11 scaffolding *(to be used efficiently)**

* These are handwritten amendments to items 4.4 and 4.11 which only appear on the owner's copy of the specification.

14 The site is protected by security fencing. There is a locked gate. Although clause 25 of the contract provides the builder will have exclusive possession of the site, both the owner and the builder had keys, and effectively shared possession. The owner, on her own admission, and as apparent from the

large number of photographs recording the progress of the works, was a frequent visitor to the site.

15 There was some disagreement about when the contract was signed and which plans comprise the contract plans. The parties agree works commenced on 15 November 2005. The owner contends the building contract was signed on 17 November 2005 and backdated to 15 November 2005, the builder states the contract was signed on 15 November, but nothing turns on this.

16 It is contended by the owner that the builder agreed to act as project manager and to co-ordinate his works with the works which were being carried out by her contractors. The builder denies this and says that the only agreement was that he would co-operate with her contractors. He relies on the special conditions set out in Schedule 4 of the contract:

> I I [the builder] accept no responsibility if there is delays due to the owner not supplying goods in time &/ tradesman's delays
>
> II If rock is encountered during excavations the owner will be charged $160 per cubic metre.
>
> III The owner will be liable for her tradesmans' actions and must have insurance (public liability) for them & she must also make sure they have appropriate cover. (sic)

17 Although it is submitted by the owner that the plumber's evidence supports her position that the builder was to project manage the works, it does nothing of the sort. The plumber's evidence simply confirms that it was his expectation that the builder would project manage the job. Having considered all of the evidence, I am not persuaded there was any agreement that the builder would act as project manager. Rather, it is very clear to me that both the plumber and the painter played a significant role in relation to these works, directing the builder when and as they saw fit.

THE BUILDER'S CLAIM

18 The builder's claim is for payment of the outstanding balance under the contract including the balance of the fixing stage payment, variations, the final payment (less the cost to complete) and damages for delay. I will consider each in turn with the exception of the claim for damages for delay. The owner also has a substantial claim for liquidated damages. I will consider delay separately.

Variations

19 The builder claims $4,844.60 for eleven unpaid variations. On the first day of the hearing, the owner conceded seven of them. In her final submissions only three variations are contested. The parties do not agree about the amount conceded by the owner – the builder says she has conceded variations totalling $3,557.31; the owner in her final submissions claims she has conceded variations totalling $4,094. I am satisfied the owner's figure

is correct on the basis of the builder's claim for $4,844 and that she is correct in deducting the contested variations from this sum.

20 There was no explanation by the owner as to why it had taken her so long to accept responsibility for payment of variations which she had requested. I reject any suggestion that the payment of $10,000 on 24 July 2007, under cover of a letter from her solicitor, included payment for variations. Of the thirteen variations carried out by the builder, eleven were requested by the owner.

21 The builder has rendered variation invoices (on 15 October 2006 and 15 January 2007) for each of the variations and relies on ss37 and 38 of the *Domestic Building Contracts Act* 1995 (the 'DBC Act') in support of his application for payment. The cost of the variations carried out by the builder was less than 2% of the contract price, and under s38 of the DBC Act these are not required to be in writing.

22 Considerable hearing time, and seemingly in the preparation of final submissions, was spent by the parties in relation to the relatively small amount in dispute.

23 Although the builder identifies five contested variations in his final submissions the owner has only identified three in hers[5], which I consider means she concedes the other two, and I have proceeded on that basis.

Scaffold - $200

24 The builder claims $1,828.15 for scaffold. The contract specification provides under the heading 'No allowances have been made for the following items': *'the cost of any required scaffolding'*

25 On the first day of the hearing the owner conceded all but $200. The $200 is for the cost of erecting and dismantling the scaffold. The owner says that as the builder and her subcontractors were to share the use of the scaffolding, the builder was to pay for its erection and dismantling. This is not what is provided for in the specification. It quite clearly states that scaffold is extra, and I am satisfied that the supply of scaffold includes its erection and dismantling and the owner must pay for this. The owner relies on the handwritten notation which only appears on her copy of the specification: *'agreed as long as used efficiently'*. There is no evidence this was agreed by the parties and even if it was, there is no evidence that the scaffolding was not used efficiently by the builder. I therefore allow $200.

Internal scaffold - $433.24

26 The owner agreed to pay for scaffold. I do not accept the owner's evidence that this agreement only applied to the external scaffold, and that the builder agreed to pay for the internal scaffold. It is irrelevant that the internal scaffold was only used by the builder's plasterer. The specification clearly

[5] First respondent's final submissions para 78

provides that the cost of 'scaffold' not 'external scaffold' is an extra. The owner must therefore pay for all scaffold. I allow $433.24.

Frame modification for the flue - $188.73

27 The builder claims $188.73 for this, yet the amount contested in the owner's final submissions is $117[6]. $188.72 is the amount set out in the schedule of extras attached to the tax invoice dated 15 January 2007. I accept the builder's evidence that the position of the flue for the gas fire is not clear on the drawings, and allow this claim. I allow $117 as this is the amount which has been contested by the owner – had she contested the full amount I would have allowed that.

28 The total allowed for the contested variations $750.24

The fixing stage payment

29 On 14 December 2006 the builder rendered the invoice for the fixing stage payment of $68,242.50. Clause 31 of the building contract requires that all progress claims are to be paid within 7 days. $35,000 was paid on 9 February 2007 and a further $10,000 was paid on 24 July 2007 – the balance outstanding is $23,242.50. The parties do not agree when the works reached fixing stage.

30 In her letter of 8 January 2007 the owner claimed that the fixing stage had not been reached, and set out what she contended were incomplete works, although many of them refer to alleged defective works. The major area of concern at that time appears to have been movement of the weatherboards. In item 1 of her letter of 8 January 2007, she claims:

> Timber weatherboards
>
> a. Many not finished around the house
> b. Moving around meter box – suggest meter box be placed in wooden bracket
> c. Some not nailed – eg/side drive area
> d. Movement in weatherboards – weatherboards not left to acclimatise prior to fitting has caused additional work in that the weatherboards now need to be repainted/refilled at an additional cost of between $8,000 - $10,000

31 She also set out various items of incomplete and defective work, many of which do not relate to the builder's works. For instance, installation of the kitchen, ceiling cornice and rebated architraves. Although the skirtings and architraves had been installed by the builder, some of them had been removed to facilitate the tiling and cabinetry works being carried out by the owner's contractors during the period 14 December 2006 and 2 May 2007.

32 I accept there were some minor items of the builder's works which required completion before fixing stage was complete including completion of the

[6] Consistent with conceded variations totalling $4,094 – first respondent's final submissions, Schedule 1

plastering where some minor patching was required. The plastering could not be completed in the kitchen because the kitchen cabinetry, which was the owner's responsibility, had not been installed.

33 The following paragraph is illustrative of the owner's attitude at this time:

> I recognise there is work yet to be completed prior to the end of the contract, however, as you can appreciate, the cost of completing the above together with the further work to be completed is much greater than the final payment amount.

The issue of delay was raised and a claim for delay damages foreshadowed. The builder provided a very detailed response in his letter of 13 January 2007. The owner replied by letter dated 19 January 2007 advising she was about the leave for overseas and would not be returning until late on 4 February and advising:

> Whilst I am overseas I am not able to action anything therefore you will need to wait until Monday 5th February before I can do anything further from my end about the matter.

34 There was a meeting on site on 5 or 6 February 2007 attended by the owner, the builder, his father, the plumber and the painter. Not only do the parties not agree on the date of the meeting, they disagree about what occurred or was agreed at that meeting, other than that they discussed the issues raised in the owner's letter of 8 January. During February the builder carried out some works including preparing the area under the stairs for plastering, and some completion works. He also removed and re-nailed some weatherboards and reinforced the door frames for the external French doors as directed by the plumber.

35 There was a further meeting on site on 17 April attended by the owner and the builder, his father and the plumber. The builder says that the cabinetry was still incomplete at this time. The weatherboards, and the owner's failure to pay the balance of the fixing stage payment, appear to have been the major issue at this meeting.

36 The builder obtained an Archicentre report dated 2 May 2007 which confirmed fixing stage was completed as at the date of the inspection which, as it is not noted in the report, I take to have been 2 May 2007. The works may well have been at fixing stage prior to that date save for those items which had been installed by the builder and removed by the owner's contractors, and the installation of the kitchen which was not completed until late March 2007.

