

Alan William Grey v Alexander Little and Marlene Little [2005] CCT B264-04

CATCHWORDS: Money claimed under a domestic building contract or quantum meruit – formation of contract - nature and extent of contract - Scope of works and variations - standard of work – time to complete defective work – breach of condition or warranty – termination – early possession – enclosed stage - damages – interest - costs.

Legislation: *Commercial & Consumer Tribunal Act 2003* - ss. 70 & 71(4);
Domestic Building Contracts Act 2000 - ss. 7(1)(a), 8, 8(3)(a), 16, 41(1), 42, 43, 44, 45, 51, 66, 84, 93

REASONS FOR DECISION Member Mr D Morzone. **Commercial and Consumer Tribunal** Brisbane 14 December 2005

Introduction

- 1 By an application filed on 8 June 2004, the Applicant claimed for payment under a domestic building contract for the amount of \$58,329.93 as money owing pursuant to clause 28(8) of the contract or as restitution by a quantum meruit, interest and costs. The claim was adjusted at the hearing in Exhibit 16 to the amount of \$59,158.65.
- 2 The Respondents filed an amended defence on 16 September 2005 relying upon a different agreement including a "bill of materials", the failure to achieve practical completion due to the extent of defects and incomplete work, credit for materials purchased by the Respondents and builder's margin, together with a counterclaim for rectification of defects and costs.
- 3 Both parties were represented at the hearing.

Background

- 4 The Applicant was and is a registered builder. The Respondents owned a property at 71 Tropical Avenue in Andergrove in Queensland. The parties were acquainted with each other through the local bowls club.
- 5 In September 2003, the parties discussed the prospect of the Applicant building a house on the Respondents property. Later in September 2003 and October 2003, the discussions about the design and cost continued. There is a dispute between the parties about whether the discussions also involved a list of materials prepared by the Applicant, which set out the costing of labour and materials totalling \$180,518.20.
- 6 It is common ground that the parties entered into a contract for the construction of the Respondents' house on or about 24 October 2003 for a fixed price of \$180,518.20. But there is some debate about the form of the contract. The Applicant relies upon the completed form of the contract tendered and marked Exhibit 9, being the HIA Plain Language New Home Construction Contract (Version HIA QCI 2000). On the other hand, the Respondents contend that the contract was signed in blank by Mr Little only. Apparently Mrs Little refused to sign the contract in blank. The Respondents say that they did not receive the completed version of the contract (Exhibit 9) until 26 March 2005 and that remained unsigned by Mrs Little.
- 7 The contract did not provide for a completion date as referred to in Clause 10. The Applicant says that was left undefined due to his personal health required him to work at his own pace. On the contrary, the Respondents say that the parties orally agreed that the practical completion would be in the first week of April 2004.
- 8 Plans were prepared and submitted to the council by the Applicant on 29 October 2003 and approved on about 27 November 2003. Work commenced on the site on about 1 December 2003. From 24 October 2003 until April 2004, the Respondent paid \$85,000.00:
 - a. A deposit of \$10,000.00;
 - b. First progress claim of \$20,000.00;
 - c. Second progress claim of \$55,000.00.
- 9 During the course of the work, the Respondents bought significant items for inclusion in the construction. The Respondents say that during the discussions the Applicant encouraged them to buy some items cheaper. The Applicant denies any such discussion and points to the terms of the contract. Schedule 3 of the contract identified exclusions from the contract, including drawing plans, paths, fences, landscaping and air-conditioning. No provision was made for the Respondent owners to supply any items.
- 10 On about 6 April 2004, the Applicant made a progress claim of \$34,648.36 for the "lock up stage". The Respondents' solicitors sent a letter of 8 April 2004, setting out areas of dispute and alleging that the Applicant was in breach of the Contract dated 24 October 2003 and giving 7 days for the Applicant to remedy the breaches. The Applicant's solicitors responded on 15 April 2004, denying the alleged breaches and, in turn, accused the Respondents of substantial breach and threatened to terminate the contact unless the Respondents remedied the breach within 10 days. In a letter of 22 April 2004, the Respondents solicitors purported to terminate the contract and required the Applicant to vacate the site and cease work immediately. In the response letter of 29 April 2004, the Applicant's solicitors communicated the Applicant's intention to terminate the contract.
- 11 The parties have engaged in a dispute in relation to the effect of the termination, payment for completed work and rectification of defective and incomplete work.
- 12 In the application, the Applicant claimed the amount of \$58,329.93 as money owing pursuant to clause 28(8) of the contract or as restitution by a quantum meruit. This figure was derived from the difference between

\$85,000.00 and the total cost to date of \$143,329.93 being \$97,813.45 for the costs of material (including GST) less material returned, plus \$21,600.00 for labour and supervision costs plus 20% builder's margin of \$23,917.48. At the hearing, the claim was adjusted in Exhibit 16 to the amount of \$59,158.65.

- 13 The Respondents have assessed the amount owing to the Applicant as only \$16,701.60, which they tended in full and final satisfaction of the contract on 24 May 2004. The tender was rejected. The Respondents say that the subtotal owing after subtracting the amount paid (\$85,000.00) from the contract amount (\$180,518.20) is \$95,518.20. The Respondents then say that the following need to be deducted:

Items purchased by the Respondents	\$27,988.00
Materials specified in the quote to be used by the date of termination paid for by the Respondents but not used or fitted by the Applicant	\$4,612.50
Respondents' locksmith costs in gaining entry to the property	\$55.00
Respondents' costs to complete the dwelling including supply and fill of security screens, completing the electricals, completing the plumbing, supply and installing of shelves and for licensed builder to finish off the dwelling including Builder's Statutory Insurance and cleanup	\$47,670.30
Additional charges agreed to by the Respondents for:	
(a) drawing the plans	\$720.00
(b) change of mesh	\$288.00
(c) rendering of 13 m ² at \$28.00 per metre	\$364.00
GST on above items	\$137.20
Total amount owing to the Applicant	\$16,701.60

- 14 The house remained incomplete at termination. The Respondents rely upon defective and incomplete work identified by the Queensland Building Services Authority on 5 August 2004. In particular, they counter-claim for \$6,941.00 for rectification of soffits and patio sheeting. The Applicant disputes the counter-claim as a remnant of the incomplete state of the house at the date of termination and early possession by the Respondents.

