QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Waymore Constructions Pty Ltd v Wyatt & Anor* [2020] QCAT 251
PARTIES:	**WAYMORE CONSTRUCTIONS PTY LTD** (applicant) **V** **PAUL WYATT** **KATE WYATT** (respondents)
APPLICATION NO/S:	BDL095-15
MATTER TYPE:	Building matters
DELIVERED ON:	7 July 2020
HEARING DATES:	11 April 2016 12 April 2016 13 April 2016 25 July 2016 21 September 2016
HEARD AT:	Brisbane
DECISION OF:	Member Deane
ORDERS:	**1. Paul Wyatt and Kate Wyatt are to pay Waymore Constructions Pty Ltd the amount of $35,535.77 by 4:00pm on 5 August 2020.** **2. Any Application for costs including for reserved costs by a party is to be made by filing in the Tribunal two (2) copies and providing to the other party one (1) copy of any submissions and evidence in support of the Application for costs by 4:00pm on 5 August 2020.** **3. If any Application for costs is made:** **(a) the other party must file in the Tribunal two (2) copies and provide one (1) copy of any submissions and evidence in response to the party making the Application for costs by 4:00pm on 26 August 2020;** **(b) the party making the Application for costs must file in the Tribunal two (2) copies and**

provide one (1) copy of any submissions and evidence in reply to the other party by 4:00pm on 16 September 2020;

(c) the Application for costs will be determined on the papers on the basis of any documents filed unless a party requests an oral hearing not before 4:00 pm on 16 September 2020.

4. If no Application for costs is made in accordance with Order 2 then there shall be no order as to costs.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – REMEDIES FOR BREACH OF CONTRACT – DAMAGES – MEASURE OF – Domestic Building Dispute – whether non-compliant variations payable – whether contract validly suspended – whether contract validly terminated by homeowners prior to completion – whether contractor repudiated contract – whether works substantially complete – whether works defective and incomplete – reasonable costs of necessary rectification and completion work

Domestic Building Contracts Act 2000 (Qld), s 51, s 84, s 90, s 91, Schedule 2
Queensland Building and Construction Commission and Other Legislation Amendment Act 2014 (Qld), s 62

Bellgrove v Eldridge (1954) 90 CLR 613
Carr v J A Berriman Pty Ltd (1953) 89 CLR 348
Castle Constructions (Qld) Pty Ltd v Pourasad [2015] QCAT 17
Commonwealth v Verwayen (1990) 170 CLR 394
Gates v The City Mutual Life Assurance Society Limited (1986) 160 CLR 1
Greer v Mt Cotton Constructions Pty Ltd [2018] QCATA 196
Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26
Hudson Crushed Metals Pty Ltd v Henry [1985] 1 Qd R 202
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17
Ryan v Worthington [2015] QCA 201
Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co [1953] 2 All ER 1471
Tabcorp Holdings Limited v Bowen Investments Pty Ltd (2009) 236 CLR 272

APPEARANCES &
REPRESENTATION:

Applicant:	AC Freeman instructed by McInnes Wilson Lawyers
Respondent:	P Somers instructed by McBride Legal

REASONS FOR DECISION

[1] Waymore Constructions Pty Ltd ('the Builder') entered into a contract for the performance of substantial alteration and extension work[1] to the home of Mr and Mrs Wyatt (the Homeowners). The contract was entered into on 14 February 2014 ('the Contract'). The works were relevantly described as:

> Alterations and Extension to existing three story cottage …Plans BVN Donovan Hill dated 23-10-13, Project No 1304003. Structural Plan Westera Partner dated 2-10-13 Project No Hydrolic Plan H Design dated 10-10-13.(sic)[2]

[2] The Builder commenced work on site on 10 March 2014. There is no dispute that the building period of 189 days started on this date.[3] The work was to reach Practical Completion under the Contract on or before 15 September 2014 subject to any extensions of time under clause 16 of the Contract.[4] The Contract was not subject to finance.[5] The Builder was aware that the Homeowners were in fact using a financier to pay for at least some of the works and 'CBA' was noted as the proposed lending body.[6] The Contract price included a substantial number of Prime Cost and Provisional Sum items, totalling, on my calculation, $243,110 of the Contract Price.[7]

[3] It is uncontroversial that there were a number of variations to the scope of works and that the Builder did not document the variations as contemplated by the Contract or the *Domestic Building Contracts Act* 2000 (Qld) ('the Act') nor were any documented requests for extensions of time under clause 16 of the Contract made including in respect of varied work requested after the Date for Practical Completion.

[4] Although the Act has been repealed, it continues to apply to domestic building contracts entered into before 1 July 2015.[8]

[5] The Homeowners continued to live in the premises during the works and at least initially there were regular discussions between Mr Morgan, the Builder's director

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1 The contract price was $603,434.26 (incl GST) subject to changes in price in accordance with the Contract.

2 Exhibit 9, annexure 4, Schedule 1, item 4. The evidence is that a prior contract dated 23 September 2013 had been entered into by the parties and that both the architectural and structural plans had been updated as well as the price prior to the parties entering into the Contract.

3 Exhibit 9, annexure 4, clause 2.7.

4 Ibid, clause 3.1; Schedule 1, item 10.

5 Ibid, clause 7.1.

6 Ibid, Schedule 1, item 9.

7 Ibid, Schedule 4.

8 *Queensland Building and Construction Commission and Other Legislation Amendment Act* 2014 (Qld), s 62.

and nominee, and either or both of the Homeowners. Mrs Morgan was an employee of the Builder performing bookkeeping and administrative duties in respect of the Contract.

[6] On 30 March 2015, prior to completion of the Contract the Homeowners purported to terminate for the Builder's breach or repudiation. By that time 385 days had passed, a period of more than double the original building period under the Contract. Mr Wyatt gave evidence that despite the building period in the Contract their expectation, based on discussions with Mr Morgan, who 'guaranteed' the work would be finished by November, was that the works would be completed by Christmas 2014.

[7] The Builder contends that the Homeowners were not entitled to terminate. It accepts that there was some defective and incomplete work at the time of the purported termination, which would have been attended to prior to completion or within the contractual defects liability period and that the Homeowners wrongly denied it the opportunity to attend to that work.

[8] At the time of purported termination, the Homeowners had paid to the Builder all stage claims except the Practical Completion stage payment, $90,515.14. They had also paid amounts in respect of agreed variations.

[9] The Builder commenced proceedings seeking amounts owing under the Contract and damages for repudiation of the Contract, interest and costs.[9]

[10] The Builder's Amended Application and Response to counter-claim sought damages, amounts for the costs of the suspension and debt collection costs and further or alternatively amounts on the basis of quantum meruit.[10] The Builder in its final submissions now claims damages for breach of the Contract.

[11] The Homeowners claim the termination was valid. They retained a new builder, Mr Cuckson ('the new builder'), to complete the works including to rectify defective work.

