QCAT

Queensland Civil and Administrative Tribunal

CITATION:	Cameron v Cavric P/L t/a Cavalier Homes Mackay [2010] QCAT 114
PARTIES:	Jennifer May Cameron V Cavric Pty. Ltd. trading as Cavalier Homes Mackay
APPLICATION NO:	BD010-09
MATTER TYPE:	Building matters
HEARING DATE:	8th, 9th and 17th March 2010.
DECISION OF:	K. Geraghty, Member
DELIVERED AT:	Brisbane
ORDERS MADE:	As per Order

CATCHWORDS:

1 Whether an agreement to terminate a contract was such as to relinquish any rights to claim damages as a result of breach of that contract.

2. Consideration of the effect of "betterment" in the assessment of damages, when a better house was built by the applicant in mitigation of her loss when the house that the applicant originally contracted for was not built.

3. Whether damages for notional loss of rent for the period of delay in the completion of the construction of a house should take into account interest that would have been paid on borrowings when the ability to pay off the when the interest on the borrowings has merely been delayed.

CITATIONS:	Haines v Bendall (1991) 172 CLR 60 at page 63 Cattanach v Melchior 215 CLR 1 at paragraph 101 Hyder Consulting (Aust) Pty Ltd v. Wilh Wilhelmsen Agency Pty. Ltd. The Maersk Colombo [2001] 2 Lloyd's Rep 275 Consort Express Lines Ltd v J-Mac Pty Ltd (2006) 232 A.L.R. 341 at [14] Port Kembla Coal Terminal Ltd v Braverus Maritime Inc (2004) 140 FCR 445 at 542 [485]-[486] per Hely J Harbutt's Plasticine v Wayne Tank and Pump Co Limited [1970] 1 QB 447 at 473 Pegler v Want (UK) Ltd [2000] All E.R. 260 Hyder Consulting (Aust) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd [2001] N.S.W.C.A. 313 v Rodier [2006] N.S.W.S.C. 282 Campbell J observed at [143] Paper Australia Pty Ltd v Ansell Ltd [2007] V.S.C. 484 Davidson v JS Gilbert Fabrications Pty Ltd

APPEARANCES and REPRESENTATION (if any)

Applicant:	Ms C.M. Muir, instructed by McKays Solicitors
Respondent:	Ms S.D. Anderson, instructed by Macrossan and

INTRODUCTION

1. The applicant claims $73,945.00 damages plus interest for an alleged breach of a building contract by the respondent, a duly licensed builder. The defence denies any breach, but alleges that there was a termination by consent of the building contract on the basis that the respondent would pay to the applicant the sum of $12,750.00 by the applicant as a deposit. It is said that the agreement to terminate by consent was an accord and satisfaction.

2. Therefore the task for the Tribunal is to determine whether there was a breach of the building contract; to determine whether there was an agreement to terminate the contract by consent whereby the parties relinquished any rights they had to sue for damages; to determine what the legal consequences are of any such termination; and in the event that the respondent is liable for damages, to assess the quantum of those damages.

THE APPLICANT'S EVIDENCE

3. The applicant was a real estate sales person who became a real estate agent in or about February 2007. In the course of her occupation, she had arranged to sell "spec" houses built by the respondent. She was also buying land and building houses on such land for rental purposes. At the same time, the applicant was running a curtain and blinds business known as "Curtain Fairy".

4. On 27 July 2007 the parties entered into a "QC1 2000 New Home Construction Contract" for the respondent to build a house "the Cambridge 24" on land owned by the applicant at Lot 21 Lenesha Drive, Mackay ("Lenesha Drive") to specification for a price of $255,000.00 including GST ("the contract").

5. Amongst other things, the contract provided for construction to start within twenty-one days of Council approval of the plans; for practical completion in 186 days; window furnishings, turf and fencing were excluded from the specifications.

6. The applicant says that she never actually saw the specifications and assumed that the "finish" would be the same as other houses the respondent had built of the same design and which she had become familiar with through her sales

activities, and in particular, a house at Companion Way, Mackay; and another house situated at Firefly Crescent, Mackay in respect of which the applicant had also entered into a building contract with the respondent for the respondent to build. The respondent's witness, Mr Hewitt, who was the respondent's project manager at the relevant time, agreed that the specifications for Lenesha Drive were the same as for the other houses.

7. It is not in dispute that the respondent knew before entering into the contract that the applicant's intention was to rent the home once it was completed.

8. The applicant paid a deposit of $12,750.00 to the respondent on 11 September 2007, more than six weeks after the signing of the contract, although the contract provided for that to be paid upon the signing of the contract (Clause 4.2). The applicant said that the reason for the late payment was simply that she paid the deposit when she got an invoice from the respondent requesting payment. She also paid the deposit on the Firefly agreement on the same day, the Firefly contract having also been entered into on 27 July 2007. It would appear from the evidence of Mr Hewitt, who dealt with the applicant, that he was unaware that the deposit had not been paid on the signing of the contract, and assumed that it had been paid on that date.