Issues

- 15 It seems to me that the following issues arise for determination by the Tribunal having regard to the scope of the application, and the defence and counterclaim:
- (i) Formation and terms of the contract in relation to supply of materials, practical completion date and quality of the contract work?
 - (ii) Whether the Applicant and/or Respondents breached the contract?
 - (iii) Whether the contract was terminated by one or other party?
 - (iv) Whether the Applicant is entitled to the payment for work completed, or whether the Respondents are entitled to damages for breach?

Formation of the contract

- 16 It is common ground that the parties entered into a contract for the construction of the Respondents' house on or about 24 October 2003 for a fixed price of \$180,518.20. It is also undisputed that the work the subject of the contract between these parties falls within the definition of "domestic building work". But there is some debate about the formation of the contract.
- 17 Discussion began in September 2003, when the parties discussed the prospect of the Applicant building on the Respondents' property. Later in September 2003 and October 2003, the discussions about the design and cost continued using a sketch plan.
- 18 The Applicant relies upon the completed form of the contract tendered and marked Exhibit 9, being the HIA Plain Language New Home Construction Contract (Version HIA QCI 2000). On the other hand, the Respondents contend that the contract was signed in blank by Mr Little only. Apparently Mrs Little refused to sign the contract in blank. They say that the completed version of the contract (Exhibit 9) was not received until 26 March 2005 and remained unsigned by Mrs Little despite work commencing. The Applicant pleads that the contract was partly in writing and partly oral as follows:¹
- (a) So far as the agreement was oral the Respondents state that on 24 October, 2003 the Respondents had a conversation with the Applicant whereby it was agreed that the Applicant would build a residential dwelling at 71 Tropical Avenue, Andergrove for the Respondents for the contract price of \$180,518.20. The agreement contained the following terms made orally:
 - (i) That the Applicant was to use the materials as listed in the bill of materials referred to in paragraph 2 herein and attached to the Defence of the Respondents;
 - (ii) A contract price of \$180,518.20 was to be reduced by the amount of any items in the bill of materials purchased by the Respondents;

¹ Exhibit 2 - Defence – Attachment 1 para 1

- (iii) *The dwelling was to be built as per the plan provided by the Respondents to the Applicant in September, 2003 which was referred to during the conversation referred to above;*
- (iv) *Completion was to be in the first week of April, 2004 however the Respondents stated to the Applicant that they would be willing to extend completion by two or three weeks if required in order to have the job done properly rather than rushed.*
- (b) *So far as to the Contract was in writing the Respondents state that a bill of materials was referred to during the verbal conversation and agreed on as the materials to be used by the Applicant and the prices for those materials including the price for labour and builder's margin such amounts totalling \$180,518.20.*
- 19 The Applicant, Mr Grey gave evidence about this issue. He was a Registered Builder with 50 yrs experience. He holds a registered builder's licence and one for his company. He was able to refresh his memory from contemporaneous notes in his working diaries,² and gave the following testimony:
- a. 7.9.03 – He received a call from Alex Little – Mr Little said he was thinking of building and wanted to come around to discuss building. They made arrangements to come around and discuss the plan.
 - b. 22.9.03 – Mr Grey met with Mr & Mrs Little to discuss plan as arranged. They had several plans, and decided on a sketch plan. They wanted to know how much it would cost. Mr Grey did not remember whether I gave them a rough estimate – since he had to work it out.
 - c. Over the next couple of weeks, Mr Grey took plans to various sub-trades and prepared a rough schedule of estimates. He identified document dated 23.9.03 (Exhibit 5) as his own personal rough workings. He recalled that Mr & Mrs Little did not get a copy of that until "several months" later when we were discussing screen doors etc, in about March 2004.
 - d. 8.10.03 – he went to Pioneer design.
 - e. 21.10.03 – Collected plans, and took them to Mr & Mrs Little, together with the terms & conditions of the contract so they were familiar with it. He left them there.
 - f. 24.10.03 – He received a call from Alex little, and went around to their house to sign the contract. He remembered that the contract was signed in the completed form contained in Exhibit 9. He identified the signatures on page 1 as applied on that day. He also said that item 10 had no date for practical completion because he had bypass surgery and did not want the pressure. He said he wanted to do a good job at his own pace. He denied any discussions about the Littles purchasing items;
 - g. He said that he went to his home to copy the contract and returned on 27.10.03 to give the Littles a copy.
- 20 During cross-examination Mr Grey denied giving the Applicant his costings of materials (Exhibit 5) on the 24 October 2003. He was not really certain about how or when the Respondents came into possession of the document. He denied telling Mr Little that *he could go and get some items himself if he could obtain them more cheaply*. Mr Grey maintained that there was never a finishing date and denied the suggestion that he told the Littles that April 2004 was the likely completion date.
- 21 Mr Little also testified in relation to the formation of the contract. He is now retired having served 9 years in Army. He testified that:
- a. He knew Mr Grey on a social basis through the bowls club, and just approached him and asked him to consider a rough sketch;
 - b. At the First meeting – The Littles gave Mr Grey the sketches and he said he would get back to them with a quote. He recalled stipulating that he and his wife required a completion date in April, preferably the first week of April. However, he added that he also made the statement, that he was the type of person that likes good workmanship and if the building required 2 – 3 weeks longer that would be "ok";
 - c. During the second meeting – Mr Little recalled discussion about the price of the house, which did not include, footpath, drive way, fencing, or clothes line. Further plans had not been drawn. He recalled instructing Mr Grey go out and get the plans drawn and come back with a firm quote;
 - d. At the third meeting in October 2003 – Mr Little recalled that Mr Grey said he didn't realise that prices had increased so much, and that the house would cost in the vicinity of \$180,518.20. He remembered that Mr Grey said that to get to that price he had a copy of a document with all figures, and gave the Littles a copy with the total at the bottom of one of the pages.³ Mr Little identified Exhibit 5 as the document (with his additional handwriting all over it). Mr Little also recalled that he wrote a list of PC items allowed as discussed. The plans needed amendment to include the eaves as originally required. At the same meeting, Mr Little remembered receiving a blank copy of the contract to read;
 - e. At the Fourth meeting – Mr Little recalled *that was the day we settled on the contract and built the house*. He said that the parties arrived on a gentlemen's agreement and shake hands on it, with the price inserted in the HIA contract. He remembered that Mr Grey had his own HIA contract that he brought and Mr Grey stated that he just wanted to sign the signatures page, which was blank apart from the value. Mr Little printed his name and my wife's name, he signed his name. Mr Grey asked Mrs Little to sign but she said that *"why should she sign there was nothing filled out"*. So Mr Grey just signed his name and I witnessed it;
 - f. Mr Little said that they had a purchaser for their unit and were ready to move in April. Mr recalled that Mr Grey was aware of this and he later met the man;
 - g. Mr Little recognised the completed colour photocopy version of the contract (in the form of in Exhibit 9), which was later delivered by the Applicant on 26 March 2004, at 6:55 am.