[12] They sought a declaration that they properly terminated the Contract on 30 March 2015, claimed damages in the sum of $107,133.83 and delivery up of certificates.[11]

[13] Subsequent to the oral hearing the parties filed written submissions the last of which was filed in the Tribunal on 28 February 2017.[12]

[14] The Builder claims damages and other amounts owing after adjustments in the Homeowners' favour in the sum of $92,043.27.[13] Alternatively, the Builder claims $72,866.83 in the event that the Homeowners are found to be entitled to a set off or damages in respect of rectification of defective work and in respect of incomplete Practical Completion works.[14]

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9 Filed 19 May 2015.
10 Filed 12 October 2015.
11 Response and /or counter-application filed 26 June 2015.
12 Builder's submissions filed 19 October 2016 and 28 February 2017; Homeowners' submissions filed 18 January 2017.
13 Submissions filed 19 October 2016, [214].
14 Ibid, Attachment 1.

[15] The Homeowners dispute the Builder's claim and counterclaim for loss and damage in the sum of $64,353.29.[15] The Homeowners contend that they engaged the new builder to complete the works identified in the Mitchell Brandtman ('MB') report[16] for $90,515, being the amount of the final progress stage claim under the Contract and thereby mitigated their loss. The Homeowners' evidence is that two other builders declined to quote.

[16] The delay in finalising the determination of the proceeding once final submissions had been received is extremely regrettable and relates to resourcing issues.

Builder's claim - $92,043.27 or $72,866.83

[17] I find the Homeowners are to pay the Builder $35,535.77.

[18] The Builder contends that it is entitled to the final progress claim under the Contract as it was wrongly prevented from achieving practical completion. Its claim is calculated as follows:

(a)	Contract price	$603,434.26 (incl GST)
(b)	Variations	$ 82,455.42
Sub-total		$685,889.68
(c)	Less payments	$595,375.54
(d)	Less adjustment credits	$ 25,631.73
Sub-total		$ 64,883.41
(e)	Plus outstanding variations	$ 9,881.06
(f)	Plus costs of suspension	$ 17,278.80
Total		$ 92,043.27

[19] Mr Wyatt's evidence originally was that $606,378.54 was paid to the Builder.[17] Mr Wyatt's evidence was that the Homeowners had paid $512,919.12 to the fixing stage and $93,459.42 for variations.[18] Subsequently his evidence was that $596,527.31(incl GST) was paid to the Builder.[19]

[20] The Builder and the Homeowners agree that $512,919.12 (incl GST) has been paid in respect of the stage claims.

How much was paid by the Homeowners for variations?

[21] I find the Homeowners paid $82,455.57 (incl GST) in respect of variations including increases to PC and PS items.

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15 Submissions filed 18 January 2017, [4].
16 Exhibit 35.
17 Exhibit 1, [6].
18 Exhibit 9, annexure 13, p 84.
19 Exhibit 37, [4].

[22] The Builder and the Homeowners agree that the following variations, including increases to PC and PS item allowances have been paid, which on my calculation totals $82,455.57:[20]

(a) $648.62 - invoice 270 dated 24 February 2014 – insurance increase;

(b) $16,262.40 – invoice 276 dated 28 March 2014 – block wall;

(c) $1,234.20 – invoice 280 dated 7 April 2014 - increase height of block wall;

(d) $393.03 – invoice 283 dated 22 May 2014 - sleepers;

(e) $75.10 - invoice 285 dated 16 June 2014 – letterbox;

(f) $980.10 – invoice 286 dated 19 August 2014 – structural framing;

(g) $484.00 – invoice 287 dated 19 August 2014 – cladding front entry;

(h) $37,682.02 – invoice 292 dated 17 November 2014:

(i) Plastering – PS item - $9,900 (excl GST);

(ii) Joinery – PC item - $12,477.60 (excl GST);

(iii) Electrical wiring – PS item - $1,863.07 (excl GST);

(iv) Skylights - $1,954.15 (incl GST);

(v) Replacement gutter - $528.00 (incl GST);

(vi) Replacement chamfer boards - $6,270.00 (incl GST);

(vii) Supply & labour rosewood seat & handrail - $1,958.00 (incl GST);

(viii) Tiles – PC item - $144.21 (excl GST);

(ix) Pantry door - $181.50 (incl GST);

(i) $10,890 – invoice 295 dated 17 November 2014 - painting – PS item;

(j) $338.80 – invoice 299 dated 22 December 2014 – Bika changes – PC item;

(k) $3,388.00 – invoice 300 dated 22 December 2014:

(i) Pedestrian gate - $2,057 (incl GST);

(ii) Electrical for pedestrian gate - $726 (incl GST);

(iii) Replace gutter - $605 (incl GST).

(l) $2,904 – invoice 302 dated 22 December 2014 – extra tiles and tiler labour – PC and PS items;

(m) $1,149.50 – invoice 303 dated 13 January 2015 - infill void;

(n) $5,602.30 – invoice 305 dated 19 January 2015 – re-roof;

(o) $423.50 – invoice 306 dated 1 March 2015 – booth seat.

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[20] Exhibit 31, annexure A; Exhibit 37.

[23] In addition, the Homeowners paid the Builder a total of $1,152.62 in respect of default interest claimed in invoices 301 and 304 in January 2015. The Homeowners did not specifically claim reimbursement of this amount. In the absence of a specific claim for this amount I have not taken this amount into account in determining the amount payable as between the parties.

What credit adjustments are to be made?

[24] I find the Homeowners are entitled to a credit adjustment of $26,048.05 (incl GST).

[25] The Homeowners contend that they are entitled to an adjustment of $30,211.32, being the total of adjustment notes 296, 298, 309, 310 and 311. The Builder concedes an adjustment of $25,631.73.

[26] The Homeowners and the Builder agree that the following credit adjustments should be allowed:

(a) $8,349.82 (incl GST) - adjustment note 298 dated 2 December 2014 in respect of the following PC items:

(i) carpet in the sum of $3,200;

(ii) appliances in the sum of $2,000; and

(iii) lighting in the sum of $3,149.82;[21]

(b) $2,700 (incl GST) – adjustment note 309 dated 31 March 2015 in respect of pool fencing;[22]

(c) $1,513.64 (incl GST) – adjustment note 310 dated 31 March 2015 in respect of the PC item shower screens;[23]

(d) $2,719.59 (incl GST) – adjustment note 311 dated 31 March 2015 in respect of the PC item lighting.[24]

[27] The Builder contends that adjustment note 296 dated 2 December 2014 issued in the amount of $14,928.27 (incl GST) was issued in error to the extent that it purported to provide a credit in respect of doors and windows.[25] The Builder concedes the credit adjustment in respect of the PC item air-conditioning in the sum of $2,500 and the PS item external cladding in the sum of $8,265, totalling on my calculation $10,765.[26]

[28] Mr Morgan's evidence is that the amount in respect of doors and windows was included erroneously on the assumption it was a PC or PS item.[27] I accept that doors and windows are not identified as PC or PS items under the Contract and that the

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21 Exhibit 26, annexure 6, p 62, p 63.
22 Exhibit 26, annexure 6, p 66.
23 Exhibit 26, annexure 6, p 67.
24 Exhibit 26, annexure 6, p 68.
25 Exhibit 26, annexure 6, p 65.
26 Submissions dated 19 October 2016, attachment 2 states it totals $10,348.68.
27 Exhibit 26, [10].

credit was therefore erroneously applied. The credit in respect of this item was in the sum of $4,163.27 (incl GST).[28]

Are amounts payable to the Builder in respect of unpaid variations?

[29] I am not satisfied that the Builder has established an entitlement to any amount for unpaid variations claimed.