9. The applicant proposed to pay the progress payments stipulated by the contract by draw- downs from her mortgage on her residential home. Thus an actual mortgage of the Lenesha Drive property was not necessary, but she would still have to pay interest to the lender on the draw-downs, at the home loan interest rate charged by the lender from time to time.

10. Although construction of the home did not start, it seems that the applicant did not begin pressing for construction to begin until about October 2007. The applicant says that she observed that no work had commenced and that on many occasions after October she asked Mr Hewitt when construction would commence and was given various explanations for the delays, including that they were waiting on Council approval, or that they were required to attend to urgent work in Moranbah following a storm/natural disaster.

11. The applicant says that she was reluctant to push the issue too much because she was selling the respondent's spec built houses and did not want to jeopardise that source of income. Further, she had contracted to buy a property at Nebo Road on 5 October 2007 for $255,000.00 with possession to occur on 12 November 2007, for the purpose of operating a real estate agency

with a partner from those premises. The partnership did not eventuate and she contracted to sell the property on 7 January 2008 for a sale price of $292,000.00, with settlement to occur on 4 February 2008. She used the draw-down facility from her private residence to pay for Nebo Road. She says she would still have borrowed money for progress payments had the construction of Lenesha Street commenced, but it would have cost her more. She would still have bought the Nebo Road property even if the construction of Lenesha Drive had already started. Nevertheless, she was not pushing for the construction of Lenesha Drive to start once she had contracted to sell Nebo Road and she was anticipating the receipt of the purchase on 4 February 2008, so that she could avoid her lender drawing up a mortgage document, and incurring extra cost. Once she had the money, she did begin to push harder for construction to start.

12. The applicant agrees that she did ask Mr Hewitt to hold off for a month until the sale of Nebo Road, that is to hold off during January 2008.

13. However, construction of Lenesha Drive still did not commence after the beginning of February 2008. The applicant says that in about April 2008 she recalls speaking with Mr Hewitt on the telephone about when construction would commence, and in fact she said to him words to the effect "if you don't want to build my house, just say so"; and that he replied "we have a contract and we have to build it" or words to that effect. The applicant then says that there were further queries with respect to the commencement of construction made by her to Mr Hewitt and that there were further brush-offs between May and July 2008.

14. The applicant says that on 24 July 2008 the administration/office clerk for the respondent, Dee Borellini, phoned to ask for the applicant's bank details to deposit money for blinds that Curtain Fairy had supplied to the respondent; and also for the respondent to pay the applicant's advertising fees. The applicant gave two separate bank account numbers, one for the blinds and one for the advertising fees and that these payments were deposited into her accounts on the same day. Annexure "C" to the Statement of Claim shows a deposit made by the respondent on 24 July 2008 in one of the applicant's bank accounts.

15. Then, on 25 July 2008, the applicant says that during a conversation with Mr Hewitt about the Firefly house (and other matters) Mr Hewitt mentioned that he wanted to pull out of the Lenesha contract, but he moved quickly onto another issue and there was no further discussion on that subject. She says that this conversation took place on the telephone.

16. The applicant then rang her solicitor to get legal advice about the delays in starting construction and it was recommended to her that she contact the builder to see if Lenesha Drive had received Council approval and was ready for construction.

17. On 25 or 26 July 2008 the applicant rang Mr Hewitt and asked if the plans had been to Council and she says that he advised her that they had been to Council.

18. On 28 July 2008 (a Monday) the respondent deposited $12,750.00 into her bank account (that being the amount of her deposit for the contract). However, the applicant says she was not aware of that straight away and it was only a few days later when she saw her bank statement that she realised that the money had been paid. The applicant says that she immediately rang Mr Hewitt but could not get hold of him. On 1 August 2008 she eventually was able to speak with him on the phone to enquire about the refund of her deposit. She says that she told Mr Hewitt that (the respondent) could not pull out of a contract like that, and that she was getting legal advice, and he responded "you do what you have to do".

19. On 4 August 2008 the applicant emailed a letter to the respondent (a letter which had been drawn up on the advice of her solicitors). That letter is attachment "B" to the applicant's written statement which is Exhibit 4. It queries the basis for the return of the deposit and requests that construction proceed and threatens a claim for damages. The respondent did not respond to this letter.

20. Again on 2 September 2008 the applicant sent a letter to the respondent demanding that work commence and reserving the right to claim damages; again there was no response.

21. On 16 October 2008 pursuant to the provisions of the contract, the applicant served a Notice to Remedy Breach on the respondent. There was no response again, and on 31 October 2008 a Notice to End Contract was served on the respondent.

EVIDENCE OF MR HEWITT

22. Mr Hewitt gave evidence on behalf of the respondent. He said that shortly after the signing of the contract, the applicant asked him to hold off commencement for a month because the applicant was considering building a duplex at Lenesha Drive because of the odd shape of the land and that he held off lodging the plan with the Council for this reason. (The applicant denies this, although admitting that she did discuss the possibility of a duplex on the land without specifically asking Mr Hewitt to hold off).