² Exhibit 8

³ Exhibit 5, 20, or 21

- 22 Finally Mrs Little testified about the formation of the contract. She said in her evidence that at the time of being asked to sign the contract it was *not filled* in. She recalled saying to Mr Grey that *I'm not going to sign it, it has not been filled out*. She remembered that the list of materials (Exhibit 5) was presented at the same time as the contract price was finalised and before the contract was signed.
- 23 Having regard to all of the evidence, I find that:
- a. On 21 October 2003, the Applicant presented the Respondents with the plans, together with the incomplete contract schedule and HIA terms & conditions of the contract for the Respondents to read.
 - b. On 24 October 2003, I accept that the Applicant again attended the Respondents' house. On that occasion I find that the Applicant presented the list in the first 5 pages of Exhibit 5 as specifications of the materials and labour to substantiate the agreed contract price of \$180,518.20, and the Contract in the form of Exhibit 9 for signing. I find that Mrs Little refused to sign the document on the belief that it was not fully completed, eg. see items 7, 8, 12 and 13 of Exhibit 9.
 - c. I accept that the parties discussed whether the payment schedule was suitable for a block work house. However, I also find that the parties did not agree on an alternative payments schedule. Schedule 2 Progress Payments was incomplete and the timing of payments fell to be determined according to s 66 of the *Domestic Building Contract Act* as set out in Part A.
 - d. I accept that the Respondents generally discussed the desire to complete the house by April 2004, but that the parties did not set a date term for completion. I find that the Respondents were aware of the Applicant's by-pass surgery and need to care for his health. In the absence of any express term, the time for completion was a reasonable time having regard to the Applicant achieving a good job and work at his own pace.
 - e. I also find that there were also discussions about the Littles purchasing items with a view to saving some costs as noted by Mr Little on the last page of Exhibit 5. These notes were not intended to be part of the contract and there was no discussion about the builder's margin applying to those items, so that issue will fall to the terms of the contract relating to the express excluded items in Schedule 3 and PC items listed in Schedule 4 of the contract.
 - f. I further find that the Applicant went to his home to copy the contract and returned on 27.10.03 to give the Respondents their colour copy. After that time, Mr Little completed the Schedule 2 Progress Payments Part A as shown in Exhibit 9.
 - g. By their conduct of performing their obligations under the contract after the work commenced on 1 December 2003, I find that both Respondents accepted (or at least affirmed) the final form of Exhibit 9 as the contract binding the parties together with the general conditions, specification (first 5 pages of Exhibit 5) and plans (Exhibit 11).
- 24 The *Domestic Building Contracts Act* 2000 regulates domestic building contracts. Pursuant to s. 7(1)(a), a "*domestic building contract*" is a contract to carry out domestic building work. "*Domestic building work*" is defined in s. 8 to include work associated with the erection, construction, removal or resiting of a detached dwelling (s. 8(3)(a)). It is undisputed that the work the subject of the contract between these parties falls within the definition of "*domestic building work*".
- 25 Therefore, I find that the Applicant and the Respondents entered into a wholly written domestic building contract between, which comprised the following documents:
- a. Exhibit 9 - the Schedules and General Conditions of the HIA Plain Language New Home Construction Contract (Version HIA QCI 2000);
 - b. Exhibit 10 - the Plans approved by the council on 27 November 2003;
 - c. Exhibit 5 (first 5 pages authored by the Applicant) – as the specification of materials and labour costs including builder's margin of 20%.