[30] The Builder claims for invoice 314 in the amount of $1,006.47(incl GST and margin) for water tank pumps and for invoice 316 in the amount of $8,874.59 (incl GST) for electrical work. The invoices were issued after the purported termination and unsurprisingly are unpaid.

[31] The Builder contends that the variations were signed and approved by the Homeowners prior to the purported termination and relate to work performed. The evidence is, and the Builder concedes, however, that these variations did not strictly comply with the Contract or the Act.

[32] A builder is not entitled to recover the amount for a non-compliant variation unless the requirements under s 84 of the Act have been met. No application to approve recovery under s 84 of the Act was before me.[29]

[33] Both invoices are for adjustments to PC or PS allowances rather than what might necessarily be considered 'true variations'. The water tank and pumps PC allowance was $3,500, the plumbing PS allowance was $15,000 and the electrical PS allowance was $11,000.[30] PC and PS adjustments are provided for in clause 20. Evidence of the cost of the PC or PS item must be given when claiming payment for that item.[31]

[34] Mrs Morgan gave evidence that the electrical allowance had been exceeded by $10,426.17 up to the date of the purported termination of which $2,049.37 had been invoiced and paid.[32] I accept that a variation document indicating that the estimate of additional electrical work would be $7,986 (incl GST and margin) had been issued and signed by the Homeowners on 18 January 2015[33] but that is not evidence of the actual underlying costs to the Builder contemplated by the Contract.

[35] Mrs Morgan also gave evidence that:

(a) the plumbing allowance had been exceeded and that a variation document indicating that the estimate of additional plumbing work would be $2,477.74 (incl GST and margin) had been issued and signed by the Homeowners on 18 January 2015;[34]

(b) the prime cost allowance for water tanks and pumps had been exceeded by $1,006.47;

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28 Submissions dated 19 October 2016, attachment 2 states it totals $4,579.59. The difference appears to relate to the addition of GST but the amount of $4,163.27 is already inclusive of GST.

29 *Greer v Mt Cotton Constructions Pty Ltd* [2018] QCATA 196.

30 Exhibit 9, annexure 4, schedule 4.

31 Exhibit 9, annexure 4, clause 20.9.

32 Exhibit 31, [9].

33 Exhibit 31, attachment B.

34 Exhibit 31, [46], annexure F.

(c) the water tanks had been installed prior to the purported termination and that the pumps had at that time not been installed but were held in storage by the Builder.[35]

[36] This is not evidence of the underlying costs to the Builder contemplated by the Contract.

[37] Copies of Reece invoices for tanks and pumps are in evidence before me, which evidence the following costs:

(a) Graf platin tank - $1,768.00 (excl GST);

(b) Two Vortex pump - $792.46 (excl GST);

(c) Rainwater tank poly slimline - $1,097.53 (excl GST);

(d) Vada pressure pump - $613.80 (excl GST).[36]

[38] On my calculation these costs exceed the water tank and pumps PC allowance but not by the amount claimed by the Builder.

[39] Copies of at least some of the Builder's electrical contractor's invoices are in evidence before me but I have not been able to reconcile the amounts contended for by the Builder. The Builder has not established its entitlement on the balance of probabilities.

Is the Builder entitled to the costs of suspension?

[40] I find the Builder is not entitled to the costs of the suspension.

[41] The Builder claims $17,280 in respect of the period of 21 workdays for the period 20 December 2014 to 20 January 2015 when work recommenced.

[42] Where the works are validly suspended under clause 18 of the Contract the contractor is entitled to demand its 'costs of suspending and recommencing the works including the contractor's margin applied to those costs'.[37] Mr Morgan gave evidence that the claim was calculated at a wage cost for Mr Morgan of $50/hour for 8 hours per day for the 21 days and at a rate of $35/hour for the Builder's employee for 8 hours per day for the 21 days plus 10% margin plus GST.[38]

[43] The Builder delivered to the Homeowners a Notice to remedy breach and suspension of works notice dated 19 December 2014. The evidence is that Mrs Morgan hand delivered the notice to the Homeowners on the evening of Tuesday 23 December 2014 purporting to suspend the works from Friday 19 December 2014.

[44] The Builder was not entitled to suspend the Contract for the reasons set out later in these reasons. Accordingly, it is not entitled to claim costs associated with suspension pursuant to clause 18.3 of the Contract.

Is the Builder or are the Homeowners entitled to damages?

[45] I find the Builder is entitled to damages.

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35 Exhibit 31, [75], [76].
36 Exhibit 26, annexure 3, p 35, p 36, p 37.
37 Exhibit 9, annexure 4, clause 18.3.
38 Exhibit 5. On my calculation this adds to $17,278.80.

[46] Whether the Builder is entitled to damages or whether the Homeowners are entitled to damages depends largely upon whether the Homeowners validly terminated the Contract.

[47] The Builder contends, and I accept, for the reasons set out later in these reasons, that the Homeowners wrongfully terminated the Contract preventing it from completing the Contract and attending to the defects prior to handover or during the defects liability period. It contends, and I accept, for the reasons set out later in these reasons, the works were substantially complete and so it should receive the Contract price adjusted as considered appropriate.

[48] The Homeowners contend that the Builder is only entitled to damages in the amount of $25,280.06.[39] They contend the Builder would be entitled to the value of the practical completion stage work performed to the date of termination plus its profit margin on incomplete works, about which there is no evidence, less the costs the Builder would have incurred in rectifying the defective works. The Homeowners submit that the best evidence as to the costs to complete is the Supplementary Joint Expert Report, which sets out that the costs to complete are $42,522.11.[40]

[49] Where works are defective or incomplete, in breach of the Contract, this requires an assessment of the cost of work, which is both reasonable and necessary to ensure the Homeowners receive the benefit of the Contract entered into by the parties.[41] There is evidence before me as to whether various items of work were defective or incomplete and the reasonable costs of attending to those items.

[50] The established measure of damages for breach of contract is to award an amount so that the 'innocent' person is placed in the same position, in so far as money can, as the person would have been in had the Contract been performed.[42] It requires an accounting of the Contract price, agreed variations, adjustments for Provisional Sum and Prime Cost items and amounts paid.

[51] The Homeowners contend, and I agree, that as the Builder would have incurred costs in completing the incomplete work and attending to rectifying the defective work that this should be taken into account in determining any damages payable. It is necessary to consider evidence as to the reasonable costs to complete and to rectify. I accept that the costs to the Builder are not likely to be as much as the cost payable by a homeowner to another builder to perform the same work because amongst other things the Builder would not be on-charging a profit margin and if a sub-contractor's work was defective the sub-contractor may have attended to this work at no or little cost to the Builder. There is no evidence before me in respect of the latter. Although the parties were legally represented the evidence as to quantum was not as clear as it might have been.

[52] I set out below my findings in respect of the extent of defective and incomplete works.

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39 Practical completion stage claim of $90,515.14 less costs to complete of $42,522.11 less costs to rectify of $22,712.97.

40 Exhibit 34.

41 *Bellgrove v Eldridge* (1954) 90 CLR 613; *Tabcorp Holdings Limited v Bowen Investments Pty Ltd* (2009) 236 CLR 272.

42 *Gates v The City Mutual Life Assurance Society Limited* (1986) 160 CLR 1.

Homeowners' claim - $64,353.29

[53] I find the Homeowners are not entitled to claim damages.