37 In contending fixing stage had not been reached as at the date of the Archicentre Report – 2 May 2007, the owner's solicitors rely on a number of items in the report which I will list (with the commentary from the Archicentre report), and comment upon:

Item and Archicentre commentary		Comment
2(b)	Installation of cornice has not been completed	This is not the builder's work
2(d)	Within kitchen only very minor items of the builders work are incomplete and I understand this is because the builder has been held up by installation of kitchen fittings.	Builder delayed by the owner
2(e)	I am advised cornices are not in the building contract	This is not the builder's work
5	Rendering to brick construction at front entry is incomplete. As to whether this work should be included in Fixing Stage or not is arguable.	Rendering is not part of the fixing stage
6(e)	Minor adjustment to door track is required	This is a completion or maintenance item
6(f)	Adjustment of doors required is minimal and is not grounds for non-payment of Fixing Stage	These are completion or maintenance items
6(g)	Gap between door and doorjamb is excessive and minor adjustment is required	This is a completion or maintenance item
6(h)	Tops of doors to balcony are not exactly aligned.	This is a completion or maintenance item
7(a)	It is understood that handles matching those that are part of the hinge arrangement are not available. Perhaps owner could select handles for fitting by the builder	Not a reason to withhold payment
7(b)	Detailed design should be provided prior to construction. If manufacturer of bi-fold window hardware does not supply required hardware owner could select another for fitting by builder	Not a reason to withhold payment
11(a)	Architraves and skirtings – substantially complete	These had been installed and removed by the owner's contractors to facilitate tiling and cabinetry works
11(b)	Rebated architraves required by owner are not standard construction	Not the builder's works
13	Roof balcony screed not completed. Agreed	Not a reason to withhold payment.

38 'Fixing stage' is defined in s40(1) of the DBC Act as:

> fixing stage means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position

Whilst, on a strict interpretation of the definition, the works had not reached 'fixing stage', this is because either the outstanding works were the responsibility of the owner, or the builder was unable to complete some

minor items because of the delays by the owner in completing her works. In particular, the kitchen was not installed until late March 2007 and the builder says that the cabinetry was still incomplete on 17 April (the further on-site meeting). In my view, it would be grossly unfair to deny the builder payment of the fixing stage after 2 May 2007 (the date of the Archicentre report) when he had completed his works so far as he was able, pending completion by the owner of her works. Further, it is clear from the correspondence, and the owner's own evidence, that the real reason she refused to make full payment of the fixing stage progress claim was because of her concerns about the weatherboards.

39 The owner also contends she had no obligation to make the fixing stage payment because of the alleged latent defects in the weatherboards. However, these so-called latent defects, which I will consider later, were not discovered until early July 2007. A copy of the expert report, which the owner says she received on 9 July, was not provided to the builder's solicitors until 13 July 2007 some 7 months after the fixing stage progress claim. Although she had some concerns about the weatherboards, she did not know about this alleged latent defect when she made the part-payment of $35,000 in February 2007, and refused to pay the balance of the fixing stage.

40 Accordingly, there is no excuse for the owner's continued failure to pay the fixing stage progress claim.

Claim for the balance of the contract price

41 There is a dispute between the parties as to when, and by whom the contract was terminated. The builder claims he validly terminated the contract on 16 July 2007, the owner says that she accepted the builder's repudiation of the contract on 15 August 2007.

42 Relying on clause 42.5 of the contract the builder claims the balance he says is outstanding under the contract less the cost to complete the works. The final payment under the contract is $27,297 from which he has deducted $11,120 which he has estimated as the cost of completion. For reasons I will discuss later, I find $11,120 is a fair and reasonable estimate of the cost of completion.

The balance of the contract price

43 Whether the builder is entitled to payment of the outstanding balance under the contract depends on the facts and circumstances surrounding the termination of the contract.

44 The builder relies on clause 42.5 of the contract which provides:

> If the Builder brings this Contract to an end under this Clause, the Builder is entitled to the Contract Price and other amounts payable by the Owner under this Contract, less the cost to the Builder of performing the remainder of the Building Works. The Builder is also

> entitled to reasonable compensation for any other loss caused by the Owner's breach.

Clause 42 allows the builder to terminate the contract where the owner is in substantial breach of her obligations including the failure to pay a progress payment.

45 The builder sent the owner a copy of the Archicentre report under cover of a letter dated 10 May 2007 in which he claimed the balance of the fixing stage payment and the payment for variations – a total of $38,087.10. The owner replied on 22 May 2007 advising she was still disputing some items and would be engaging her own expert. On 31 May 2007 the builder served a Notice of Suspension pursuant to clause 35.1 of the contract giving her 7 days in which to remedy the breach. When payment was still not made, he served a Notice of Substantial Breach pursuant to clause 42.2 of the contract dated 22 June 2007, giving her notice that if she failed to make payment of the outstanding progress payment [the balance of the fixing stage payment] within 10 days, the contract would be terminated.

46 On 13 July 2007 the owner's solicitors wrote to the builder in which, amongst other things, they dispute that the Archicentre Report confirms fixing stage has been complete, and advised that as the works were still not complete the owner was entitled to liquidated damages as at 13 July 2007 of $32,914.29. They also referred to there being defective works and enclosed a copy of the report received from Mr McDonald dated 7 July 2007. They then advised the owner was willing to pay $10,000 (after deducting part of the amount claimed for liquidated damages from the balance of the fixing stage payment) and that this would be paid into his bank account. It seems that letter was sent by ordinary mail.

47 On 16 July 2007, payment still not having been made, the builder wrote to the owner ending the contract. I accept the builder's evidence that he received the letter of 13 July 2007 from the owner's solicitor after he sent his letter of 16 July 2007 ending the contract.

48 The owner's solicitors wrote to the builder on 27 July 2007 alleging that his purported termination on 16 July 2007 was invalid, and enclosing a Notice under clause 43 of the contract alleging he was in substantial breach. In summary, the grounds for the notice were that the builder had failed to diligently undertake the necessary works to achieve completion, which had still not been achieved, and failing to rectify defective works. On 15 August 2007 the owner's solicitors wrote to the builder purporting to terminate the contract because, they alleged, he had failed to remedy the alleged breaches as set out in the notice. Although not expressed to be in the alternative, the letter also purports to accept his repudiation of the contract (the same grounds as those set out in the Notice of Substantial Breach) and thereby terminating the contract.

49 I am not persuaded the owner had any valid reason for withholding payment of the fixing stage, or that the builder was in substantial breach at the time

he served his Notice of Substantial Breach dated 22 June 2007. Accordingly, I find the builder was entitled to terminate the contract on 16 July 2007, and that he is entitled to payment of the balance of the contract price, as adjusted. For reasons which I will discuss later, I find this to be $16,177, in accordance with clause 42.5 of the contract.

THE OWNER'S CLAIMS

50 The owner's primary claims concern the preparation and installation of the weatherboards and delay with some minor claims for incomplete and defective works. She relies on a number of reports prepared by Mr Kevin McDonald.

Cost of completion and rectification costs.

51 The owner's claim is not entirely clear. Although in her final submissions, the owner relies on the cost estimates prepared by Mr McDonald in support of her claim for the cost of completion and rectification works, in her Particulars of Loss and Damage dated 6 March 2009 she claims an additional $3,367 described as an 'adjustment for actual costs expended'. Although under clause 42.5 of the contract I need only be concerned with the cost to the builder of completing the works, for the sake of completeness the owner's claims.

52 Mr McDonald's estimates are set out in his report of 9 October 2007 and total $64,155.58. Two items are abandoned in the owner's final submissions: the electrical fit-off of $4620, and the cornice in the master bedroom of $349 reducing the claim to $59,186 as follows:

Item	Mr McDonald's estimate
1. Rectify weatherboards	$38,889.84
2. Rectify carport	$ 2,626.42
3. Carport remote controlled roller door	$ 1,300.20
4. External rendering	$ 2,772.00
5. Manhole doors to sub-floor x 2	$ 409.20
6. Waterproofing to upper balcony	$ 326.70
7. Overlooking screen to upper balcony	$ 349.80
8. Repair damaged floorboard to meals area	$ 4,641.12
9. Sand and lacquer floorboards and staircase	$ 5,821.20
10. Replace damaged caps x 2 on stair posts	$ 277.20
11. Complete internal carpentry	$ 415.80
12. Electrical fit-off	abandoned
13. Install mirrors and shower screens	$ 2,382.60
14. Cornice in master bedroom	abandoned

15. Complete internal and window clean	$ 594.00

53 In considering his cost estimate, items 3,4,7,9, 13 are completion items. Mr McDonald's estimate of the cost to complete these items is $11,148. The owner claims $21,887.30. Surprisingly, despite having prepared a 50 page final submission, counsel for the owner has not addressed the completion costs in those submissions.