Fundamental breach of contract

- 26 The Respondents' solicitors sent a letter of 8 April 2004, setting out areas of dispute and alleging that the Applicant was in breach of the Contract dated 24 October 2003 and giving 7 days for the Applicant to remedy the breaches. The Respondents relied upon the following alleged breaches at the hearing:⁴
- a. Failed to complete the building by the time stipulated;
 - b. Used materials in the building which were different to the bill of materials agreed upon;
 - c. Claimed builder's margin on items purchased by the Respondents;
 - d. Claimed payment for extras which were not agreed upon;
 - e. Claimed lock-up stage claim based on the original contract price of \$180,520.00 instead of the reduced price (due to the Respondents' purchasing certain materials pursuant to the Contract) of \$152,622.20;
 - f. Failed to complete the cement for the carport and front patio area being part of the base stage;
 - g. Failed to complete the construction of the dwelling in an appropriate and skilful way using reasonable care and skill, in particular, using the wrong sized cornices in the kitchen and constructing the glass block window in the kitchen in a manner which resulted in a gap;
 - h. The soffits and patio sheeting were not constructed according to Australian Standard AS 4055 1992 (C2 wind rating W 50);
 - i. Locked the Respondents out of the premises prior to presenting the claim for payment for the "lock up" stage leaving the Respondents with no chance to inspect the dwelling.

⁴ Exhibit 8 & Defence Para 4 (Exhibit 2)

- 27 The Applicant's solicitors responded on 15 April 2004, denying the alleged breaches and, in turn, accused the Respondents of substantial breach and threatened to terminate the contract unless the Respondents remedied the breach within 10 days. The Applicant relied upon the following breaches at the hearing:
- a. Failure to make the progress payment in breach of clause 28.2(1) of the contract; and
 - b. Failure to produce evidence of the capacity to pay the balance of the contract price pursuant to clause 28.2(a) of the contract.
- 28 I now turn to discuss the merits of the allegations having regard to the scope and terms of the contract as I have found it, and the stage of completion of the work:

Failed to complete the building by the time stipulated

- 29 I accept that the Respondents generally discussed the desire to complete the house by April 2004, but I do not accept that the parties agreed on a set date for completion. I accept that the Applicant had by-pass surgery and needed to care for his health. I find that these matters were known to the Respondents at the time of the contract and was the main reason for the absence of any express practical completion date in the contract. I have found that, in the absence of any express term, the time for completion was a reasonable time having regard to the Applicant achieving a good job and work at his own pace.
- 30 I find that a reasonable time for the Practical Completion Date was 30 June 2004. That time had not yet expired by the time of the Respondents' letter of 8 April 2004. Therefore, no breach can be sustained. Further, I note that by letter dated 17 March 2004, the Respondents requested the Applicant for a written estimate of the Practical Completion Date. The Applicant reaching practical completion by 25 June 2004 and so advised the Respondents by a letter dated 23 March 2004.

Used materials in the building which were different to the bill of materials agreed upon

- 31 The Respondents identified the following materials which were specified in Exhibit 5 but were not used or fitted at the time of the letter, namely:

a.	Feature window at entry	\$250.00
b.	Batten Southeast wall	\$850.00
c.	Brace Sheets	\$220.00
d.	Total of 37 lengths of 70 x 35 x 6000 L.O.S.P/ less 88 linear metres over supply, removed from the site = total of 134 linear metres	\$335.00
e.	L.O.S.P. 709 x 45 x 650 linear metres spec actual 70 x 45 x 450 value difference	\$292.50
f.	Block fill – quoted 25 m ² Actual 14 m ² Difference value	\$1,540.00
g.	Concrete slab/thickness overcharge of 5m ² value	\$675.00
h.	Liquid nails	\$100.00
i.	Security Locks glass sliding doors – supply and fit	\$360.00
	Total	\$4,622.50

- 32 I accept the evidence of Mr Grey that the building involved the usual events of "unders and overs". It seems to me that these matters would have been brought into account at the time when there was certainty about the use of materials in the completed building. In my view, the allegation of breach is pre-mature and appropriate time for the adjustments to be done for these types of items is the fixing stage and practical completion. I do not accept that the Applicant has breached any term of the contract as at the enclosed stage.

Claimed payment for extras which were not agreed upon

- 33 In his evidence the Applicant relied upon a calculation of "Extra's For A&M Little: 71 Tropical Avenue Job" as a list of agreed variations as follows:

a.	Insurance Allowed \$850	\$700.00
b.	Change of mesh to slab to F82 @ 16 per sheet x 18	\$288.00
c.	Draw Plans	\$720.00
d.	Extend block wall 2,400 long rendered both sides	\$827.00
e.	K Jordon Termite barrier under block walls	\$365.80
		\$2,900.80
f.	Plus 20% builder's margin	\$580.00
		\$3480.00
g.	Plus GST	\$348.00
	Total	\$3,828.80

- 34 Part 7 of the *Domestic Building Contracts Act 2000* applies to the contract regardless of the terms expressed in it.⁵ Non-compliance with the variation requirements under the Act affect the builder's entitlement to payment for any extra work pursuant to s 84 of the Act. The definition of "variation" in section 16 of the Act, shows that the statutory scheme is not only predicated upon the protection of a consumer from an increased contractual price. But also, in my view, the requirement to reduce variations to writing creates a record of the amendment to maintain contractual certainty in relation to many aspects of the contract, for example the addition or omission of specified work including any price variation.
- 35 In my view, the purchases by the Respondents and alterations to the contract work listed in Exhibit 11 constitute variations and the Respondent was obliged to comply with the statutory requirements. The Clause 4.4(c) of the contract obliged the Applicant builder to include any amount of any addition or deduction for variations.
- 36 I am not satisfied that the inclusion of the variations in the absence of the formal requirements under clause 20 amounts to a substantial breach within the meaning of the contract. In any event, I am satisfied on the evidence that each of the variations claimed were agreed between the parties and the formal requirements were waived by the Respondents.⁶