[54] The Homeowners claim the following:

(a) Costs to rectify defects in the sum of $22,712.97;[43]

(b) Credit adjustment notes 298, 296, 309, 310 and 311 in the sum of $30,211.32;

(c) Cost of the MB report[44] in the sum of $10,780;[45]

(d) Locksmith cost to change locks in the sum of $649.[46]

[55] The Homeowners' claim fails to accord any value to the Builder's work since the fixing stage claim, which they paid on 18 November 2014 other than for variations paid since and is not framed in accordance with the established principles set out earlier in these reasons.

Were the Homeowners entitled to terminate the Contract?

[56] I find that the Homeowners were not entitled to terminate the Contract.

[57] The Homeowners contended that they were entitled to terminate the Contract under the Contract, under the Act[47] or at common law for repudiation. In the final submissions[48] there is no express reliance upon a valid termination under the Act. It is submitted that the Builder either repudiated the Contract or breached it entitling the Homeowners to terminate the Contract.[49]

[58] The Contract provides that a party may give a notice to remedy breach but does not exclude common law rights to terminate for breach, including for repudiation.[50] It is uncontroversial that the Homeowners did not deliver a Notice to remedy breach under the Contract or otherwise put the Builder on notice prior to changing locks on 26 March 2015 and sending a lawyer's letter purporting to terminate on 30 March 2015.

Were the Homeowners entitled to terminate under the Contract?

[59] I find that the Homeowners were not entitled to terminate under the Contract.

[60] The Homeowners contend that they were entitled to terminate the Contract as the breaches set out below constituted:

(a) breaches of fundamental terms. A fundamental term is one that 'underlies a contract such that, if it is not complied with, the performance becomes something totally different from that which the contract contemplated';[51] or

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43 Exhibit 7, [7].
44 Exhibit 35.
45 Response and/or counter-application, attachment 6.
46 Exhibit 9, annexure 37.
47 *Domestic Building Contracts Act* 2000 (Qld), s 90(1)(b) ('the Act').
48 Filed 18 January 2017.
49 Ibid, [157].
50 Exhibit 9, annexure 4, clause 27.9.
51 Submission filed 18 January 2017, [134] citing *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ER 1471.

(b) a fundamental breach of the contract, being 'a breach which deprives an innocent party of substantially the whole benefit of a contract';[52] or

(c) substantial breaches of essential terms.

[61] Where a right to terminate for breach of the Contract arises an election is required to be made within a reasonable time to either terminate or to affirm the Contract. An election to affirm may be inferred from conduct, which is only consistent with the continued performance of the Contract.[53] If the Contract is affirmed then the right to terminate for that breach will be lost unless the breach can be regarded as a continuing breach.

[62] I address each alleged breach.

Failing to complete the works within the building period under the Contract

[63] I find that the Builder did not complete the works by the end of the building period as required by clause 3.1 of the Contract. I also find that the Homeowners waived the non-compliance by not raising delay and continuing to vary the scope of the works after the expiry of the original building period.

[64] Under the Contract the building period was 189 days. It is conceded that given works commenced on 10 March 2014 that the Contract provided for the works to reach practical completion on or before 14 September 2014 subject to any extensions of time.

[65] The Builder is entitled to a reasonable extension of time to the building period if the carrying out of the works is delayed by a claimable delay.[54] The builder is to give the owner written notice of the extension of time detailing both the cause of the delay and the extension of time within 20 working days of when the builder became aware of both the cause and the extent of the delay and the notice is to be accompanied by supporting documents.[55] A variation to the scope of works may be a claimable delay if it could not have reasonably been foreseen by the Builder at the time of entering into the Contract.[56]

[66] It is conceded that the Builder did not claim any extensions of time and the works did not reach practical completion on or before 14 September 2014 or on or before 30 March 2015 when the Homeowners purported to terminate contrary to the requirement to bring the works to practical completion within the building period.

[67] The evidence is that:

(a) after the Contract was signed and before work commenced a variation to the scope of work was identified as required relating to the retaining wall. Mr Wyatt signed variation 1 on 7 March 2014.[57] The variation document did not indicate whether the variation would cause delay as required by the Contract.[58]

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52 Submission filed 18 January 2017, [134] citing *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

53 *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 348.

54 Exhibit 9, annexure 4, clause 16.1.

55 Exhibit 9, annexure 4, clause 16.3.

56 Exhibit 9, annexure 4, clause 16.2(a) and clause 16.2(b).

57 Exhibit 4, annexure 7.

(b) the Builder provided options for various aspects of the works, in particular, options relating to PC or PS items and the Homeowners communicated their decisions about these options. Much of this was done by email. The Builder did not indicate on other variation documents prepared and delivered to the Homeowners a reasonable estimate of the delay expected by each variation.

(c) changes were made to the scope of works at the Homeowners' request after the expiry of the building period.[59]

[68] Mr Wyatt was not an unsophisticated contracting party. He had previously worked in the construction industry as a commercial and residential builder for five years, including as a foreman. Although some time had passed, he accepted he had a pretty good idea of what was involved. Having given evidence that he did not expect delays, which seems unlikely given his experience in the industry, he then conceded that he expected some delay but not the extent experienced.

[69] Mr Wyatt conceded that as at 29 December 2014 the Homeowners' response to the Notice to remedy breach did not raise the issue of delayed completion.[60] His evidence was that they wanted the Builder to continue and were attempting to get finance to pay for the increased costs of construction. He also conceded that:

(a) as at 19 January 2015 the parties were working towards completion of the Contract;

(b) as at 5 February 2015 the Homeowners were willing to remove the benchtop from the Contract scope of work but were later advised by their finance broker that they should not agree to do that;

(c) at no point between September 2014 and 30 March 2015 did the Homeowners issue a notice to remedy breach in relation to the delay nor formally raise the issue of delay with the Builder;

(d) the delay was first raised at about the time the Builder locked up the site on or about 17 March 2015;

(e) plumbing and final tiling work could not be completed until the benchtops were installed but he did not concede carpentry works could not be completed.

[70] The Tribunal[61] has previously accepted that:

> The contract does not contemplate that late completion represents a substantial breach. It provides specifically for late completion damages in the event that the building period is exceeded in item 11 and clause 31. As a matter of construction, I am satisfied that damages are the remedy for late completion under the contract. However, if the delay was of inordinate length, a common law right to terminate may arguably arise.

[71] The Contract provided that no amount was payable as liquidated damages if the works did not reach practical completion by the end of the building period.[62] The evidence is that the Homeowners remained living in the house while the works were

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58 Exhibit 9, annexure 4, clause 19.1(a)(iv).
59 Including as shown in Exhibit 4, annexure 12, emails 30 September 2014 and 1 October 2014.
60 Exhibit 4, annexure 27, p 163 – p 164.
61 *Castle Constructions (Qld) Pty Ltd v Pourasad* [2015] QCAT 17, [85].
62 Exhibit 9, annexure 4, clause 31 and item 11.

performed. The parties' genuine pre-estimate was that the Homeowners would not suffer loss if completion of the works was delayed. The Homeowners did not seek to set aside the liquidated damages amount on the basis it was not a genuine pre-estimate of their loss.

[72] Clause 27 of the Contract entitled the Homeowners to give a notice to remedy breach if the Builder was in substantial breach.[63]

[73] The Homeowners contend that as the works were only nearing the enclosed stage as at 15 September 2014 the breach was not one which the Builder could have remedied within 10 working days had they issued such a notice.