23. Mr Hewitt says that the applicant gave him the go-ahead to commence building the house one month after signing the contract but he was working out west at the time, and the contract "got lost in the system".

24. Mr Hewitt says that for two months, the applicant called him about commencement of Lenesha Drive, but he was out of town and told her so. He said that there was a terrible storm at Tieri on 15 October 2007 which damaged or destroyed all or most of the 580 homes in Tieri, and from that time onwards until October 2008 he spent the majority of his time there only being available in Mackay early on Monday mornings and late on Friday afternoons. Further, the respondent's office staff spent most of their time handling Tieri matters; and the respondent's sub-contracting tradesmen spent most of their time, at least for the next six to ten weeks, in Tieri. As a consequence, all of the respondent's house construction in Mackay stalled.

25. In his written statement (Exhibit 6) Mr Hewitt says that he was at Shinn Street Mackay working on a job shortly thereafter (the statement does not say after what but appears to imply that it was shortly after the two months when he received calls from the applicant about the commencement of construction). It says that at this time the applicant approached him in person and said words to the effect "*Dave, what's going on? I just want to move on"*; and that he replied to the effect of *" The plans haven't gone into Council. Look we have stuffed you around."*; and the applicant said *"If you don't want to build it, just let me know so I can find someone else"*. Mr Hewitt then said words to the effect of *"To be honest, we just don't have the resources with all the things going on out west, I would be more than happy to refund your deposit so we can all move on."* He says that the applicant then replied *"I am happy with that Dave, at least I know where I stand and we can all move on from here*". Mr Hewitt remembered that he was working with Promina board at this time.

26. Mr Hewitt says that he then telephoned Dee Borellini straight away and asked her to refund the deposit to the applicant, and that Borellini rang him back half an hour later asking what account to pay the money into, and that he told her to ring the applicant and find out which bank account. Later on that same day, Dee telephoned Mr Hewitt and confirmed that the deposit had been repaid.

27. Mr Hewitt goes on to confirm that some days later the applicant rang him to the effect that he could not end the contract like that and that the applicant was going to sue. Mr Hewitt says that he then said "you and I both agreed that we would refund your deposit and that would be it, but you do what you think you need to do".

28. Mr Hewitt recalled receiving a letter from the applicant complaining about the return of the deposit. He denied telling the applicant that the plans had been submitted to Council.

EVIDENCE OF DEANNE BORELLINI

29. Ms Borellini recalled that on about 24 July 2008 she spoke to the applicant on the telephone and was provided with details of a bank account for money to be paid into for blinds. Ms Borellini did not remember anything about advertising fees.

30. Ms Borellini goes on to say that at about the same time the applicant advised her that she wanted her deposit back in respect of the Lenesha Drive property. She says that she advised the applicant that she would need to speak to Mr Hewitt before doing so.

31. She then telephoned Mr Hewitt and told him of her conversation with the applicant. Mr Hewitt said that he wanted to check with the company's lawyers before authorising the refund and said that he would ring back, and a short time later he did ring back and authorised that refund.

32. Ms Borellini goes on to say that on or about 25 July 2008 she phoned the applicant to ask which of the two bank accounts she should deposit the money into and was told which one.

33. Both versions of the applicant and Mr Hewitt about the circumstances of the refund of the deposit were put to her and she denied them both and still backed what she said.

34. It may be noted here that her evidence was quite at variance with Mr Hewitt's evidence, as Mr Hewitt says that the applicant spoke to him personally about the refund of the deposit and he rang Ms Borellini asking her to make the refund. When Ms Borellini's version was put to him, he denied that that had happened.

35. Ms Borellini also produced a computer printout of the Shinn Street job (exhibit 18) which showed it commencing on 5 August 2007 and continuing through to 27 June 2008. She pointed out that on 10 June 2008 there was an entry "Promina 60 Sheet Stramit, Delivery" and said that this meant that the Promina sheets had left the factory (either at Brisbane or at Townsville) and would take one to two weeks to arrive on site.

36. I note that Exhibit 18 also makes reference to Promina board on 9 August 2007 and 24 August 2007.

37. The applicant in her evidence produced a diary note dated 6 November 2007 showing that she visited the Shinn Street site with a potential buyer, Rod Ewin, on that day. She said that at this time she had authority to sell Shinn Street, but did not have that authority in June 2008. She further said that 6 November 2008 was the last time she had gone to the Shinn Street site although she had been to the site once or twice before 6 November to see Mr Hewitt about getting his signature for another property or properties. She thought that this would have been in October but it seems somewhat unlikely that she would have been able to see Mr Hewitt on a building site in Mackay subsequent to 15 October 2008 because from that time onwards he was "out west"

FINDINGS ON LIABILITY

38. Both the applicant and Mr Hewitt were very vague about dates. The applicant's written statement (Exhibit 4) signed on 12 June 2009 and was therefore made nearly a year after the events while Mr Hewitt's written statement (Exhibit 6) was signed on 26 June 2009. Their oral evidence was given close to two years after the relevant events. I would infer that their recollections of conversations are not necessarily 100% accurate.