Claimed builder's margin on items purchased by the Respondents

- 37 By letter dated 17 March 2004, the Respondents provided the Applicant with a list of all items selected and purchased by them totalling \$27,896.00 having regard to their "contract value" as specified in Exhibit 5. It seems to me that items listed in Exhibit 5 were inclusive of the builder's margin as part of the whole calculation of the contract price.
- 38 The Applicant never agreed with the unilateral "take outs" from the specification by the Respondents, and always maintained a claim for his "20% builder margin". So there was never agreement about the builder's margin for owner's purchasers, nor do I see any basis to compel the Applicant to abandon his builder's margin on general contract items which were not expressly included in the contract as PC items or owner's items.

Claimed lock-up stage claim based on the original contract price of \$180,520.00 instead of the reduced price (due to the Respondents' purchasing certain materials pursuant to the Contract) of \$152,622.20

- 39 By letter dated 17 March 2004, the Respondents provided the Applicant with a list of all items selected and purchased by them totalling \$27,896.00 having regard to their "contract value" as specified in Exhibit 5. I have already found that Exhibit 5 (first 5 pages authored by the Applicant) was the specification of materials and labour costs for the purposes of the contract.
- 40 Whilst the Applicant disagreed with the unilateral "take outs" by the Respondents, he only accepted a deduction of \$21,845.60 excluding the front door lock and ceiling fans and after deducting "20% builder margin". So there was never agreement about the value of the reduction of the contract (if any).
- 41 Having regard to the nature of the items allegedly purchased by the Respondents and the continuing disagreement, I see no basis for the Applicant to reduce the progress claims made to the enclosed stage.

Failed to complete the cement for the carport and front patio area in base stage.

- 42 The contract adopts the statutory definition of Base Stage as follows:
"base stage" means--
(a) for a building with a timber floor with base brickwork--the stage when--
(i) the concrete footings for the building's floor are poured; and
(ii) the building's base brickwork is built to floor level; and
(iii) the bearers and joists for the building are installed; or
(b) for a building with a timber floor without base brickwork--the stage when--
(i) the building's stumps, piers or columns are finished; and
(ii) the bearers and joists for the building are installed; or
(c) for a building with a suspended concrete slab floor--the stage when--
(i) the building's concrete footings are poured; and
(ii) the formwork and reinforcing for the suspended slab are installed; or
(d) for a building with a concrete floor, other than a suspended concrete slab floor--the stage when the building's floor is finished
- 43 It seems to me that the definition calls for the base stage as the structural or main floor slab and footings as the base of the structure. This interpretation is also supported by the industry practice. Mr Graham, senior building inspector of the QBSA, testified that the industry regarded that the structural floor is the floor attached to or part of the main foundations of the building – in this type of construction rendered masonry & walls of the building are sitting on top of the floor. Having regard to the plans – Exhibit 10, he said that:
a. SF1 indicated the perimeter of the structural floor indicating the main slab;
b. The carport was infill type floor and could be poured after the main slab;
c. Slab 2 was also infill slab that could be poured at any time.
- 44 In my view the Respondents have not shown any breach of the Base Stage

⁵ Section 93 *Domestic Building Contracts Act 2000*

⁶ See also concession made in the Respondent's outline of Submissions – top page 3

Failed to complete the construction of the dwelling using reasonable care and skill.

- 45 In particular, using the Respondents assertion that the wrong sized cornices were installed in the kitchen and the glass block window in the kitchen was constructed with a gap.
- 46 Clauses 1.1, 11 and 36 of the contract prescribed the standard of work required of the Applicant. Part 4 of the *Domestic Building Contracts Act 2000* also sets out the warranties implied in every domestic building contract. Section 41(1) provides that: "The warranties mentioned in Division 2 are part of every regulated contract. Division 2 includes s.42 to 44 which relevantly provides as follows:"
- 47 Section 42 prescribes the standard for materials in these terms:
"(1) The building contractor warrants that all materials to be supplied for use in the subject work –
(a) will be good and, having regard to the relevant criteria, suitable for the purpose for which they are used; and
(b) unless otherwise stated in the contract, will be new. ...
(6) In this section – "relevant criteria", for materials, means-
(a) generally accepted practices or standards applied in the building industry for the materials; or
(b) specifications, instructions or recommendations of manufacturers or suppliers of the materials."
- 48 Section 43 requires compliance with the legal requirements as follows: "The building contractor warrants the subject work will be carried out in accordance with all relevant laws and legal requirements, including, for example, the *Building Act 1975*."
- 49 Then s. 44 prescribes the standard of work expected of a builder as follows: "The building contractor warrants the subject work will be carried out-
(a) in an appropriate and skilful way; and
(b) with reasonable care and skill."
- 50 The contract also defines "Fixing Stage" in the same terms as the Act to mean "the stage when all internal lining, architraves, cornice, skirting, doors to rooms, baths, shower trays, wet area tiling, built-in shelves, built-in cabinets and built-in cupboards of a building are fitted and fixed in position."
- 51 The time for final installation of the cornices in the kitchen is in the fixing stage, which had not been reached under the contract. Similarly, the glass block window in the kitchen was only required to be temporarily fixed at the "enclosed stage", which may have produced a gap for attention prior to practical completion. Therefore, in my view the Respondents' complaints about the cornices and glass block window in the kitchen is premature and not warranted at the enclosed stage.