[74] Clause 27.4 provides that if the party in substantial breach does not rectify or commence to substantially rectify the breach within 10 working days the Contract may be brought to an end by giving a separate notice.

[75] If the Homeowners had issued a Notice to remedy breach or otherwise raised the issue of delay this would have afforded the Builder the opportunity to commence to rectify its breach within 10 working days by for example accelerating the works, refusing to agree to undertake further varied work requested by the Homeowners[64] or by submitting relevant extensions of time claims.

[76] Mr Morgan's evidence is, and I accept, that the Homeowners did not seem to be concerned with the Contract completion date. This is consistent with Mr Wyatt's evidence, which is, essentially, despite the contractual completion date he expected the works to be complete two or three months later.

[77] I find that the Homeowners waived strict compliance with this term of the Contract and ought not be permitted to resile from the position they adopted without putting the Builder on notice.[65]

Submitting progress claims when stage claims not due

[78] I find that the Builder made progress claims when not due. I also find that the Homeowners waived the non-compliance at least in respect of the Enclosed and Fixing stage claims by making the payment.

[79] The Contract provided for payment of the contract price at specified stages as defined.[66] I set out the definitions of the most relevant stages.

[80] Enclosed stage relevantly 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) ….
>
> (iii) for a metal roof – scribing and final screwing off necessarily having been done; and

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63 Exhibit 9, annexure 4, clause 27.1
64 Exhibit 9, annexure 4, clause 19.2 (b).
65 *Commonwealth v Verwayen* (1990) 170 CLR 394.
66 Exhibit 9, annexure 4, Schedule 2.

(c) the structural flooring is laid; and

(d) the external doors are fixed (even if temporarily)….; and

(e) the external windows are fixed (even if temporarily).

[81] Fixing stage means 'the stage when all internal linings, architraves, cornices, 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.'[67]

[82] Practical completion means:

(a) where the works are for the erection, improvement or repair of a home to a stage suitable for occupation – the stage when works:

(i) have been completed in accordance with this contract and all relevant statutory requirements apart from minor defects or minor omissions; and

(ii) are reasonably suitable for habitation.

(b) in all other cases – when the works have been completed in accordance with this contract apart from minor defects or minor omissions.[68]

[83] Clause 4 of the Contract provided that:

> 4.1 The owner must pay the contract price adjusted by any additions or deductions made under this contract progressively at each stage;
>
> ….
>
> 4.3 The contractor must give the owner a written claim for a progress payment for the completion of each stage.
>
> 4.4 A progress claim is to state:
>
> (a) the amount claimed for the stage;
>
> (b) the amount of any addition or deduction for variations;
>
> (c) the amount of any addition or deduction due to a prime cost item or provisional sum item;
>
> ….
>
> 4.5 The owner must pay a progress claim to the contractor within 5 working days of receiving the progress claim.

[84] The Homeowners contend that the Builder had failed to complete work that formed part of the definition of the stage under the Contract[69] in respect of the Enclosed stage, the Fixing Stage and the Practical Completion stage at the time the stage claim was made.

[85] Mr Morgan's evidence was that Mr Wyatt requested the Base stage claim be put in early because the Homeowners were going away and that he was also asked for the

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67 Ibid.
68 Ibid.
69 Ibid, Schedule 2, Table 1.

Framing stage claim early. Mr Wyatt conceded that on one occasion he arranged for an early payment of a progress claim before he went overseas.

[86] Mr Wyatt's evidence is that the Homeowners paid the Enclosed stage claim on 11 September 2014 even though flashings on the roof were not installed and paid the Fixing stage claim on 18 November 2014 even though he claimed a significant amount of work required under that stage had not been completed.

[87] The evidence is that there was some communication between the parties, which resulted in Mr Wyatt advising Mr Morgan that he agreed to forward the Enclosed Stage payment to the financier for payment.[70]

[88] Mr Morgan conceded that some work, which forms part of the Fixing stage, but not all the work claimed by the Homeowners, had not been completed at the time the progress claim was made. In particular, Mr Morgan conceded that skirting board in a bedroom had not been affixed and some joinery items had not been fixed.

[89] The evidence is, and I accept, that all built in cabinets had not been fitted and fixed in position nor had all wet area tiling been completed nor had the bath in the main bathroom been fitted at the time the Fixing claim was made.[71] I find that the Fixing stage had not been achieved at that time.

[90] There is no evidence before me that the Homeowners informed the Builder that they disputed that the stages had been achieved. There was also no evidence that the Homeowners raised with the Builder that despite their acceptance of previous non-compliances that they required the Builder to strictly comply with the terms of the Contract.

[91] As referred to earlier, Mr Wyatt had been employed as a foreman in the residential construction industry and so was well placed to understand whether or not the stages had been achieved. I accept that the Homeowners pointed to the Builder's breach of clause 4.3 in correspondence with the Builder on 29 December 2014 relating to an early claim of the Fixing Stage but by that time they had paid the claim and no further stage claim was actually made prior to their purported termination.[72]

[92] The Practical Completion stage claim was issued after the Homeowners' purported termination, apparently in an attempt to resolve the dispute between the parties. The Homeowners clearly did not rely upon that conduct to support their prior purported exercise of their rights.

[93] The Homeowners point to the Builder's request to remove certain work, and in particular the concrete benchtop work, from its scope so that it could claim practical completion. The evidence is that given the delay associated with the Homeowners' preferred concrete benchtop supplier's installation of that work that the parties discussed removing that work from the Contract scope. Mr Wyatt conceded that initially the Homeowners agreed to this but were advised against doing so by the finance broker. In view of the deteriorating relationship and the delay associated with this work it is not, in my view, unreasonable for the Builder to explore removing this work from the scope.

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70 Exhibit 4, annexure 11, p 121.
71 Exhibit 9, annexure 14, p 87, p 91, p 93, p 94, p 95; Exhibit 16.
72 Exhibit 9, annexure 27, p 164.

[94] I am not satisfied that the giving of compliant progress claims was so fundamental to the Contract that the failure to do so gave rise to a right to terminate the Contract.

[95] In any event, the Homeowners waived strict compliance with this term of the Contract and ought not be permitted to resile from the position they adopted without putting the Builder on notice.

Non-compliant variations

[96] I find the Builder made variation claims when not due. I also find that the Homeowners waived the non-compliance by making payment.

[97] Clause 19 of the Contract provided:

(a) for certain matters to be set out in the variation document including the price, when the price becomes payable and if there will be a delay because of the variation a reasonable estimate of the delay.[73]

(b) that the Builder was to give the variation document signed by the Builder to the Homeowners before commencing the work unless the work is required to be carried out urgently and it is not reasonably practicable to do so.[74]

(c) that the price of a variation becomes payable immediately after that work is commenced unless otherwise agreed.[75]

[98] Mr Wyatt conceded that whilst formal variation documentation was not provided prior to the variation work being performed, the Homeowners were aware that varied work was being performed at their request and they paid the Builder's claims for variations up to the time of their purported termination. The evidence was that the Builder provided costing options to the Homeowners usually by email to seek their instructions.

[99] The Homeowners did ask the Builder on a number of occasions for variation documentation so that they could provide the information to the bank to support drawdown requests or requests for additional finance. I accept that there was some delay between the requests and its provision.