54 There are five completion items, each of which I will consider in turn. In considering the cost of completion of each item I must have regard to what was provided for in the specification, not what the owner actually purchased and had installed. The builder can only be responsible for a scope of works consistent with the contract specifications.

Item 3 – carport roller door

55 The builder allows $1850 and Mr McDonald's estimate is $1,300.20. In the circumstances I find that the builder's allowance is reasonable.

Item 4 – external rendering – ground floor

56 The owner says the actual cost of these works was $3,850. The builder allows $1,950. Mr McDonald's estimate is $2,772 (which has not been included in the builder's final submissions).

57 The amount spent by the owner is significantly more than the builder's allowance because she has had a stucco finish applied whereas the specification provided for *'a fine sand finish'*. Accordingly, I find the builder's allowance is reasonable.

Item 7 – privacy/external screen

58 The builder allows $245 and Mr McDonald's estimate is $349.80. This work has not been carried out. I find the builder's allowance is reasonable.

Item 12 – shower screen and mirrors

59 The owner has spent $3,036 shower screens and mirrors The builder allows $2,575 and Mr McDonald's estimate is $2,382.60.

60 The contract specification provides for two semi-frameless shower screens 1000mm x 1000mm. A corner shower screen was specified for the ensuite. The owner purchased 1200mm shower screens with cut outs for shower seats. I accept this is not what was provided for in the contract and find the builder's allowance of $2,575 is reasonable.

Item 9 – floor polishing

61 The owner relies on Mr McDonald's estimate of $7,188.70. The builder allows $4,500.and Mr O'Meara's estimate is $3,400.

62 The owner's claim includes the cost of polishing the stairs which I accept was not included in the contract. If the stair polishing, and the margin and the applicable GST are deducted, Mr McDonald's estimate is $4,693.20. This includes $3,760 (specified in his report as the cost of polishing the floor), plus 20% margin and GST which counsel has failed to take into account in the owner's final submissions. Accordingly, and noting that the builder's allowance and Mr McDonald's estimate are very close, I find the builder's allowance of $4,500 is reasonable.

63 In summary, I make the following allowances for each of the completion items:

Item	Allowance
3. Carport roller door	$ 1,850
4. External rendering – ground floor	$ 1,950
7. Privacy/external screen	$ 245
12. Shower screen and mirrors	$ 2,575
9. Floor polishing	$ 4,500
	$11,120

64 As I have found the builder's allowance for each of the completion items is reasonable, the total allowance for completion works is $11,120, slightly less that Mr McDonald's estimate of $11,148 (not including the stair polishing).

Items which the builder says are not his responsibility

65 There are a number of items included in Mr McDonald's cost estimate which the builder says are not his responsibility.

Item 5 – manhole doors

66 The owner claims $409.20 for installation of two manhole doors to the sub-floor. I do not know if these have been installed. However, they are clearly not the builder's responsibility. Item 29.2 of the Project Specifications which refers to 'sub-floor access – door/access panel' is struck through.

Item 11 – complete internal carpentry

67 The owner claims $415.80 for this item. Mr McDonald reported there were some areas of skirting to be fitted in the kitchen and meals area, and adjustment is required to doors and sashes. I accept that the skirting had been installed by the builder but was removed by the owner's contractors so they could carry out their works. This claim is dismissed.

68 The adjustment of doors and sashes is a completion item. The only evidence I have before me for this work is Mr McDonald's estimate of $225 plus 20% margin plus GST which I calculate as $297 which I allow.

Item 15 – complete internal and window clean

69 The owner claims $594 for this item. As I have found the contract was terminated by the builder, and these are handover items these are not his responsibility. Further, even if I had been satisfied that this was the builder's responsibility, I note the house remained unoccupied for some 19 months after the contract was terminated. Since then the floors have been sanded and polished, and in such circumstances the cost of the final clean must be the owners.

Defects

Item 1 - Weatherboards

70 The owner claims $38,894.84 for the removal and replacement of the weatherboards and repainting the house. She relies on Mr McDonald's evidence that the end grains (also referred to by the experts as cut ends and end joints) should have been primed before the boards were installed, and that their expected life is significantly reduced because they were not. Pre-primed weatherboards were installed. The builder acknowledges that the ends were not primed but contends that if the end grains should have been painted this was the painter's responsibility, not his [painting having been excluded from the builder's works under clause 4.3 of the specification]. Further, he says, that if the gaps had been sealed by the painter with an appropriate sealer, this would have been an acceptable finish.

71 It seems the owner's initial concern, as set out in her letter of 8 January 2007, was the shrinkage of the boards and that this is what she wanted investigated. The builder obtained reports from the supplier and Archicentre, copies of which he provided to the owner.

72 In a letter dated 31 January 2007, Peter Alexander, managing director of the supplier, Peuker & Alexander Pty Ltd said:

> Further to our discussion regarding the seasonal behaviour of the above product [baltic weatherboards] pleased be advised that this product will expand and contract according to climatic changes as the material strives to match its immediate environment. During cold/wet months the boards will "take up" moisture and expand but as the weather becomes drier and hotter the boards will lose moisture and begin to shrink. This is normal behaviour and allowance for this should be made by way of adequate "over lap" during the fixing process. If pre painting isn't possible then care should be taken to avoid different coloured primers and top coats as a contrasting streak of colour will appear during warmer months as the boards shrink and the undercoat is exposed.
>
> As this movement of boards is to be expected, provision should be made for it and the use of gap fillers or putty's (sic) should be avoided as they will interfere with this natural process.

73 In a document headed 'Architect's Advice' from Archicentre dated 2 May 2007, Peter Farries, architect reports about the status of the works in general, identifies that the fixing of the weatherboards is complete and reports:

> ADVICE SOUGHT
>
> …
>
> The main point in dispute is a question of responsibility for unsightly appearance of the weatherboard cladding.
>
> SUMMARY OF REPORT
>
> Responsibility for the unsightly appearance of the weatherboards rests with the painter (or the building owner if painter was acting on instruction) when applying gap sealant to the overlapping edge of weatherboards.

74 In relation to the shrinkage of weatherboards he reports:

> Shrinkage of weatherboards. The assumptions behind this complaint are wrong. Weatherboards installed here appear to be of fair quality and are supplied primed ready for fixing.
>
> Unsightly appearance of the cladding is mostly due to the application of gap filler at the overlapping joint between boards. I understand that Poly Filler Gap Sealant was used for this. An empty container found on site had a cautionary noted that advised that the product was not suitable for use on weatherboard overlaps. This could be taken to imply that there are some gap sealants available that are suitable for weatherboard overlaps but I would dispute this. Timber weatherboards should be simply nailed in place and painted. It is good practice to prime paint cut ends of boards before installing but sealant applied to end grains after installation would also protect boards from water penetration. (emphasis added)
>
> Shrinkage of the boards after application of sealant and paint has caused the sealant to pull away from one or other of the boards, giving a patchy appearance. Sealant should be completely removed from overlaps before repainting. Responsibility for any additional work is entirely that of the painter. I understand that the painter is engaged under a separate contract.

75 The owner, who still believed that shrinkage of the boards was a major issue, engaged Mr McDonald to inspect and prepare an expert report. Mr McDonald confirmed that the shrinkage was within the tolerances set out in the Building Commission's Guide to Standards and Tolerances and that it was so noticeable because of the poor preparation work by the painter. Instead of using a flexible gap filler along the weatherboard overlaps the painter used a poly filler which split as the boards shrank. The experts agree that some seasonal shrinkage is to be expected.

76 It seems that the issue of the unprimed end grains may never have arisen but for Mr McDonald investigating whether they had been. There are no

obvious signs of distress suggestive of the end grains not being primed. I asked him why he decided to look at them and he was unable to answer me. It is also not clear why he considered it necessary to inspect 100 boards. Whilst it is important that an expert investigate and report on causes of damage and distress, it is in my view, questionable how far an expert should go in actively looking for defects which he thinks might exist.