39. Both the applicant and Mr Hewitt appeared to give evidence in a frank manner. I therefore look to the surrounding circumstances. I note that the applicant's undisputed actions once the deposit was transferred to her bank account on 28 July 2008 (which she did not know about for a few days) were consistent with her contentions. She rang Mr Hewitt (according to her on 1 August 2008 after trying to contact him earlier) and Mr Hewitt confirms that she made a call less than five days after repayment of the deposit, saying that she was going to sue, although the versions of that conversation are a little different.

40. The applicant also sent the letter of 4 August 2008 (Attachment "B" to Exhibit 4) which is consistent with her version and was written at a time when her memory was fresh; it indicates that she had sought legal advice.

41. On the other hand, Mr Hewitt's evidence does not hang together. The defence was insistent that the relevant conversation about the deposit took place in mid-June and this is said to be corroborated by Exhibit 18 with respect to Promina being delivered on 10 June 2008. Mr Hewitt says that immediately after that conversation at Shinn Street he asked Dee Borellini to refund the deposit and the repayment of the refund was confirmed by Ms Borellini as occurring that very day. In fact the refund undisputedly occurred on 28 July 2008 more than a month after the conversation Mr Hewitt alleges. Further, Mr Hewitt did not respond to the letters (Attachments "B" and "C" to Exhibit 4) as might have been expected if he did consider that there had been an agreement absolving the respondent of liability.

42. I do not accept Ms Borellini's evidence which is denied by both the applicant and Mr Hewitt. This evidence does somewhat taint the defence case.

43. The respondent's Counsel during the hearing expressed some derision at the applicant's version that the refund was repaid without any discussion. However, as mentioned, even on Mr Hewitt's evidence, the refund was made quite out of context of any discussions. I think it quite feasible that repaying the deposit was an attempt to fob off the applicant, realising that the respondent had no real prospect of getting the construction of Lenesha Drive started by reason of their other commitments, and hoping that the applicant would just go away. Mr Hewitt in my view was probably engaging in a self justification exercise after the event.

44. Therefore on the balance of probabilities, I accept the applicant's evidence. Accordingly, there was no agreement that the applicant relinquish her right to sue for damages for breach of contract. As to Mr Hewitt's version, I find it unlikely that either the applicant or Mr Hewitt were legally sophisticated enough to enter into an agreement whereby the applicant relinquished her right to sue for damages. I think that at no stage did the applicant have any intention of doing that. Put at its highest, I think that Mr Hewitt's position was that he interpreted the return of a deposit as being a termination of the contract and that in his view, once the contract was terminated that was the end of it.

45. Even if I accepted Mr Hewitt's evidence in total about the circumstances of the repayment of the deposit, in my view that would not be sufficient to enable me to find that there was an agreement by the applicant to relinquish her claims for damages. I note that in paragraph 16 of Mr Hewitt's written statement, he says that in his telephone conversation with the applicant (the one on or about 1 August 2008) that "you and I both agreed that we would refund your deposit and that would be it"; but I consider that at best this was simply referring to his personal interpretation of the arrangement between himself and the applicant – again, in my view, it would not be sufficient to constitute an agreement to relinquish the right to claim damages.

46. In my opinion, the terms of the contract would have to be such as to establish a clear intention to bring all obligations to an end, and just to say "we can all move on from here" or even to say "that will be it", in my view does not establish any clear intention at all. In my view it is more consistent with a proposition that the applicant was then free to get another builder to construct her house, and from the respondent's point of view, it was free of the obligation to build a house which they had no time or resources to do. Further, in my opinion simply returning the applicant's own money, which was the respondent's obligation to do anyway since it had done absolutely nothing, is not consideration for such an agreement as alleged by the respondent.

47. I therefore find that the respondent did breach the contract by failing to build the house, and that the applicant is entitled to damages.

ASSESSMENT OF DAMAGES

48. Damages for breach of contract should be assessed in a sum which, so far as money can do, will put the injured party in the same position as he or she would have been in if the contract had not been performed, e.g. Haines v Bendall (1991) 172 CLR 60 at page 63. It is not in dispute that the applicant, as soon

as there was no response to the services of the notices on the respondent, began to look for other builders to build a house on the subject land. She tried to get quotes from other builders for the original plan, but was told (correctly) that that plan was copyright.

49. Accordingly, as she could not get the exact house that the respondent was supposed to have built, she got a number of quotes from builders for similar houses, and the cheapest quote was obtained from Peter Thorne Builders ("Thorne") on 19 November 2008 for $297,945.00 including GST. The applicant duly contracted with Thorne to have that house built and it was completed on or about 13 August 2009.