Soffits and patio sheeting were not constructed according to Australian Standard AS 4055 1992 (C2 wind rating W 50)

- 52 The contract adopted the statutory definition of "enclosed stage" for a building as follows
"enclosed stage", for a building, means the stage when--
(a) the external wall cladding is fixed; and
(b) the roof covering is fixed, but without--
(i) soffit linings necessarily having been fixed; or
(ii) for a tile roof--pointing necessarily having been done; or
(iii) for a metal roof--screwing and final screwing off necessarily having been done; and
(c) the structural flooring is laid; and
(d) the external doors are fixed (even if only temporarily), but, if lockable door separating the garage from the rest of the building has been fixed, without the garage doors necessarily having been fixed; and
(e) the external windows are fixed (even if only temporarily).
- 53 In my view the Respondents' complaint about the soffits and patio sheeting were also pre-mature at the enclosed stage. According to that definition, the "enclosed stage" can be achieved "when the external wall cladding is fixed ... but without--soffit linings necessarily having been fixed." I am satisfied that these components were sufficiently fixed to satisfy the "enclosed stage" and would be further attended prior to practical completion.

Locked the Respondents out of the premises prior to presenting the claim for payment for the "lock up" stage leaving the Respondents which no chance to inspect the dwelling.

- 54 By clause 10.1 of the contract, the Respondents delivered up to the Applicant exclusive possession of the site to carry out the works. Further clause 18.2 vests a power in the builder to exclude or remove from the site any person for the purposes of compliance with the *Workplace Health & Safety Act 1995*. By virtue of clause 26 of the contract, the Respondents were also disentitled to take control of, possession of or use the works until they had paid the contract price or with the consent of the Applicant builder.
- 55 Consequently, I see no basis for the Respondents claim of right to enter and inspect. I am not satisfied on the evidence that the Applicant's conduct was contrary to his right of possession of the site.

Failure to make the progress payment in breach of clause 28.2(1) of the contract

- 56 The Respondents paid 5% deposit of \$10,000.00 and two further progress claims. On about 6 April 2004, the Applicant made a progress claim of \$34,648.36 up to the Enclosed Stage as prescribed in Schedule 2 of the contract and pursuant to s 66 of the *Domestic Building Contracts Act* as follows:

STAGE	PERCENTAGE (%)	AMOUNT (\$)
Deposit	5	10,000.00
Base	10	20,000.00
Frame	15	30,000.00
Enclosed	35	60,000.00
Fixing	20	36,000.00
Practical Completion	Balance	

57 I accept that the Respondents used the old building jargon of "lock up" stage as equating to "enclosed stage". The written progress claim for the "lock up" stage (Exhibit 17) seems to comply with the requirements of clause 4.3 and 4.4 of the contract calculated as follows:

a. 65% of \$180,518.20	\$117,336.70
b. Less previously paid -	\$85,000.00
c. Less front doors \$1,000.00 less 20% builder's margin	\$838.19
d. GST	<u>\$3,149.85</u>
e. Total Inc GST	\$34,648.36

58 Consequently, clauses 4.1 and 4.8 of the contract obliged the Respondents to pay the contract price adjusted progressively at each stage, without any right of set off. By virtue of clause 28.2, the Respondents committed a substantial breach of the contract by not paying progress payments as required by Clause 4.

Failure to produce evidence of the capacity to pay the balance of the contract price pursuant to clause 28.2(a) of the contract.

59 Similarly, by failing to give evidence of their capacity to pay the contract price from time to time as required by clause 7, the Respondents committed a second substantial breach of the contract by virtue of clause 28.2(d).

Effect of Early Possession

60 The Applicant also relies upon the effect of Clause 26 of the Contract to defeat the counter-claim on the grounds that the Respondents' forfeited their rights under the contract pursuant to clause 26 when they took early possession in early 2004. If this argument was correct, then the builder will be excused from complying with the warranty to carry out the subject work in accordance with the plans and specifications as required by s. 45 of the Act. Further, it purports to exclude, change, or restrict the right of the building owner conferred by s. 51 which provides:

51 Proceedings for breach of warranties

- (1) A proceeding for a breach of a warranty under this part for a regulated contract must be started within 6 years and 6 months after--
 - (a) the subject work is finished; or
 - (b) if the subject work is not finished--the stated completion date or period.
- (2) In a proceeding for a breach of a warranty mentioned in this part, it is a defence for the defendant to prove that the deficiencies of which the plaintiff complains arise from instructions given by the building owner contrary to the defendant's written advice.

61 In my view the Applicant's argument is caught by s. 93 of the Act which provides:

- (1) A domestic building contract is void to the extent to which it--
 - (a) is contrary to this Act; or
 - (b) purports to annul, exclude or change a provision of this Act.
- (2) An agreement (other than a domestic building contract) is void to the extent to which it seeks to exclude, change or restrict a right conferred under this Act in relation to a domestic building contract.
- (3) Nothing in this section prevents the parties to a domestic building contract from including provisions in the contract that impose greater or more onerous obligations on a building contractor than are imposed under this Act.
- (4) Subsections (1) and (2) apply subject to any contrary intention in this Act.

62 To the extent that clause 26 purports to restrict or take away these rights for a breach of a warranty, it is void.

Effect of claim Third Progress Claim – "Base Stage"

63 During the hearing the Respondents made much of the Applicant's inflated progress claim for the "Slab" of \$55,000.00, which exceeded the contract and statutory schedule of progress claims. That progress claim was paid by the Respondents.

64 In my view, as at the enclosed stage the Respondents had waived any breach arising from the Applicant's inflated claim. The breach was also remedied by since the cumulative value of the claims equated to 65% by the time of the Applicant's claim for the "Enclosed Stage. In other words, as at the enclosed stage, the Respondents total progress claims exceeded his entitlement under the schedule.