77 The owner relies on clause 12 of the specification which provides:

> Except where western red cedar or treated pine cladding is to be used, or unless otherwise specified, all timber cladding shall be primed, or treated with a penetrating wood preservative for exposed faces and edges before fixing. [emphasis added]

and clause 2.2.3 of AS/NZS 2311 (Painting end grain) which provides:

> During wetting or drying the rate of water movement along the grain of timber is extremely rapid compared with the rate of water movement across the grain. This explains why cracking often begins at the unsealed cut end of butt and mitre joints and at the bottom edge of vertical boards.
>
> Design should make provision for the protection of all end grain of external timber. To retard the ingress of moisture, exposed timber cladding should be coated all-round before being attached to the building framework.

and the NAFI Timber Manual – Timber External Cladding which provides for weatherboard installation:

> If a paint finish is to be used, end grains should be se
>
> aled with compatible mastic or a timber paint primer applied to ends of boards before fixing.

78 The builder relies on the reference to *'exposed faces and edges'* in the specification and contends they should be read together not independently as *'exposed faces'* and *'exposed edges'*. The owner contends this phrase should be read as *'exposed faces'* and *'edges'* (whether they are exposed or not). It seems obvious to me that the builder is correct and the specification should be read as referring to faces and edges which are exposed. Once installed, the end grains are not exposed. However, that is not the end of the matter as AS/NZS 2311 recommends sealing of end grains before installation.

79 Whilst the contract specification is prescriptive, as it forms part of the contract between the parties, the provisions of AS/NZ 2311:2000, and the NAFI Timber Manual are not. An Australian Standard is only prescriptive where it has been incorporated into the Building Code of Australia and, as I understand it, this standard has not been. The NAFI Timber Manual is for information purposes only. However, both are guides as to what is good practice. Further the warranties set out in s8 of the DBC Act require that the work be carried out in a proper and workmanlike manner and be fit for

the purpose for which it is intended. If the weatherboards have a latent defect, because they are not adequately protected from moisture ingress, the s8 warranties will have been breached.

80 The three experts agree that when they were apprentices, and working on-site, the accepted industry practice was for the end grains to be painted. Mr McDonald said he was taught to do this as a carpenter, Mr McKinnon and Mr O'Meara both said this was a painter's job. Both Mr McDonald and Mr O'Meara gave evidence that as apprentice carpenters and throughout their careers as carpenters, painters attended on site to paint the boards, but that was before the introduction of primed boards. Mr O'Meara also said that he had 'splashed paint' on the ends of boards.

81 However, they also agreed that the method adopted by the builder is consistent with current industry practice. I suspect that knowledge of this current industry practice is what prompted Mr McDonald to carry out his forensic investigation. He was reasonably certain that he would find a 'technical' defect.

82 Whilst Mr O'Meara agreed it is good practice to prime cut end grains before installation, he suggested that it was an acceptable practice to apply a sealant after installation. He referred to the forward to AS/NZ 2311:2000 which provides:

> Alternative materials and systems can also provide satisfactory service: however, the materials and systems included in this Standard are known to perform satisfactorily when correct application methods are followed.

83 In the witness box he suggested that 'Selleys No More Gaps Weatherboard' is an appropriate product. This had not been referred to in his report. Mr McDonald does not agree that this will suffice.

84 I reject Mr O'Meara's evidence insofar as he seeks to rely on a blog page by a Bill Hutchinson dated 20 November 2007 titled "A home improvement blog about renovating our Queenslander home in Council, Australia' which includes a five step process for preparing timber weatherboards for painting. I am not persuaded this has any probative value.

85 In his first report dated 11 February 2008, Mr McKinnon stated:

> There is not an alternative normal industry and good practice for the weatherboard installation and painting of weatherboards other than prime painting of cut ends to my knowledge.

This was subsequently revised during the hearing, after it was put to the builder in cross-examination that his own expert agreed priming of cut ends was required before installation, by the deletion of 'not' from the first sentence. However, this is an odd amendment, particularly in circumstances where the sentence no longer makes sense. Also, Mr McKinnon does not identify any alternative methods in his report although at paragraph 7(a)(i) he says:

> The priming of end cuts is a good practice. Unfortunately this is not as prevalent as it used to be. The fitting of weatherboards to the weather stop and then gap sealing does protect from water penetration. One coat of primer is applied only on bare timber.'

86 No explanation was proferred by the builder for his failure to call either Mr Alexander nor Mr Farries to give evidence and, in the circumstances where there is little evidence to support the builder's position that he was not required to prime the end grains, I consider it appropriate to apply the rule in *Jones v Dunke*[7] and draw a negative inference. In the case of Mr Farries, it is clear from his advice/report that he shares the view that cut ends should be primed before the boards are installed. Although he attempts to qualify this opinion there is nothing in his report to indicate what type of sealant he considers would protect the boards from water penetration. In any event, as I understand the expert evidence, the priming of the ends is to protect the boards from moisture penetration, which can occur as a result of climatic changes, including increased humidity, which is not the same as water penetration.

87 Whilst it is true that painting was excluded from the builder's works, it was not the painter's responsibility to tell the builder that priming of the end grains was required. It was the builder's responsibility to identify any necessary preparatory work, and if he was not prepared to prime the ends, to arrange for the painter to do so in a timely manner so as not to impede the progress of the works. It is irrelevant that the builder said he was unaware of any requirement to prime the cut ends before installation. If a registered building practitioner fails to take all necessary steps to appraise himself of the relevant standards and what constitutes good building practice he does so at his peril. Ignorance is not an excuse.

88 Whilst I am satisfied that the end grains should have been primed before the boards were installed, I am not persuaded that it is necessary to replace them. Counsel for the owner referred me to SM Walker's decision in *Avramoski v Barrett Property Group Western Region* [2006] VCAT 1216 but the situation there was quite different. In *Avramoski* the tribunal found:

> I find that the quality of the brickwork is unsightly and so poor that the only practicable method of overcoming all of the problems referred to and producing conformity with the requirements of the contract is by demolishing the whole of the unrendered brickwork on the house and rear wall of the garage and rebuilding it in a proper and workmanlike manner… [49]

The same cannot be said here. It is true there seems to have been some deterioration in their condition but, as discussed above, whether this is due to the failure by the builder to prime the edges, or the fact they have been left in a poor, partly painted state for a considerable period, is problematic.

[7] [1959] HCA 8

89 Despite concluding the failure to prime the end grains was a latent defect Mr McDonald has not referred to any literature outlining the possible consequential reduction in life span for weatherboards. Whilst he said he thought signs of rot could be expected within 2 to 3 years, I do not have any evidence as to the anticipated life of weatherboards, where the end grains have been primed or where they have not, or the frequency with which they should be painted. The boards are showing some signs of splitting at the edges and whether this occurred when they were cut, as suggested by Mr O'Meara, or whether this is a result of the failure to prime the ends, or whether there has been a deterioration because the boards have been left in a poor, partly painted condition for more than two and half years, is problematic. At the view, when Mr McDonald removed an end stop, greying of the timber was apparent. Mr McDonald suggested this was evidence of water or moisture staining. However, it is difficult to determine why this may have occurred.

90 The failure to paint the end grains is not the cause of the unsightly appearance of the weatherboards. This was caused by the failure by the painter to carry out the painting in a proper and workmanlike manner. The painting is poor, and patchy. Despite the painter's protestations to the contrary, I do not accept that any part of the painting is complete. Not only did he use the incorrect product in applying a non-flexible filler where the boards overlapped, he has damaged the boards in removing it, and in many areas has scraped back to the bare boards. The result is very unsightly. The builder is not responsible for the cost of repainting, because the need to repaint arises from the poor preparation by the painter, his use of an inappropriate filler, and the damage caused by him in removing it. The cost of repainting is a matter between the owner and the painter.