50. As part of her damages claim, the applicant claims loss of rent during the period between which the house to be built by the respondent should have been completed, and the completion of the Thorne house. Further, the applicant claims the difference in price between the two contracts.

CLAIM FOR RENT

51. Both parties agree on a period of 57 weeks over which notional rent should be calculated and agree that the gross rent should be based on $500.00 per week. Accordingly, both parties calculate a sum of $28,500.00.

52. From this sum, both parties agree that landlord's insurance of $594.72 should be deducted; and they further agree that the sum of $2,806.00, being the interest saved by the delay, ought to be deducted. This leaves a claim of $25,098.83 which the applicant maintains is the appropriate measure of damages for loss of rent.

53. The respondent also says that interest of $18,812.36 would have been paid by the applicant over the relevant period, and that should be deducted as well leaving a loss to the applicant of $6,286.47.

54. This appears to me to be a correct application of the principle of compensation of putting the applicant in the same position as she would have been in if the contract had been performed. However, the applicant's submission is that such an approach fails to recognise that the delay in payment of interest is not a

saving and that the applicant is ultimately not better off as it just delays the applicant's ability to pay off the interest earlier.

55. As I understand the submission, it means that for a number of years into the future (it is unknown when) the applicant would have her profits from the rental home reduced by interest payments, but once the interest payments were completed, she would obtain the full benefit of the amount of the rent at least insofar as no interest would be deducted. With respect to the Thorne house, that position when greater profits could start to be made, would be reached one year later than it ought to have been. Thus 10, 15 or 20 years down the track (whatever it may be) the applicant will have one less year in which to earn profit from the rental home without any deduction of interest. If the profit from the rental payments after the deduction of landlord's insurance was then (in round figures) $27,905.00, the applicant will lose $27,905.00 in 10, 15 or 20 years time or whatever the case may be.

56. Of course it is not known how long the applicant might have to pay interest on the loan; whether at the present time she is, or in the future she may start, paying off the principal and therefore reduce the interest and so on. Thus it is a situation where I have to assess damages using a "broad axe", e.g. Cattanach v Melchior 215 CLR 1 at paragraph 101.

57. I assess the applicant's loss in this regard to be $10,000.00 being very roughly the present value of a loss of $18,812.00 in 10 to 15 years time. Accordingly, I would deduct the amount of $8,812.00 (in round figures) from $25,098.00 (in round figures) which leaves a loss of $16,286.00 for which the respondent should compensate the applicant.

DIFFERENCE IN CONTRACT PRICE FOR THE CONSTRUCTION OF THE HOUSE

58. Certified valuer, Darren Palmer, was asked to look at the respective plans of the house that the respondent was going to build, and the house Thorne did build, and provide variances in prices. In his report dated 3 August 2009 he identified a number of factors which he said made the Thorne home superior to the respondent's home.

59. In paragraph 7.2 of the Report (Exhibit 7), Mr Palmer said that "after analysing the separate building contracts, the following variances were established. The

Thorne built residence is consideration superior over the Cavalier residence for the following reasons:

a. Living are being 13 square metres larger;
b. Garage being 4.5 square metres larger;
c. Ceiling heights are 2.7 metres (Cavalier 2.4 metres);
d. External walls solid core filled;
e. 30 square metres of additional concrete driveway;
f. Additional paving;
g. An upgrading to tiling and increased areas inclusive of tiles throughout the garage area;
h. Additional air-conditioning;
i. Dishwasher installed;
j. Additional electrical work;
k. Turf to yards;
l. Security screen windows."

Mr Palmer went on to say in that report that he considered that those variances warranted a higher contract price in the vicinity of $40,000.00.

60. In his oral evidence, Mr Palmer priced the additional air-conditioning as $3,500.00; the dishwasher $800.00; and the value of "upgraded" security screening as $1,200.00. He priced the living areas of the respondent built house at $1,220.00 per square metre, while the living area of the Thorne built house was $1,202.00 per square metre. The cost of garages and outdoor areas were the same at $1,000.00 per square metre and $450.00 per square metre respectively. Overall he identified $48,521.00 as the value of the superior features of the Thorne built house over the respondent built house.

61. A bundle of documents that Mr Palmer used in preparing his report was tendered in evidence. One of those documents indicated the ceiling variances added $14,000.00 to the price; that tiles to the garage cost an extra $2,000.00; lining to the garage an extra $1,500.00; extra paths an extra $1,500.00; the driveway $8,100.00; the turf was $1,500.00 and front door $500.00. All in all these variances added up to $37,900.00.

62. Mr Palmer conceded that none of the values were exact but were the median of a "band" of values derived from analysis of many homes that had been built and valued in the area.

63. The applicant did admit that she specifically asked Thorne to build higher ceilings at 2.7 metres high instead of 2.4 metres high. Further, the applicant admitted that she asked Thorne to do extra tiling in the garage although she said that because of a contact that she had she was able to get more tiles than were needed for the original house for the same price. Again, she conceded that turf was an extra for the Thorne house and that she did ask Thorne for additional paving around the house.