[100] I also accept that the Homeowners pointed to the Builder's breach of clause 19 in correspondence with the Builder on 29 December 2014[76] and 14 January 2015[77] when they were in dispute about the Builder's purported suspension of the works and claimed entitlement to interest on amounts claimed to be overdue but that did not indicate that despite their acceptance of previous non-compliances they required the Builder to strictly comply with the terms of the Contract.

[101] The Homeowners in their final submissions contend that the Builder's conduct in relation to variation documentation and in particular giving variation documents on 23 December 2014 at the same time as giving a Notice to remedy breach and

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73 Exhibit 9, annexure 4, clause 19.1.
74 Exhibit 9, annexure 4, clause 19.2(a), clause 19.3(a) and clause 19.6.
75 Exhibit 9, annexure 4, clause 19.8.
76 Exhibit 9, annexure 27, p 164.
77 Exhibit 9, annexure 31, p 173.

purporting to suspend the works breached the implied term of the Contract to co-operate.[78]

[102] The Appeal Tribunal has accepted that parties may waive non-compliance with contractual variation provisions by paying for non-compliant variations.[79]

[103] I am not satisfied that the giving of compliant variation documents was so fundamental to the Contract that the failure to do so gave rise to a right to terminate the Contract.

[104] In any event, the Homeowners waived strict compliance with clause 19 of the Contract and any related implied term of the Contract to co-operate by paying for variations and ought not be permitted to resile from the position they adopted without putting the Builder on notice.

Failing to provide evidence of prime cost and provisional sum items when claiming payment

[105] I find the Builder made claims for PC/PS items without providing evidence of costs. I am not satisfied that such a breach was a substantial breach of the Contract giving rise to a right to terminate.[80]

[106] The evidence is that the Builder did not provide evidence of the costs of the PC/PS items claimed in invoices 292 and 295 until 23 December 2014 despite the invoices being issued 17 November 2014.

[107] Invoice 292 was for $37,682.02 (incl GST) and dated 17 November 2014.[81] The variation document for the work claimed in invoice 292 related to a mixture of variations to the scope of work and increases to PS or PC item allowances.[82] It was signed by the Builder on 23 December 2014.

[108] Invoice 295 was for $10,890 (incl GST) and dated 17 November 2014.[83] The variation document for the work claimed in invoice 295 related to an increase to the painting PS item allowance.[84] It was also signed by the Builder on 23 December 2014.

[109] The Builder claimed these invoices were payable by 24 November 2014.

[110] As referred to earlier in these reasons, Mr Wyatt's evidence is that the variation documents were hand delivered to the Homeowners on 23 December 2014 together with documents evidencing the:

(a) increases to the plastering PS of $18,000 (excl GST); sub-contractor quote - $29,700 (incl GST);

(b) increases to the joinery PC of $40,000 (excl GST); sub-contractor quote - $56,447.60 (incl GST);

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78 [99].
79 *Greer v Mt Cotton Constructions Pty Ltd* [2018] QCATA 196.
80 Exhibit 9, annexure 4, clause 27.1.
81 Exhibit 9, annexure 25, p 132.
82 Exhibit 9, annexure 25, p 131.
83 Exhibit 9, annexure 25, p 147.
84 Exhibit 9, annexure 25, p 146.

(c) increases to the painting PS of $23,000 (excl GST); sub-contractor quote - $35,200 (incl GST);

(d) electrical costs; invoices from the electrical contractor - electrical work had a PS allowance of $11,000;

(e) skylight supplier costs – invoice $2,656.50 (incl GST);

(f) rosewood materials supplier costs - invoice $838.00 (incl GST);

(g) increase to the tiles PC of $1,800 (excl GST); supplier quote - $2,124.21 (incl GST).

[111] The Contract contemplated the provision of evidence of increased supplier costs for PC and PS items to the Homeowners but did not contemplate that such underlying evidence was required to be provided for other work. The costing evidence was provided to assist the Homeowners with their financing.

[112] The Homeowners contend that the PC/PS items were not payable until five working days after 23 December 2014. I accept that the Builder had no entitlement to be paid those amounts before that time.

[113] To the extent the invoices sought to make contractual PS and PC adjustments, those adjustments are provided for in clause 20. Evidence of the cost of the PC or PS item must be given when claiming payment for that item.[85] Accordingly, to the extent the invoices sought payment of PC or PS adjustments those amounts were not payable until after the evidence of the cost was provided.

[114] The Contract provided that the provision of the evidence of costs was a pre-condition to the amount being payable. I am not satisfied that the obligation was so central to the performance of the Contract that it could be regarded as a fundamental or essential term the breach of which gave rise to an entitlement to terminate.

Notice to remedy breach - suspension

[115] I find the Notice to remedy breach was not validly issued and the consequential suspension was not valid. I find that the Homeowners waived any entitlement to rely upon such conduct or the consequential delay to terminate including by not, within a reasonable time, purporting to rely upon this substantial breach to bring the Contract to an end.

[116] The Builder delivered a Notice to remedy breach dated 19 December 2014.[86] It claimed that it had not received payment for variation invoices, said to be due 24 November 2014 in accordance with clause 4 of the Contract.

[117] The Homeowners contend that clause 4 relates to obligations to pay progress claims and that the invoices did not strictly speaking relate to a progress claim as provided for in Schedule 2 of the Contract. Relying upon such a contention is inappropriate in the circumstances.[87] The evidence is that the Builder issued the Fixing stage

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85 Exhibit 9, annexure 4, clause 20.9.

86 Exhibit 4, annexure 13.

87 The Homeowners do not specifically rely upon this point in their final submissions but much was made of it during the oral hearing.

claim invoice 292 dated 11 November 2014.[88] Mr Wyatt requested the invoice for the Fixing stage claim to be separated into the stage claim and a separate claim for variations.[89] The Builder complied with the request and issued invoice 294 dated 17 November 2014[90] and invoices for 'variation work'.

[118] It was conceded that the variations were not issued in strict compliance with the Contract or the Act. In those circumstances, the invoices seeking payment of non-compliant variations were not payable under the Contract at the time.[91]

[119] As also set out earlier in these reasons, to the extent the invoices sought to make contractual PS and PC adjustments, those amounts were not payable before the evidence of the cost was provided.

[120] The Builder purported to suspend the Contract for the Homeowners' claimed breach of the Contract being non-payment of those invoices. The Builder had no entitlement to suspend on that basis because the amounts were not overdue.

[121] The Builder contends that the Homeowners were in breach of the Contract in other respects, which entitled the Builder to issue a Notice to remedy and to suspend. Even if that is correct that is not the basis upon which the notice was issued. The Homeowners were not in a position to remedy breaches, which were not identified in the notice.

[122] The Homeowners contend that the Builder engaged in conduct during the suspension of the works that caused delay.[92] In particular, they point to the Builder cancelling the Mixed Element site measure appointment in early January 2015. The Builder concedes that the appointment was cancelled as it had purported to suspend the works. I accept that it is more likely than not that the purported suspension caused the works to be somewhat delayed. However, I note that the suspension substantially occurred during a period in which the construction industry historically shuts down. The Contract provided that a claimable delay may include 'the industry shutdown being a 3 week period commencing on or about 22 December in each year'.[93]

[123] The Homeowners took steps to remedy the alleged breach and the amounts were paid on or about 16 January 2015 and work re-commenced a few days later.