91 In all the circumstances and having regard to *Bellgove v Eldrige* (1954) 90 CLR 613 I am not persuaded that replacement of the boards is reasonable or necessary, but consider it appropriate that there be an allowance for the builder's failure to prime the end grains. Although the extent to which this may compromise the life of the weatherboards is unclear, I am satisfied that in failing to prime the end grains the builder has failed to carry out the works in a proper and workmanlike manner, in breach of the warranties set out in s8 of the DBC Act. In considering the appropriate allowance it is appropriate to have regard to the experts' respective estimates. Mr O'Meara estimated the cost of removing and replacing the weatherboards as $12,000 ($13,200 inclusive of GST) plus $4,160 ($4,576 inclusive of GST) to repaint the house. As both estimates are plus GST his total estimate is $17,776. He confirmed he had allowed $4,000 for purchasing the replacement weatherboards – 1300 lineal metres at $2.60 per metre plus GST.

92 Mr McDonald said his enquiries of timber suppliers in October 2007 revealed a cost of $3.80 per lineal metre plus GST. I prefer Mr McDonald's

evidence in this regard – 1300 lineal metres at $3.80 per metre is $4,940 plus GST - $5,434. Mr McDonald allows $13,640 plus GST for painting.

93 In all the circumstances, I consider $5,000 to be appropriate compensation. This amount includes an allowance to prepare for painting the areas which have been re-nailed by the builder

Item 2 - the carport beam

94 The owner claims $2,626.42 for repairs to the carport. Mr McDonald asserts that the carport beam is undersized and the carport is in danger of collapse. There is no sign of differential movement. There appears to be a slight bow in the beam but whether that is due to it bowing or because it is a natural material is unclear. If it was failing some apparent sign of differential movement could be expected. Apart from some very slight 'cracking' at the joint with the roof which, in part, looked as though it was where the fill had come away, there is no other indication that the beam is failing. The side gutter has a significant bow in it but this is not comparable with the slight bow in the beam and it is therefore difficult to be satisfied there is any correlation between the two. It may simply be that the guttering was not installed straight noting that it is on the boundary fence. I find this defect has not been proved.

Item 6 – waterproofing to the balcony

95 Although waterproofing to the balcony was not included in the builder's specification he carried out this work, and is therefore responsible for it. The owner alleges it was defective. Although Mr McDonald estimates the cost of this work at $326.70, I allow the amount the owner has paid - $594 which I am satisfied is reasonable.

Item 8 - the meals area/conservatory flooring

96 The owner claims $4,641.12 to remove and replace the floorboards in the meals area which is in the conservatory. Although the flooring in the conservatory area has shrunk in places (and not only in the conservatory area), the overall appearance is not unsightly. It is common ground that the floor was installed in October 2007 and the conservatory blinds were installed, by the owner, in March 2008. This means the floor was not protected during the summer months from the summer sun and heat. Temporary window coverings were not installed until the owner moved in earlier this year.

97 Although the installation of the floor was the builder's responsibility, the owner engaged another contractor to install the conservatory. I am satisfied the owner was specifically warned about the need to protect the floor in the first quotation she received from the conservatory contractor in April 2006.

98 As discussed above, this site was not in the exclusive possession of the builder – both the owner and the builder had keys to the padlocks on the front gate of the security fence. There was nothing preventing the owner

from taking appropriate steps to protect the floor and in my view it was incumbent upon her to do so. This is not something for which the builder can be responsible.

99 Further, the owner arranged for the floor to be sanded and polished in January this year, just before she started to move in. This claim is dismissed.

Item 10 – damaged caps on stair posts

100 Although two of the caps on the stair posts have been damaged there is no evidence as to how this damage occurred. The builder was not in exclusive possession of the site. The owner had her own trades working on site at the same time as the builder, and I cannot be satisfied on the evidence before me that the builder or his trades caused this damage. This claim is dismissed.

The role of the painter - Chris Panayiotou

101 It is clear that the owner relied heavily on the advice she received from the plumber and the painter, which may not have always been wise. The painter is the plumber's father. Although I am not persuaded the builder has any right of indemnity or contribution from Mr Panayiotou, or that the owner's claim, insofar as it relates to the failure to prime the end grains is an apportionable claim, it is appropriate that I comment on his role in this project, and this proceeding.

102 It quickly became apparent during cross examination that he is easily excitable and reluctant to listen to any opinions that differ from his. It seems that the issue with the weatherboards was raised by him when the shrinkage first became apparent. He refuses to accept that the shrinkage is within tolerances although Mr McDonald has given this opinion.

103 On the day on which he was to give evidence (the second last day of the hearing), having heard the evidence of each of the experts, the painter filed a further witness statement and, for the first time, said that he had used other filling products. Until then there had been no suggestion that he had used anything other than Pollyfilla Gap Sealant ('the yellow tube'). To the contrary, he had been quite abusive towards Mr O'Meara, during cross-examination, asserting that if that if that polly filla was not suitable then maybe he [the painter] should sue the manufacturer because he had been using it for years without any problems.

104 He said he had only used the yellow tube under the rafters in the carport where he said he had used 18 tubes, and that there were no problems where he had used it. He said he had used Nordsjo Super Filler at the end stops and for the joints and that he had used Bostik Flexible Filler, an acrylic gap filler, under the weatherboard overlaps – this is a flexible filler and I do not accept it was used. If it was used it would not have cracked and stretched as

described by Mr McDonald and it would not have been necessary to remove it.

105 The painter contends the painting of the weatherboards is 85% complete. At my request, he coloured in the areas where he said there were 3 coats of paint in blue, 2 coats in green and 1 coat in yellow leaving uncoloured those areas where he had not painted. These are not consistent with my observations on the day of the view where I recorded that it was difficult to believe there were 3 coats where it had been re-caulked. It was also obvious that some of the boards were not painted and that the painting generally had not been carried out in a cohesive or logical order. Where the back wall has been painted the coverage is very poor and patchy.

106 The painter complained at the hearing that he had not had an interpreter at the view and so had experienced some difficulty communicating what he had done, and where. I specifically asked him whether he required an interpreter for the view and he said it was unnecessary. He did not request an interpreter until the first day of the hearing. During the hearing he listened intently to the evidence that was being given and rarely required anything interpreted. On a number of occasions I noted that matters were not being interpreted and he said he could understand. When he was being cross examined, despite my constant reminders that all evidence should be through the interpreter, at times he said that he thought it would be easier to explain himself in English, although I note that when he is excited his English can be difficult to understand.

107 He has filed three comprehensive 'witness statements', two of which were filed during the course of the hearing. The first, which is described as a witness statement, is dated 27 October 2008 and is three pages. Following the site inspection he filed a two page document headed 'Further comments' which he said were his comments arising out of the inspection, and also a reply to the builder's witness statement. On the day he was to give his evidence he filed a two page document headed 'Further comments 2' which clearly demonstrates his understanding of the evidence as it sets out his response to the matters discussed at the hearing. I observed that he did not take many notes during the course of the hearing.

108 The painter's confidence that he knows better than anyone else was demonstrated by his evidence that after he found, by thumping some of the boards, they were loose and although he is not a carpenter, he nailed some boards to show Jim Kotsiris (the builder's father) how it should be done.

The role of the plumber - Tassos Panayiotou

109 I did not find the plumber's evidence compelling. He had difficulty remembering his 'evidence' and was unable to answer questions put to him in cross-examination without reference to his witness statement. He was seemingly prepared to say whatever he thought would assist his sister-in-law's case. His witness statement is almost identical, word for word to the

owner's. He confirmed that they had met together with her solicitor who had prepared their witness statements. Further it was evident from his demeanour in the witness box that the plumber has a forceful and volatile personality. I have serious reservations about the veracity of his evidence.

DELAY

110 Both parties have significant delay claims. The builder claims 51 weeks at $600 per week – a total of $30,600. The owner claims liquidated damages of $35,657. She also claims the following costs which she says she has incurred because of the delay in completion of the works:

Temporary fencing 15 August 2007 to 16 March 2007 (the date of final submissions) and continuing until complete/fix weatherboard issues[8]	$935
Furniture storage fees (May 2008 until Jan 2009 at $110 per month)	$990
Insurance (business insurance/contractor's risk)	$1,526

111 The building period under the contract was 221 days; which included an allowance of 20 days for inclement weather and its effects, and 40 days for *'other days that are reasonable having regard to the nature of the Building Work'*, [9] therefore completion was due on 25 June 2006. I have previously found the contract was terminated on 16 July 2007.