64. She disputed that in fact the driveway as constructed by Thorne was different in size to the one referred to in the respondent's specifications as she measured it as being 10.5 metres long and 5.6 metres wide, expanding to 6.2 metres wide. She said there was in fact no space for a larger driveway.

65. The applicant was not aware of any difference in the external walls with the Thorne house as compared to the respondent's house, that is she did not know anything about the Thorne house having solid core filled external walls. She understood that the security screen windows and the dishwasher were features that were supposed to be installed in the respondent's house.

66. With respect to additional electrical work, the applicant said that she had certain extra electrical work done independently of the Thorne contract, and paid for it herself. Otherwise it is not clear to me exactly what the difference was between the electrical work in the Thorne house and the electrical work proposed for the respondent's house.

67. The applicant understood that security screen windows, dishwasher and the air-conditioning was the same as or similar to what she was supposed to have got with the respondent's house.

68. The respondent submitted that the applicant had not suffered any loss whatsoever in having to pay extra for the Thorne house because she had chosen many of the additions herself, and apart from that, she had purchased a superior product and in effect had got proper value for her money.

69. The applicant's submissions framed the issue as being one of "betterment" and set out the following authorities establishing legal principles for "betterment":

a. "As Shelter JA explained in Hyder Consulting (Aust) Pty Ltd v. Wilh Wilhelmsen Agency Pty. Ltd.

> "In my opinion, if a defendant negligently damages or destroys the plaintiff's property and there is no evidence that the plaintiff had any reasonable choice other than to replace or repair what had been damaged or destroyed, the cost of replacement or repair, provided it is not extravagant, is recoverable as damages. In each case it is a question of fact."

b. To similar effect is the English decision in *The Maersk Colombo [2001] 2 Lloyd's Rep 275,* where the English Court of Appeal considered whether the measure of damages in relation to a damaged crane should be the cost of replacement or the diminution in its value. In considering this question, the Court rejected any distinction in approach between contract or tort, between damage to and or chattels or between cases of exact or approximate replacement.

c. The approach adopted was one which applied the compensation principle, subject to a requirement for reasonableness. Relevantly, the court accepted the following propositions.

> "(1) …
> (4) If the claimant intends to replace the chattel, and if the market or resale value as assessed is inadequate for that purpose, then the higher replacement value may, in the event, be the appropriate measure of damages.
> (5) When and if replacement value is claimed, the claimant can only succeed to the extent that the claim is reasonable; that is, that it reflects reasonable mitigation of its loss.
> (6) The claim will ordinarily be reasonable if it is reasonable to replace the chattel and the cost of replacement is reasonable."

d. In repairing or replacing a chattel, there are often practical difficulties in obtaining an exact replacement for the chattel which was damaged or destroyed. The question which then arises is whether some deduction from the replacement cost is to be allowed for any "betterment" to the plaintiff.

e. There is no general rule requiring such a deduction to be made: see Consort Express Lines Ltd v J-Mac Pty Ltd (2006) 232 A.L.R. 341 at [14]:

"[14] The principle identified by these authorities establishes that a tortfeasor must bear the cost of replacement or repair of the plaintiff's property where that has been damaged or destroyed by the tortfeasor's negligence. And the quantum of that cost is not diminished by any betterment of the plaintiff's property as a result of the repairs which the plaintiff achieves provide that the plaintiff does not act extravagantly: Port Kembla Coal Terminal Ltd v Braverus Maritime Inc (2004) 140 FCR 445 at 542 [485]-[486] per Hely J."

f. As Hely J explained in Port Kembla Coal Terminal Ltd v Braverus Maritime Inc (2004) 140 FCR 445 at [486]-[487]:

"486 Subject to questions of extravagance, there is no rule that requires a plaintiff to account for any advantage or betterment which the plaintiff has obtained by repairing an old article with new materials or by acquiring a new article for old in the case of a replacement after total loss, although any savings or profits which the plaintiff makes by use of the new article must be brought to account. In particular, no allowance for betterment is made merely because the property which is repaired or replaced might last longer than the property which was damaged or destroyed by the defendant's negligence: *Optus Networks Pty Ltd v Leighton Contractors Pty Ltd* [2002] NSWSC 450 at [1387]- [1388].