[124] I accept that suspension of the works other than in accordance with clause 18 of the Contract is a substantial breach of the Contract by the Builder entitling the Homeowners to give a Notice to remedy breach.[94]

[125] The Homeowners did not give a Notice to remedy breach on this basis nor did they within a reasonable time of the Builder's breach purport to rely upon this substantial breach and the consequential delay in bringing the Contract to an end. The

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88 Exhibit 9, annexure 17, p 108.
89 Exhibit 9, annexure 18, p 109 – p 111.
90 Exhibit 9, annexure 20, p 115.
91 *Greer v Mt Cotton Constructions Pty Ltd* [2018] QCATA 196.
92 The Homeowners do not specifically rely upon this point in their final submissions as a breach set out in section IV.
93 Exhibit 9, annexure 4, clause 16.2(l).
94 Exhibit 9, annexure 4, clause 27.1(a).

Homeowners clearly affirmed the Contract after these breaches and are not entitled to rely upon these breaches to bring the Contract to an end having done so.

Failure to provide estimate of Practical Completion[95]

[126] I am not satisfied that the Builder breached its obligation to provide an estimate of Practical Completion.

[127] The Homeowners contend that the Builder failed to provide an estimate of Practical Completion in breach of clause 24.1.

[128] The Builder provided a calendar on or about 19 January 2015,[96] which suggested that Practical Completion would be achieved by 20 February 2015.

[129] There is also evidence before me that the Builder sent an email on 2 March 2015, which indicated that Practical Completion would be achieved 14 March 2015 and another on 17 March 2015 indicating that Practical Completion was a month away.[97]

[130] The Homeowners concede that these estimates were given but take issue with the fact that the date kept changing. The obligation was to provide non-binding estimates.[98]

[131] The evidence is that there were delays in the benchtop supplier undertaking the site measure during the period of these estimates, which affected when the installation of the benchtops could be completed and therefore when practical completion would be achieved. Some of these delays were as a result of the supplier's acts or omissions and some as a result of the Builder's acts or omissions.

[132] It is clear that there were non-binding estimates given for the timing of the completion of the work.

Performance of defective work and failure to remedy defective work[99]

[133] I am not satisfied that the Builder breached its obligations because the time for attending to any defective work had not expired. In any event, I am not satisfied that the extent of defective work would, if regarded as a breach, entitle the Homeowners to terminate.

[134] I accept that the Builder was required to carry out the works under the Contract in an appropriate and skilful way and with reasonable care and skill.[100]

[135] The Builder contends that defective work would have been rectified prior to handover or within the defects liability period but it was prevented from performing this work by the Homeowners' wrongful termination.

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95 The Homeowners do not specifically rely upon this point in their final submissions as a breach set out in section IV.

96 Exhibit 4, annexure, p 149, p 150.

97 Exhibit 9, annexure, p 186.

98 Exhibit 9, annexure 4, clause 24.1.

99 The Homeowners do not specifically rely upon this point in their final submissions as a breach set out in section IV.

100 Exhibit 9, annexure 4, clause 35.1 (d).

[136] The Tribunal has previously accepted that if works are not carried out in an appropriate and skilful way then 'the homeowner is entitled to damages, but is not generally entitled to terminate the contract.'[101]

[137] Having regard to the extent of defective work, most of which was minor defective work, considered later in these reasons, I am not satisfied that if the work was regarded as being in breach of this obligation it could be considered to be so substantial to found an entitlement to terminate.

Failure to proceed with the works – suspending the works in March 2015

[138] I am not satisfied that the Builder effectively suspended the works in March 2015 contrary to clause 18 of the Contract by securing the site.

[139] The Homeowners contend that the Builder effectively suspended the works when not entitled to do so as the Homeowners were not in breach. They contend that there was some work that could be completed, which was not contingent upon the installation of the concrete benchtops.

[140] There is no requirement under the Contract, to which I have been referred or which I have identified, that the Builder is to attend the site every possible workday. Mr Morgan's evidence was that the remaining works could be more efficiently progressed once the benchtops had been installed. The 17 March 2015 email advising of the Builder's intention to secure the site indicated that the Builder intended to attend site from time to time pending the installation of the benchtops to perform some work.[102] Given the amount of work to be completed as set out later in these reasons, some of which was dependent upon the installation of the benchtops, it is not surprising that the Builder did not intend to attend at site each day and wished to secure the site to prevent damage or injury for which it would be responsible.

[141] Mr Wyatt conceded that:

(a) a site measure by the kitchen benchtop supplier took place in mid to late March prior to the purported termination;

(b) some of the remaining work e.g. plumbing could not be undertaken prior to the bench tops being installed, but contended that some work could be progressed;

(c) they were using part of the Contract works as they had moved items into cupboards on or about 19 December 2014 without the Builder's written consent.

[142] Although the Builder had acquiesced in the Homeowners' use of parts of the works by not insisting on written consent in accordance with clause 25.2 of the Contract, that was in the context of regular attendance at the site by the Builder to in a sense supervise the access to parts of the works.[103] In circumstances where the Builder would not be at site as regularly, revoking the previously given free access is not unreasonable. The notification advised reasonable access to the areas would be

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101 *Castle Constructions (Qld) Pty Ltd v Pourasad* [2015] QCAT 17, [86].
102 Exhibit 9, annexure 23, p 186.
103 Exhibit 9, annexure 4, clause 10.3(c).

allowed or raised the option of the Homeowners accepting parts of the works were complete, subject to a list of defects being prepared.[104]

[143] I am not satisfied that this conduct, in the circumstances, was in breach of the Builder's obligations.

Did the Builder repudiate the Contract?

[144] I am not satisfied that the Builder repudiated the Contract entitling the Homeowners to terminate.

[145] The Homeowners contend that the Builder repudiated the Contract. They point to various breaches of the Contract. They contend the Builder was not ready, willing and able to perform the Contract except in a way it unilaterally decided.

[146] I accept that breaches may be viewed together to indicate an intention to longer be bound.[105]

[147] The Tribunal has previously accepted:[106]

> At common law, if one party renounces his or her liabilities under a contract demonstrating an intention to no longer be bound or to fulfil it in a manner substantially inconsistent with its obligations, then an innocent party is entitled to accept the repudiation and terminate the contract. All of the circumstances relevant to performance may be taken into account in deciding whether there has been a repudiation. A party that is in breach of a contract may still accept repudiation by the other party, provided that it has not itself repudiated the contract. However, a party cannot take advantage of its own non-compliance with the contract. If there is a causal relationship between the breach by the party purporting to terminate and the default of the other party, a presumption operates that a party can not take advantage of their own default to terminate.

[148] The evidence is that neither party sought to strictly enforce or to perform their obligations in strict accordance with the Contract from an early time, including that the Builder accommodated the request by the Homeowners to pay the deposit in two parts outside of the time frame provided by Clause 4.

[149] The Homeowners also contend that the Builder repudiated the Contract by delay. As referred to earlier in these reasons, the Tribunal has accepted that it is possible for a common law right to terminate to arise where the delay in achieving practical completion is excessive.

[150] The Homeowners rely upon *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd.*[107] In that case the High Court viewed the lessor's conduct as a whole as indicating it was not prepared to perform the contract.