112 Before considering whether either party is entitled to delay damages, I make the observation that the parties entered into an arrangement with which they were comfortable, until their relationship soured. They agreed and both understood that the builder would not be responsible for the works carried out by the owner's contractors, or any delays her works caused to the progress of the works. They agreed that $600 was a fair and reasonable amount for delay damages. It was only once the lawyers became involved that issues about strict compliance with the contract were raised. The builder's concerns about whether the agreed damages were a reasonable pre-estimate of loss were not raised until the second day of the hearing.

113 I was referred to the comments by SM Young in *Pratley v Racine* [2004] 2035 at [5.3]

> The builder, however, has not submitted any notices requesting an extension of time, as required by Clause 34 of the general conditions of contract. Clause 34 requires the builder to deliver to the owners a notice in writing claiming an extension of time within 7 days after becoming aware that the building works would be delayed, explaining the cause of the delay and the extra time that is needed to satisfactorily complete the works. There is authority to the effect that the providing of the notice within the 7 days is a mandatory requirement if the

[8] First respondent's final submissions pg 49
[9] Schedule 1 to the contract, Item 1

> builder wishes to ground a claim for an extension of time: *Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd* (1994) 11 BCL 360 in other words, there is a time bar to granting an extension of time if the condition precedent of the notice under Clause 34 is not met. Therefore, the builder is not entitled to any delay period by which the date for completion under the contract is extended.

114 The situation here is complicated by the sharing of responsibility for the works between the owner and the builder. Although he did not make any formal claims for an extension of time as required by the contract, I accept the builder's evidence that he was forever reminding the owner of the need for her to arrange for various of her works to be carried out. For instance, in a letter dated 10.05.06 (sic) accompanying the frame stage progress claim he said:

> …The frame for the Conservatory can not be done as we are still waiting for further details and specifications from your contractor.

115 Whilst an issue during construction, delay does not seem to have become a major issue until January 2007 when the owner refused to pay all of the fixing claim, and first raised her concerns about the weatherboards. Although the owner gave evidence that she was *'At all time extremely keen to finish my home'*[10] this is not borne out by her conduct. I have found the contract was terminated on 16 July 2007, but even if I had found it was not terminated until five weeks later as contended by the owner, she did not start moving into her new home until some 19 months later. No explanation was given for this delay.

116 I accept the owner's evidence that the first notice she received of the builder's 'specific' delay claims was after the commencement of this proceeding, with the particulars of each delay being set out in the builder's witness statements.

117 The builder says that although he has calculated the period of delay at 600 days, he is only claiming 51 weeks (357 days) which he thinks it is fair. By reference to paragraph 12 of his witness statement, the actual period the builder claims the works were delayed by the owner's works is 654 days.

118 The builder had not prepared a programme for the works before they commenced, although he did bring a programme with him to the hearing. I refused leave for this to be filed, as the owner had not had an opportunity to consider it, and in any event it was a programme prepared 'after the event'. However, I allowed him to refer to it throughout the hearing.

119 The owner claims the works were delayed by the builder for 56 weeks. In effect, the owner and the builder are claiming damages for the same period of delay – the difference of five weeks relates to their dispute about the date of termination of the contract.

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[10] First respondents witness statement in reply, 18 February 2009 [68(e)] and in oral evidence

120 In support of his claim for delay damages the builder relies on special condition 'I' set out in Schedule 4 of the contract:

> [the builder] accept no responsibility if there is delays due to the owner not supplying goods in time &/ tradesman's delays (sic)

121 Counsel for the owner submitted that despite this special condition the builder is unable to claim an extension of time because he failed to follow the process set out in clause 34.1 of the contract.

122 Counsel for the builder contends that irrespective of whether the owner can establish the works were delayed by the builder she has some insurmountable difficulties. First, as she was in possession of the works clause 40 of the contracts provides that the owner is not entitled to liquidated damages where she is in possession of the land. Secondly, he says the $600 per week was not a reasonable pre-estimate of the loss she would suffer if the works were delayed.

123 Clause 40 of the contract provides that liquidated damages are payable from the 'end of the building period [as stipulated in the contract] until … *'the date the Owner takes possession of the Land or any part of the Land'*. 'Possession' is defined in the contract to include *'occupancy, use or control'*. Of course the owner was in possession. She was in possession of the land from the commencement of the contract. This is not a contract where, despite the provisions of clause 25, the builder ever had exclusive possession. Both parties had keys to the padlocks on the front gate, and the owner's works were being carried out concurrently with the builder's works. In the circumstances of this case I am not persuaded the owner's possession of the property is a bar to her recovering liquidated damages.

A reasonable pre-estimate of loss or a penalty?

124 As noted above, on the second day of the hearing counsel for the builder called upon the owner to prove that the specified rate of $600 per week for liquidated damages was a reasonable pre-estimate of the loss she would suffer if the works were delayed.

125 The owner had been living in the original house for some years, and when she decided to demolish and rebuild she and her son went to live with her parents. In lieu of board, she contributed towards the household expenses including paying for the utilities, her parents' council and water rates, and general living expenses – these were in the order of $300 to $350 per week. She said she knew that interest on her loan would be approximately $300 per week so, at the time she entered into the contract, she thought $600 per week was the appropriate rate for liquidated damages.

126 The owner, who has accountancy training, has prepared a number of tables setting out the actual costs which she incurred during the period for which she claims delay. There is no doubt that this has been a time-consuming task. For the period 15 June 2006 to 15 August 2007 (the date she claims the contract was terminated) the owner calculates her average cost per week

at $743.06. This includes *'average home loan interest'* per week of $291.74 and *'average other expenses per week'* of $451.32.

127 Similarly, the builder said that he had specified the rate for delay damages at $600 per week taking into account loss of earnings, loss of profit, price increases, labour cost increases and insurance costs which he thought would add up to about $1,000 per week. He did not provide any evidence to support his calculations.

128 Both parties referred me to the comments of Mason and Wilson JJ In *AMEV-UDC Finance Ltd v Austin & Anor* [1986] HCA 63; (1986) 162 CLR 170. Counsel for the owner referred me to their comments at 190 they said:

> …the landmark decisions of the House of Lords in Clydebank Engineering and Shipbuilding Company v. Don Jose Ramos Yzquierdo y Castaneda [1904] UKHL 3, (1905) AC 6 and Dunlop Pneumatic Tyre Company, Limited v. New Garage and Motor Company, Limited [1914] UKHL 1, (1915) AC79 In both these decisions, in conformity with the doctrine's historic antecedents, the concept is that an agreed sum is a penalty if it is "extravagant, exorbitant or unconscionable" (Clydebank, at pp.10-11, 17; Dunlop, at p.87).

However, their Honours continued:

> This concept has been eroded by more recent decisions which, in the interests of greater certainty, have struck down provisions for the payment of an agreed sum merely because it may be greater than the amount of damages which could possibly be awarded for the breach of contract in respect of which the agreed sum is to be paid (see *Cooden Engineering Co. Ltd v. Stanford*, at p 98). These decisions are more consistent with an underlying policy of restricting the parties, in case of breach of contract, to the recovery of an amount of damages no greater than that for which the law provides. <u>However, there is much to be said for the view that the courts should return to the Clydebank and Dunlop concept, thereby allowing parties to a contract greater latitude in determining what their rights and liabilities will be, so that an agreed sum is only characterized as a penalty if it is out of all proportion to damage likely to be suffered as a result of breach</u> (see *Robophone Facilities Ltd v. Blank* (1996) 1 WLR 1428 at pp 1447-1448; (1966) 3 All ER 128 at pp 142-143; U.K. Law Commission, at pars.33, 42-44)). [emphasis added]

129 Counsel for the builder referred me to their Honours' comments at 193:

> Instead of pursuing a policy of restricting parties to the amount of damages which would be awarded under the general law or developing a new law of compensation for plaintiffs who seek to enforce a penalty clause, <u>the courts should give the parties greater latitude to determine the terms of their contract</u>. In the case of provisions for agreed compensation and, perhaps, provisions limiting liability, that latitude is mutually beneficial to the parties. It makes for

> greater certainty by allowing the parties to determine more precisely their rights and liabilities consequent upon breach or termination, and thus enables them to provide for compensation in situations where loss may be difficult or impossible to quantify or, if quantifiable, may not be recoverable at common law. And they may do so in a way that avoids costly and time-consuming litigation. But equity and the common law have long maintained a supervisory jurisdiction, not to rewrite contracts imprudently made, but to relieve against provisions which are so unconscionable or oppressive that their nature is penal rather than compensatory. The test to be applied in drawing that distinction is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term. The courts should not, however, be too ready to find the requisite degree of disproportion lest they impinge on the parties' freedom to settle for themselves the rights and liabilities following a breach of contract. The doctrine of penalties answers, in situations of the present kind, an important aspect of the criticism often levelled against unqualified freedom of contract, namely the possible inequality of bargaining power. In this way the courts strike a balance between the competing interests of freedom of contract and protection of weak contracting parties (see generally Atiyah, The Rise and Fall of Freedom of Contract (1979), esp. Ch.22). [emphasis added]

130 In both these extracts I have emphasised those observations which are particularly relevant here. The High Court has confirmed that liquidated damages clauses should only be set aside if the specified amount is clearly a penalty and not compensatory.