487 The rationale for this approach was explained by Dr Lushington in *The Gazelle* (1884) 2 Wm Robb 279; 166 ER 759 (at Wm Robb 281; ER 760):

> *"If [the injured] party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.'*

g. Or, as Widgery LJ put it in Harbutt's Plasticine v Wayne Tank and Pump Co Limited [1970] 1 QB 447 at 473:

> "Nor do I accept that the plaintiffs must give credit under the heading of "betterment" for the fact that their new factory is modern in design and materials. To do so would be the equivalent of forcing the plaintiffs to invest their money in the modernizing of their plant which might be highly inconvenient for them."

h. In Pegler v Want (UK) Ltd [2000] All E.R. 260 (a case referred to with approval by Clarke LJ in the "Maersk Colombo") it was said:

> "The mere fact that party purchasing a substitute product acquires something with a longer life span, or which is more modern, or has additional features than the original would have had does not require an allowance for betterment, still less recovery limited to the financing cost of acquiring the replacement early: Harbutts' Plasticine v Wayne Tank; Bacon v Cooper Metals [1982] 1 All ER 397; Dominion Mosaciacs v Trafalgar Trucking [1990] 2 All ER 246. In particular, where there is no ready second hand market for goods, or where there might be uncertainty as to the reliability of such goods, no credit need be given for the fact that a new and up-to-date replacement has been purchased: Moore v DER Ltd [1971] 1 WLR 1476."

i. There is no difference of approach between contract and tort.

j. There are, of course, some circumstances in which it is appropriate for a deduction for betterment to be made. The primary category of case is one of "extravagance", meaning a situation where the plaintiff unreasonably chooses a course which results in betterment.

k. As Shelter JA explained in Hyder Consulting (Aust) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd [2001] N.S.W.C.A. 313:

> "[30] Several considerations are material. The most significant is whether there is evidence that the plaintiff had a reasonable choice between adopting a less expensive course of repair or reconstruction which would mitigate its damage and the course it chose which would not. A plaintiff may decide for good business reasons to use the occasion not merely to repair or rebuild

> but to improve its facilities. To adapt the words of Dr Lushington the question is whether on the evidence a greater benefit than mere indemnification could be avoided without exposing the plaintiff to some loss or burden.
>
> In my opinion, if a defendant negligently damages or destroys the plaintiff's property and there is no evidence that the plaintiff had any reasonable choice other than to replace or repair what had been damaged or destroyed, the cost of replacement or repair, provided it is not extravagant, is recoverable as damages. In each case it is a question of fact."

l. The evidential burden of establishing betterment is on the Respondent.

m. In Roberts v Rodier [2006] N.S.W.S.C. 282 Campbell J observed at [143]:

> "Once the plaintiff has discharged the onus of proving an amount which will remedy his or her damage, the onus of adducing evidence is on the defendant to prove both the presence of any betterment, and also its quantum: ***J & B Caldwell Ltd v Logan House Retirement Home Ltd*** [1999] 2 NZLR 99 at 110; ***Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd*** (1991) 33 FCR 1 at 29; ***Optus Networks Pty Ltd v Leighton Contractors Pty Ltd & Ors*** [2002] NSWSC 327 at [1402]-[1407]."

n. Similar observations were recently made by Bongiorno J in Paper Australia Pty Ltd v Ansell Ltd [2007] V.S.C. 484 (a case in which the cost of replacement of damages machinery with a modern equivalent having greater capacity was allowed without deduction for betterment).

o. The difficulties faced by a defendant in satisfying the evidential burden was considered by the Full Court in Davidson v JS Gilbert Fabrications Pty Ltd, when considering the question of measure of damage the court said:

> "Whilst the respondent must show that he acted reasonably not only in his own interests but also in the interests of the appellant – Jansen v Dewhurst

> (supra) 426 – however, the court will not scruitinise his conduct with an eye focused for criticism for he is the victim of the appellant's negligent conduct and placed in the difficult position of making a choice. Where he has been "placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighted in nice scales at the instance of the party whose (conduct) has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied that the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken. Banco de Portugal v Waterlow [1932] A.C. 452, 456 cited in Moore v D.E.R. Ltd [1971] 1 W.L.R. 1476; (1971) 3 All E.R. 517 C.A."

70. I accept those submissions as to the legal principles involved in "betterment". I would also have thought that the legal principles relating to mitigation of damages would be equally apposite, but I do not see any appreciable difference between the legal principles relating to either concept – a person acting to mitigate their loss only need act reasonably.

71. I find that the applicant did act reasonably in contracting to get a home as similar as she could to the original home to be built by the respondent. It was not possible by reason of copyright considerations to get exactly the same home with exactly the same floor area, sizes of rooms, air-conditioning, size of garage etc. Therefore I find that the fact that the living and garage areas of the Thorne house are marginally bigger, does not mean that the applicant acted unreasonably. Further, I find it reasonable that the applicant did not pore over the plans for the respondent's house and the plans for the Thorne house and compare them, and compare specifications (the applicant did not even have the respondent's specifications), and then have plans and specifications redrawn, presumably at greater expense. Therefore I do not find that it was unreasonable of her to have solid core filled external walls in the Thorne house; nor do I find it unreasonable if in fact there was additional electrical work in the plans and/or specifications of the Thorne house; nor do I find it unreasonable if in fact the screen windows specified for the Thorne house were of better quality

than the proposed screen windows for the respondent's house; nor do I find it unreasonable to have better air-conditioning.