Termination of contract

65 In a letter of 22 April 2004, the Respondents' solicitors purported to terminate the contract and required the Applicant to vacate the site and cease work immediately. In the response letter of 29 April 2004, the Applicant's solicitors communicated the Applicant's intention to terminate the contract.

66 Clause 28 of the contract governs the parties right to terminate only where the other party is in *substantial breach* of the contract as follows:

"Clause 28. TERMINATION BY DEFAULT

- | | | |
|--|------|---|
| When builder is in substantial breach | 28.1 | The builder is in substantial breach of this contract if the builder: |
| | | (a) Suspends the carrying out of the works, otherwise than under Clause 19; |
| | | (b) Has the builder's licence cancelled or suspended; or |
| | | (c) Is otherwise in substantial breach of this contract. |
| When the owner is in substantial breach | 28.2 | The owner is in substantial breach of this contract if the owner: |
| | | (a) Does not pay progress payments as required by Clause 4; |
| | | (b) Does not pay the deposit as required by subclause 4.2; |
| | | (c) Does not give evidence of the owner's title as required by Clause 6; |
| | | (d) Does not give evidence of the owner's capacity to pay the contract price from time to time as required by Clause 7; |
| | | (e) Where a lending body is stated in item 9, does not comply with: |
| | | (i) The requirements of subclauses 7.3 or 7.4; |
| | | (ii) Any of the requirements of the lending body; or |
| | | (iii) The requirements of subclause 5.2; |
| | | (f) Does not establish or maintain the security account as required by Clause 8; |
| | | (g) Does not give possession of the site as required by subclause 10.1; |
| | | (h) Interferes with or obstructs the builder or the builder's workers, suppliers or subcontractors in carrying out the works in breach of subclause 10.3; |
| | | (i) Does not give an instruction within 5 working days of becoming aware of a problem under Clause 13; |
| | | (j) Does not, or does not ensure that the owner's contractors, comply with the requirements of Clause 24; |
| | | (k) Takes possession of or uses the works or any part of the works without the prior written agreement of the builder prior to the payment in full of the contract price, adjusted by any additions or deductions made under this contract, in breach of Clause 26; or |
| | | (l) Is otherwise in substantial breach of this contract. |
| Notice to show cause | 28.3 | If a party is in substantial breach of this contract, then the other party may give to that party a written notice to show cause: |
| | | (a) Specifying the substantial breach; |
| | | (b) Requiring that the substantial breach be rectified within 10 working days after the notice is given under this contract; and |
| | | (c) Stating that, if the substantial breach is not rectified, the other party intends to end this contract. |
| Notice to end the contract | 28.4 | If the party in substantial breach does not rectify or commence to substantially rectify the substantial breach stated in the notice to show cause within 10 working days of receiving that notice, the other party may end this contract by giving a separate notice to that effect. |
| No right to end where matter is referred to QBT | 28.5 | A party is not entitled to end this contract if, within 5 working days of receiving the notice to show cause, the party in substantial breach refers the question as to whether the other party has the right to end this contract for determination by the Queensland Building Tribunal under Clause 37. |
| Where matter is referred to the QBT | 28.6 | If a reference for determination is made under subclause 28.5 the carrying out of the works is suspended and the notice to show cause is not effective until the Queensland Building Tribunal has made a determination. |
| When notice is ineffective | 28.7 | Neither party is entitled to give a notice to show cause while that party is in substantial breach of this contract. A notice given by a party in substantial breach is ineffective." |

67 The term "substantial breach" is not defined in the contract. However it will be given its ordinary and natural meaning as being a breach of an essential term, as distinct from a warranty, requiring strict or substantial performance under the contract.

68 As discussed above, I find that by virtue of clause 28.2(a) and (d), the Respondents were in substantial breach of the contract by failing to pay the "enclosed stage" progress claim and failing to give evidence of their capacity to pay the contract price. Further, by taking early possession of the works without prior permission of the Applicant constituted a further substantial breach by virtue of clause 28.2(k). On the other hand, for the reasons

discussed above, the Applicant was not in substantial breach of the contract as at the date of his notice to show cause.⁷

- 69 These circumstances enlivened the Applicant's right to give notice to show cause and the Applicant's letter of 15 April 2004 was an effective notice to show cause in compliance with clause 28.3. The failure of the Respondents to remedy entitled the Applicant to lawfully terminate the contract and his solicitor's letter of 29 April 2004 was effective notice to end the contract in accordance with clause 28.4 of the contract.

Entitlement to payment

- 70 Clause 28.8 and 28.9 of the contract provides for the parties rights and remedies as a debt after a lawful termination, in addition to all other rights and remedies, as follows:

- "Builder's rights** 28.8 On this contract being ended by the builder under Clauses 2, 15, 24, 28 or 29 the builder may, without prejudice to any other rights or remedies that the builder may have under this contract or at law, recover from the owner as a debt due and owing the greater of the following amounts:
- (a) 5% of the contract price; or
 - (b) Damages including:
 - (i) The cost of all work carried out by the builder under this contract;
 - (ii) The cost to the builder of any materials purchased by the builder and delivered to the site or ordered by the builder from suppliers and which orders can not be cancelled;
 - (iii) The cost to the builder or quitting the site;
 - (iv) Default interest on any unpaid moneys under Clause 33;
 - (v) All other costs and losses incurred by the builder as a consequence of this contract being ended.
- Other rights unaffected** 28.9 Nothing in this Clause 28 alters or affects any rights of either party at law or otherwise to end this contract without notice consequent upon the repudiation of this contract by the other party."