131 I am not persuaded that the agreed rate for delay and liquidated damages of $600 per week is a penalty. I am satisfied that at the time they entered into the contract both parties had turned their mind to what costs they might incur if the project was delayed. However imprecise those calculations might have been there is no evidence that they are so "extravagant, exorbitant or unconscionable" that they should be struck down.

The builder's delay claim

132 The builder claims that the works were delayed by the failure of the owner to arrange for the works she was responsible for to be carried out in a timely manner. His father confirmed that the builder had continued to work for him from time to time, particularly when he was unable to do anything on this project. This included a period of 4 to 6 weeks on a large unit development in Balwyn during 2006.

133 The builder has set out in great detail each of the delays which he says were caused by the owner at paragraphs 12.1 – 12.17 of his witness statement.

An exhaustive analysis of each of the delays claimed by the builder is of little assistance. The builder has not undertaken any critical path analysis which would have assisted in identifying the impact, if any, of each of the alleged instances of delay, on the overall completion date. Where a builder claims his work has been delayed by matters beyond his control, the onus is on him to prove the whole job has actually been delayed. As I said in *MX Projects Pty Ltd v Hyber Pty Ltd* [2007] VCAT 271 at [88]

> While there may well have been delays in the carrying out and completion of some of the trade contractors' works, this does not mean that the period of such delays equates to an overall delay in the project. There is no evidence that each trade contractor performed its works independently of the other contractors or that they were the sole contractor on site at any given time. A critical path analysis would have assisted in identifying the impact, if any, of a 'contractor's delay' on the overall completion date. In the absence of a revised construction program and any critical path analysis it is difficult to determine/allocate responsibility for the delays

134 These comments are equally applicable here. In the absence of a construction program prepared prior to the commencement of the works, and revised and updated during the construction period, and any critical path analysis it is difficult to determine who was responsible for the delays.

135 It seems that the periods of delay might well have been 'identified' shortly prior to the hearing. There are only dates for some of the 'delays'. In a number of instances, the builder has seemingly estimated the time by which he says the works were delayed by the owner (by reference to the item numbers in his witness statement in reply):

12.4 120 days delay to reaching frame and lock-up stage – no dates

12.13 30 days delay and disruption to plastering work – no dates

12.14 90 days delay and disruption to sanding of floor boards – no dates

12.15 75 days delay and disruption to installation of shower screens and mirrors – no dates

12.16 90 days delay and disruption to completion stage

136 During the hearing the builder said that the delays set out in items 12.14 to 12.16 were 'concurrent' delays. In addition, the builder has claimed 46 days during which the works were suspended from 31 May 2007 until termination on 16 July 2007. Time does not run whilst the contract is suspended and there can be no claim for delay during this period.

137 In relation to each of the remaining delay claims I make the following comments, once again adopting the numbering used by the builder in his witness statement in reply:

138 12.1 18 November – 1 December 2005 – 13 days. The digging of the sewer point was the owner' responsibility. She arranged for this work to be carried out by the plumber, and the builder claims that because these works

were not carried in a timely manner it delayed the construction of the footings for the sub-floor frame. The plumber gave evidence about this, and denied it caused any delay. I prefer the builder' evidence and will allow 13 days.

139 12.2 - 22 December 2005 – 26 January 2006 – 34 days. The builder claims the installation of the particle board flooring, flooring insulation and steel columns was delayed by the failure of the plumber to complete the drain suspension. The plumber denied this work was required prior to the floor being installed, and gave evidence that despite the very tight sub-floor area the drain could have been suspended after the floor had been installed. This seems unusually optimistic and I reject the plumber's evidence.

140 In any event the period of alleged delay occurred during the building industry shut-down and it is irrelevant that the builder says he told the plumber he wanted to work through that time.

141 12.3 - 14 February 2006 – 8 March 2006 – 22 days. The builder says that he was unable to order pozi struts until after 14 February 2006 instead of 23 January 2006 as he had planned, because of the delays by the plumber in completing the suspended drains. He says that he had completed all ground floor frames and erection of the structural steel (except for the conservatory which was not part of the contract works) by 14 February 2006 but had not been in a postion to order the pozi struts until the suspended drains were complete. These had to be measured before they could be made, and I accept this could not be done until the suspended drains were complete and the particle floor installed. I am satisfied the works were delayed by 22 days.

142 12.5 - 20 to 27 March 2006 – 7 days. The builder says no work was possible during this period when he was waiting for the perimeter platform scaffolding to be erected. It seems there was a dispute between him and the owner' contractors as to the type of scaffold to be used. Although scaffold was to be arranged by the builder, he said would have preferred to use Quick Stage scaffold but the plumbers did not agree. As it was always agreed that whilst the scaffold would be shared with the owner' contractors, the builder would arrange for its installation, it is hard to understand how this could be considered a delay for which the owner should be responsible. This claim is not allowed

143 12.6 - 31 March to 10 April 2006 – 11 days. The builder claims the works were delayed because the roof plumbers, who were engaged by the owner, had not completed installing the roof on the first floor. The plumber said the roof works actually took 4 days. In response to a question from me, the builder confirmed he had included an allowance in the construction period for the time he estimated it would take for the owner' contractors to carry out their works and that he would have allowed one week for these works in his 'program'. The builder is therefore unable to establish that the owner's contractors caused any delay and this claim is not allowed.

144 12.7 - 15 and 29 April 2006 – 14 days. The builder claims an extension of time for delays which he says were caused by a change to the design of the cathedral ceiling over the lounge room from D7 200 x 50 to F18 140 x 45. The owner denies any knowledge of this change of design. She has not been charged for it although it is clearly a variation to the works. There is no documentary evidence to support this variation and this claim is not allowed.

145 12.8 - 9 May and 8 June 2006 – 30 days. The builder says that he was delayed in the progress of the works whilst waiting for the windows to be manufactured and delivered to site. During cross-examination he conceded he had not paid the deposit to the window manufacturer until 19 May 2006 after he had been paid the frame stage progress claim by the owner. The windows, other than those which had to be measured on-site, were delivered on 8 June 2006. There was no delay other than, perhaps, the period between the date the order was placed and the deposit was paid, but payment of the deposit was the builder's responsibility. The windows were ordered on 8 May 2006, the deposit was paid on 19 May 2006, and the windows were then manufactured. In any event, there is no evidence that this impacted on the completion date. This claim is not allowed.

146 12.9 - 14 July and 20 July 2006 – 6 days. The builder says there was no work on site during this period due to the renderer and the painter completing their works. Although the specification provides for render with a fine sand finish, the owner changed part of it to a stucco finish. As the builder's renderer was unable to apply render with a stucco finish, an alternative renderer, suggested by the painter, was engaged by the builder. However, I cannot be satisfied on the evidence before me that there was any delay to the works during this period because of the difficulty in locating an appropriate renderer, particularly as the owner's photographs clearly show that the installation of the blue board was incomplete.

147 The builder then suggested, in re-examination, that the works had been delayed during this period waiting for the painter to finish using the scaffold to paint the upper part of the house. However, as noted above, the builder always knew the painter would need to use the scaffold to do his works and that he conceded in response to a question from me that he had allowed time for the owner's works in the construction period.

148 Further, there is no evidence that other works could not have been continuing whilst the outside of the house was being painted. This claim is not allowed.

149 12.10 - 30 July and 25 August 2006 – 26 days. This claim relates to the period when the roof plumbing and apron flashing were being carried out. The plumber said that the roof plumbing works were carried out between 31 July and 6 August 2006, and the apron flashing was carried out and completed between 6 August and 11 August 2006 with the exception of a

couple of minor items. These included the canopy over the bay window, and part of the flashing over the conservatory area.