72. However I do find that the applicant chose to have certain extras added to the Thorne house which were not the result of simply having a different plan and specifications. Accordingly I do not find that the respondent should be responsible for the extra cost caused by the applicant requesting higher ceilings, additional paving, tiling in the garage, and turf to the yard.

73. I accept Mr Palmer's evidence as to the extra cost involved in those items:

a.	Ceiling variances	-	$14,000.00
b.	Garage tiling	-	$ 2,000.00
c.	Extra paths	-	$ 1,500.00
d.	Turf	-	$ 1,500.00
			$19,000.00

74. I accept that the driveway with respect to the Thorne house is not as large as described by Mr Palmer. I do not think it is reasonable to expect that the applicant should have picked up the fact that (if it be the fact) that the dimensions of the driveway in the Thorne plan were greater than was necessary or that she should have negotiated a lower price. Nor do I think it reasonable to suggest that she has a remedy against Thorne by way of suing him. It is doubtful whether she could succeed, but in any event, the cost of legal action would obviously outweigh any benefit to her.

75. Accordingly I find that the applicant is entitled to recover damages of $23,945.00 being the difference in the contract price of the Thorne house and the contract price of the respondent's house of $42,945.00 less $19,000.00 for the additions deliberately chosen by the applicant for the Thorne house.

NEGATIVE GEARING

76. It was submitted by the respondent that because the applicant's financial affairs were so arranged that she was able to obtain the benefits of "negative gearing" with respect to tax, that this must therefore show that in fact she was not making any profit from the rental of the house at Lenesha Drive. However, the fact is that evidence was adduced as to what the applicant's interest costs were and her other costs including insurance and it was established that the applicant was making a profit. Therefore the general observation by the applicant that she was negatively geared does not stand up in the face of the

actual evidence; in all probability she has other financial affairs (e.g. she has a business and least one other rental house) the totality of which results in a negative gearing benefit to her.

SALE OF NEBO ROAD

77. I have referred to the buying and selling of the Nebo Road property in paragraph 11 of these reasons. In the end result the applicant made a profit of $23,066.00 out of that Nebo Road property.

78. The respondent submits that the applicant should account for this profit by deducting it from her damages claim as the delay in the construction of the house enabled her to buy Nebo Road.

79. However the applicant's evidence was that although she used the draw-down facility on her residential home to buy the Nebo Road property, she was still intending to pay, and would have paid, the cost of the construction of the Lenesha Drive house (had it been commenced), but that she would have to have gone to some extra expense to do so, by arranging for her lender to prepare appropriate mortgage documents to secure the loan for the Lenesha Drive house.

80. The reason for asking for the 1 month delay in construction of the Lenesha Drive house (as referred to previously) was simply to save herself the cost of having mortgage documents prepared as she knew that settlement of the Nebo Road property was to occur in early January 2008 and she would then have the benefit of the off-set facility on her residential home to pay for the Lenesah Drive house.

81. I accept the applicant's evidence in this regard and I find that there is no causal connection between the respondent's failure to construct the Lenesha Drive house and the applicant's decision to buy and then sell the Nebo Road property. Therefore I do not deduct the profit that the applicant made from the Nebo Road transaction from her damages.

CONCLUSION

82. I therefore propose to order that the respondent pay to the applicant the sum of FORTY THOUSAND TWO HUNDRED and THIRTY ONE DOLLARS ($40,231.00) for breach of contract.

83. The applicant sought interest on the deposit monies in the amount of $971.48, relating to the applicant having lost the use of that money between 11 September 2007 and 28 July 2008. The respondent did not dispute the calculation of this amount of interest by the applicant.

84. The applicant also sought interest on the capital loss, for which calculations were provided based on the claimed capital loss of $42,945.00 from 13 August 2009 to 12 March 2010. The calculation results in a claim of $1,396.18. Since I have found that the capital loss claimable from the respondent is not $42,945.00, but $23,945.00, I calculate that the interest on a pro-rata basis is $778.00. I add another $100.00 to that to account for a period of approximately two weeks from 12 March 2010 up to the date of judgment.

85. By reason of this matter having commenced prior to the commencement of the Queensland Civil and Administrative Tribunal on 1 December, 2009, but the hearing not actually occurring until subsequent to the commencement of QCAT, the cost provisions of the Commercial and Consumer Tribunal Act 2003 still apply – see Owen v The Adams Group Pty. Ltd. [2010] QCAT 10. However, both the parties in this case agree that costs should follow the event, as I understand it, particularly because of the complexity of the matter, including complexity as to the calculation of damages.

There also seems to be agreement that if there was a situation where one party was partially successful, costs should be awarded on a pro-rata basis. In any event, if there was no such agreement in fact between the parties, it is my view that the respondent did have partial success in its defence and that it is fair and reasonable that costs be awarded on an approximate pro rata basis. In my view, an appropriate proportion would be allowing 60% of the applicant's costs of and incidental to this action to be assessed on the lowest District Court Scale