- 71 The Respondents relied upon evidence of the likely cost to complete the house,⁸ including an assessment made by Mr Trevor Noe,⁹ a registered builder for 31 years. Whilst I found that evidence compelling and interesting, the assessment under clause 28.8 of the contract does not require an assessment of the costs likely to be incurred by the Respondents to complete the work. Further, the assessment does not bind the builder to the percentage of the contract price under the progress claim schedule.

- 72 Further, the right of the Applicant to recover an amount pursuant to an unwritten variation is governed by s.84 of the Act, which provides that:

84 Right of building contractor to recover amount for variation

- (1) This section applies if--
- (a) the building contractor under a regulated contract gives effect to a variation of the contract; and
 - (b) the variation consists of--
 - (i) an addition to the subject work; or
 - (ii) an omission from the subject work that results in the building contractor incurring additional costs.
- (2) If the variation was originally sought by the building owner, the building contractor may recover an amount for the variation--
- (a) only if the building contractor has complied with sections 79, 80, 82 and 83; or
 - (b) only with the tribunal's approval given on an application made to the tribunal by the building contractor.
- (3) If the variation is not a variation that was originally sought by the building owner, the building contractor may recover an amount for the variation--
- (a) only if--
 - (i) the building contractor has complied with sections 79, 80, 82 and 83; and
 - (ii) the ground of unforeseen circumstances applies; or
 - (b) only with the tribunal's approval given on an application made to the tribunal by the building contractor.
- (4) The tribunal may approve the recovery of an amount by a building contractor for a variation only if the tribunal is satisfied that--
- (a) either of the following applies--
 - (i) there are exceptional circumstances to warrant the conferring of an entitlement on the building contractor for recovery of an amount for the variation;
 - (ii) the building contractor would suffer unreasonable hardship by the operation of subsection (2)(a) or (3)(a); and
 - (b) it would not be unfair to the building owner for the building contractor to recover an amount.
- (5) For subsection (3)(a)(ii), the ground of unforeseen circumstances applies if the variation became necessary because of circumstances that could not have been reasonably foreseen by the building contractor when the contract was entered into.

⁷ clause 28.7 renders the notice to show cause ineffective if the notifying party is in substantial breach

⁸ See Exhibits 24 to 34

⁹ Exhibit 30

(6) If the building contractor is entitled to recover an amount for the variation of a fixed price contract, the amount is--

- (a) the increase in the contract price stated, or worked out in the way stated, in the appropriate variation document for the variation; or
- (b) if paragraph (a) does not apply--the cost of carrying out the variation plus a reasonable profit.

(7) If the building contractor is entitled to recover an amount for the variation of a cost plus contract, the amount is the amount worked out in the way stated in the contract.

73 During his evidence, the Applicant provided a detailed schedule and supporting invoices and receipts showing the total cost of the work to the date of termination at \$144,158.65 including all variations. I am satisfied that the detailed costs are reasonable and satisfy the requirements of clause 28.8 of the contract. In his evidence the Applicant also produced a calculation of "Extra's For A&M Little: 71 Tropical Avenue Job" as a list of agreed variations discussed above.

74 It seems to me that the circumstances of this case, including the concessions made by the Respondents,¹⁰ warrant the conferring of an entitlement on the Applicant to recover the amounts of the variations, and it would not be unfair on the Respondent owners to do so.

75 Consequently, I assess damages as a debt due pursuant to clause 28.8 of the contract in the amount of \$59,158.65 being the total costs to termination of \$144,158.65 less payments made of \$85,000.00. Since I have found that the Applicant's rights flow from the valid and subsisting contract, it is not necessary for me to consider the claim in quantum meruit. I will also dismiss the Respondents' counter-claim for damages.

Interest & costs

76 The Applicant claims "default interest" on the unpaid claim pursuant to clause 33 of the contract as follows

"Clause 33. DEFAULT INTEREST

Default interest payable 33.1 If the owner does not pay any amount owing to the builder in full by the due date, then the owner must pay default interest on such amount that is unpaid from time to time."

77 "Default interest" is defined in the contract to mean the annual rate equal to the Commonwealth Bank Overdraft Index Rate: Quarterly charging cycle plus 5%.

78 The Applicant made the last progress claim of \$34,648.36 on about 6 April 2004. In the application, the Applicant claimed the amount of \$58,329.93 as money owing pursuant to clause 28(8) of contract or as restitution by a quantum meruit. This figure was adjusted at the hearing in Exhibit 16 to the amount of \$59,158.65. The Respondents tendered \$16,701.60 in full and final satisfaction of the contract on 24 May 2004. That tender was rejected.

79 I will allow interest in favour of the Applicant, however, I will provide the parties with the opportunity to make further submission on the rate, amount owing and due date(s) applicable to the calculation of interest.

80 Each party has made a claim for legal costs and outlays. I will allow the parties time to make submissions about costs having regard to my reasons.

81 I reserve my decision in respect of interest and costs pending receipt of those submissions

Orders

82 For the above reasons, I make the following orders:

- a. The Applicant's application is allowed and the Respondents defence and counter claim is dismissed;
- b. The Respondents will pay the Applicant the amount of fifty-nine thousand one hundred and fifty-eight dollars and sixty-five cents (**\$59,158.65**), by: **4:00PM ON 2 FEBRUARY 2006**;
- c. Each party will file and exchange written submissions in relation to interest and costs of the proceedings by: **4:00PM ON 2 FEBRUARY 2006**.

Mr Geoff Stenson for the applicant
Mr Richard Morgan for the respondent

¹⁰ See concession made in the Respondent's outline of Submissions – top page 3