150 The plumber alleged there was a design issue with the canopy and there is some dispute as to how this was finally resolved – the builder said he finally installed the flashing over the canopy because the plumber refused to do so. Further, the plumber said the flashing could not be installed over part of the conservatory area because the framing (which was not the builder's responsibility) was not straight. The plumber said that the conservatory manufacturer ultimately installed cornices in the conservatory to cover up the frame.

151 I am not persuaded that any of these works had any impact on the overall construction period. Once again, the builder has claimed a delay for the time when necessary works were being carried out by the owner's contractors. These should have been allowed for in his construction period There is no evidence of delay which impacted on the completion date. This claim is not allowed.

152 12.11 - 18 September and 27 September 2006 – 10 days. I accept that works were delayed as the result of a delay in the supply of the floorboards. The contract originally provided for standard grade flooring. At the owner's request, the builder referred her to alternative suppliers when she said she wanted to change to natural grade flooring, which is cheaper. The owner provided the builder with the supplier's details and her new selection. The selected timber was not immediately available and its supply was delayed. The owner's evidence that had she known about this delay she would have gone to an alternative supplier was not convincing, and in the circumstances of this proceeding, I find it is fair to allow this claim.

153 12.12 - 6 July – 10 October 2006 – 30 days. This claim arises from the change from standard electrical installation as provided for in the contract, to a home automation system. The builder claims that the plastering works, in particular, were delayed.

154 Despite her protestations to the contrary, I find on the evidence before me, that this was first raised after the contract was entered into. It is not included on the original electrician's quotation dated 9 July 2005. Mr Oaten, the electrician who installed the home automation system, gave evidence about the discussions he had with the owner about home automation over a period of many months.

155 Whilst the owner failed to finally decide on the home automation system until late September 2006, three months after the contract completion date, I am not satisfied this delayed the works by 30 days as claimed by the builder. The electrical works could not commence until lock-up was achieved, and in this respect I note the kitchen roof window installation was not completed until 13 September 2007. This claim is not allowed.

156 The total period of delay I have allowed the builder is 45 days which means the revised date for completion was 9 August 2006. The builder is entitled to delay damages, at $600 per week ($85.71 per day), of $3,856.95.

The owner's claim for liquidated damages

157 The owner first raised her concerns about the weatherboards in January 2007. I have found the revised completion date was 9 August 2006. Works progressed slowly in 2007 as the parties, particularly the owner, were distracted by the weatherboard issue.

158 In his letter of 13 January 2007 the builder wrote:

> There is still some work required to finish your home but we are waiting for your trades to finish so that we can come in and finish the prescribed works. When I gave you the fixing stage invoice I asked you to provide me with a schedule for when your trades will finish so I can schedule my trades. From Dec 15 until now I have received nothing.
>
> Upon inspection of your house on Jan 8th there has been no progress to your house. Your tiler still needs to do a lot more work to finish. Your cabinet maker still needs to finish off. Your painter still hasn't made a start. You still haven't done anything about your concrete driveway.
>
> …Again the job is getting delayed because you are not organised.
>
> The job has been delayed due to your lack of understanding of the job and bad organisation. The biggest hold up with this job has been the conservatory roof. This was a critical item and it delayed the works and threw the whole schedule out. From mid Dec 2005 when I gave you notice to organise yourself, the conservatory roof was finished Sep 7 2006…The frame was delayed because we couldn't finish because we had nothing to work off. I couldn't get a frame inspection because the job wasn't ready. My frame stage payment was delayed because of this. There will be no negotiations with regards to damages. If anything I should ask to be compensated. Late completion of the works is due to you and your trades which you are responsible for.

159 The builder then attended to some items which the painter and the plumber had identified as being defective, including re-nailing some of the weatherboards, and around the doors. The filler was removed by the painter, and the weatherboards re-caulked by the builder, at the request of the owner (he did not charge for this work). The kitchen, which was the owner's responsibility, was not installed until late March 2007. I reject any suggestion by the owner that the floors could have been polished before the kitchen was installed. The works were suspended by the builder on 31 May 2007.

160 Whilst both parties now seek to rely on the clauses of the contract to support their respective delay claims, it is clear that both contributed to the delay. I

do not accept the submission on behalf of the owner that because the builder has failed to make formal extension of time claims as required by clause 34 of the contract, he is unable to rely on the special condition in Schedule 4 of the contract. This would lead to a grossly unfair outcome in circumstances where it is quite clear that significant delays were caused by the owner's failure to organise the works for which she was responsible in a timely manner.

161 It is impossible on the evidence before me to identify who was responsible for the delays after the fixing stage progress invoice was rendered on 16 December 2006. The builder, on his own evidence, continued to carry out some work in early 2007, as did the owner's contractors.

162 Section 53(1) of the DBC Act empowers the tribunal to *'make any order it considers fair to resolve a domestic building dispute'*. In the circumstances of this case, and considering the conduct of both parties, I find it is fair to allow the owner liquidated damages for the period 10 August 2006 to 19 January 2007. This is the date on which the owner received the builder's letter of 13 January and when she replied she would not be able to progress the matter further until 5 February at the earliest, following her return from overseas late on 4 February. This is a period of 163 days which at $600 per week ($85.71 per day) is $13,970.73.

The owner's claim for damages since the contract was terminated

163 The owner seeks recovery of additional costs she has incurred since the contract was terminated. As set out above these are:

Temporary fencing 15 August 2007 to 16 March 2009 and continuing until complete/fix weatherboard issues[11]	$935
Furniture storage fees (May 2008 until Jan 2009 at $110 per month)	$990
Insurance (business insurance/contractor's risk)	$1,526

164 In her particulars of loss and damage dated 6 March 2009 the owner also seeks $6,062 for extension of the building permit. Details of the calculation of this amount have not been provided, and this claim is not referred to in her final submissions. It may be that this claim has been abandoned. In any event, as there is no supporting documentation or any other evidence to support this claim I find it has not been proved.

165 When the contract was terminated on 16 July 2007, the works were nearly complete. The owner did attend to the completion items until shortly before she started start moving into her home until February this year – some 18 months after the contract was terminated. There was no explanation why she did not have these works carried out earlier. Notwithstanding her concerns about the weatherboards, they were not an impediment to

[11] First respondent's final submissions pg 49

occupation of the house. Even had I found they needed to be replaced, this could have been done while she was living there. Had she moved in earlier, she would not have had to pay these additional costs. This claim is dismissed.

CONCLUSION

166 As I noted at the outset this has been an unfortunate experience for the owner and the builder not assisted by the interference and behaviour of the plumber and the painter.

167 I will order the owner to pay to the builder the sum of $25,972.97 calculated as follows:

Amounts allowed to builder		
Conceded variations	$ 4,094.00	
Allowed variations	$ 750.24	
Fixing stage payment	$23,242.50	
Balance of contract price	$16,177.00	
Delay damages	$ 3,856.95	
		$48,120.70
Amounts allowed to owner		
Weatherboards	$5,000.00	
Adjustment to cost of flooring	$2,630.00	
Repaint	$ 250.00	
Adjustment of doors	$ 297.00	
Liquidated damages	$13,970.73	
		$22,147.73
		$25,972.97

168 The builder seeks interest on the outstanding progress payments, and the balance of the completion payment. Under s53(2)(b)(ii) of the DBC Act, the tribunal may award damages in the nature of interest. I am satisfied that an order for interest is appropriate in this case on the outstanding fixing stage payment from 22 May 2007 to the last day of the hearing: 6 April 2009. I am not persuaded that there should be any order for interest in relation to the balance of the completion payment, the exact amount of which was subject to dispute between the parties.

169 The contract provides that interest is to be at the *'going overdraft rate'*[12]. The builder says this was 16.6%, but has not provided any evidence to

[12] Schedule 1, Item 8

support this. The owner says the prevailing overdraft rate varied from 8.95% (Westpac) to 14.3% (Commonwealth Bank) and submits that any award of interest should be calculated at the lowest rate: 8.95%. She has provided copies of web pages from the various banks apparently printed on 11 October 2007 setting out the overdraft rates at that time. However, the rates have changed periodically since the payments became due and I will reserve the assessment of interest pending submissions from the parties as to the relevant rate or rates to be applied.

170 I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C. AIRD