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104 Exhibit 9, annexure 36.

105 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; *Hudson Crushed Metals Pty Ltd v Henry* [1985] 1 Qd R 202.

106 *Castle Constructions (Qld) Pty Ltd v Pourasad* [2015] QCAT 17, [89], citing *Shevill v Builders Licensing Board* (1982) 149 CLR 620; *Kelly v Desnoe* [1985] 2 Qd R 477; *Quinn Villages Pty Ltd v Mulherin* [2006] QCA 433; *Nina's Bar & Bistro v MBE Corporation* [1984] 3 NSWLR 613.

107 (1989) 166 CLR 623, 637.

[151] The Homeowners contend that the delay in completing the works was through no 'fault' of theirs. However, the evidence is that:

(a) as conceded by Mr Wyatt during his oral evidence, the Contract drawings produced by BVN Donovan Hill had some limited details of joinery[108] but there were no specific joinery schedules and the schedules of selections had quite a number of items 'TBC'[109] and that this lack of detail would impact PC/PS item costings;

(b) as conceded by Mrs Wyatt, certain information was provided after the Contract was entered into and updated plans were provided to the Builder as work progressed;

(c) the Homeowners had engaged the architects to prepare the drawings;

(d) as conceded by Mr Wyatt during his oral evidence, a number of the changes to the works requested by the Homeowners could not have been foreseen by the Builder and might mean that more time was required to complete;

(e) the Homeowners did not put the Builder on notice that they required the Builder to strictly comply with the terms of the Contract in relation to the time for completion.

[152] Repudiation will not lightly be found. Given the waiver by the Homeowners of the Builder's non-compliance with the strict terms of the Contract and their failure to put the Builder on notice that they would no longer acquiesce in such non-compliance, I am not satisfied that the Builder's conduct looked at as a whole would lead a reasonable person to conclude that it did not intend or was unable to perform the Contract nor that the delay was gross and excessive in the circumstances.

Were the Homeowners entitled to terminate under the Act?

[153] I find that the Homeowners were not entitled to terminate under the Act.

[154] The Act permits a Homeowner to end a contract if the work is not finished within 1.5 times the building period. The Homeowners relied upon a breach of the Act in their termination notice.[110] The term 'finished' is not defined in the Act.

[155] Schedule 2 of the Act sets out the definition for 'stated completion date' as

> for a regulated contract, means, if applicable, the date stated in the contract as the date by which the subject work is to be finished.

[156] Schedule 2 of the Act also sets out the definition for 'stated completion period' as

> for a regulated contract, means, if applicable, the number of days stated in the contract as the number of days that will be required to finish the subject work once it is started.

[157] In the current context, I accept that 'finished' equates to practical completion under the Contract.

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108 Exhibit 4, annexure 1, p 13.
109 Exhibit 4, annexure 1, p 52 – p 61.
110 Exhibit 9, annexure 38, p 190 – p 193, [7], [13].

[158] An owner is only entitled to end the Contract if the reason for the increase in time to complete the work could reasonably have been foreseen by the builder when the Contract was entered into.[111]

[159] The Court of Appeal has previously accepted that a purported termination of a contract at a time more than 1.5 times the initial contract period was ineffective as the owner did not allow for delays, which could not have reasonably been foreseen by the builder when the Contract was entered into, when giving the notice purporting to exercise this right even though no claim for an extension of time under the contract had been made prior to the purported termination.[112]

[160] The Builder contends the reasons for the delay were not foreseeable. In particular, the Builder points to a number of variations to the scope of work and increases to PC and PS allowances. Mr Morgan gave evidence of these and the impact on the building period.[113] The independent experts did not give evidence about delay.

[161] As referred to earlier, Mr Wyatt conceded during his oral evidence that at the time the Contract was entered into:

(a) the Homeowners were to provide updated plans and that more refinement of their requirements would be provided;

(b) the Contract drawings produced by BVN Donovan Hill had some limited details of joinery[114] but there were no specific joinery schedules and the schedules of selections had quite a number of items 'TBC'[115] and that this lack of detail would impact PC/PS item costings;

(c) a number of the changes to the works requested by the Homeowners could not have been foreseen by the Builder and might mean that more time was required to complete.

[162] During the hearing the Homeowners conceded that the following work was performed at the Homeowners' request, the Builder invoiced them for the work, the invoice was paid and the work could not reasonably have been contemplated at the time of entering into the Contract:

(a) Variation to joinery - VJ panel cupboard fronts, the subject of invoice 292, dated 17 November 2014.[116] Mr Morgan's evidence was this caused seven days' delay. Mr Wyatt conceded this work might have caused some delay;[117]

(b) Variation to guttering outside study, the subject of invoice 292. Mr Morgan's evidence was this caused a half a day delay. Mr Wyatt conceded this work might have caused some delay;[118]

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111 The Act, s 90(2).
112 *Ryan v Worthington* [2015] QCA 201, [55].
113 Exhibit 5.
114 Exhibit 4, annexure 1, p 13.
115 Exhibit 4, annexure 1, p 52 – p 61.
116 Exhibit 9, annexure 25, p 132.
117 Exhibit 5, [5].
118 Exhibit 5, [6].

(c) Variation to replace rotten chamfer boards to existing cottage, the subject of invoice 292. Mr Morgan's evidence was this caused three days' delay. Mr Wyatt conceded this work might have caused some delay;[119]

(d) Variation to pantry door, the subject of invoice 292. Mr Morgan's evidence was this caused a half a day delay;[120]

(e) Variation to dining room seat, the subject of invoice 306 dated 1 March 2015. Mr Morgan's evidence was this caused a one-day delay;[121]

(f) Variation to rebuild block wall, the subject of invoice 276 dated 28 March 2014. Mr Morgan's evidence was this caused 21 days' delay;[122]

(g) Variation to increase block wall height, the subject of invoice 280 dated 7 April 2014. Mr Morgan's evidence was this caused a one-day delay;[123]

(h) Variation to tiling to bathrooms and kitchen, the subject of invoice 302 dated 23 December 2014. Mr Morgan's evidence was this caused five days' delay;[124]

(i) Variation to replace decking board between extension and deck, the subject of invoice 303 dated 13 January 2015. Mr Morgan's evidence was this caused three days' delay;[125]

(j) Variation to pedestrian gate, the subject of invoice 300 dated 22 December 2014.[126] Mr Morgan's evidence was this caused three days' delay;[127]

(k) Variation to back deck guttering, the subject of invoice 300 dated 22 December 2014. Mr Morgan's evidence was this caused a one-day delay;[128]

(l) Variation to roof front façade – existing cottage, the subject of invoice 305 dated 19 January 2015.[129] Mr Morgan's evidence was this caused 14 days' delay.[130]

[163] In the absence of clear contrary evidence, I accept Mr Morgan's evidence as to the delay caused by these variations, which could not reasonably have been contemplated at the time of entering into the Contract. The total delay caused by these matters is 60 days.

[164] During the hearing the Homeowners conceded that the following work was performed at the Homeowners' request and the work could not reasonably have been contemplated at the time of entering into the Contract:[131]

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119 Exhibit 5, [7].
120 Exhibit 5, [9].
121 Exhibit 5, [11].
122 Exhibit 5, [12].
123 Exhibit 5, [13].
124 Exhibit 5, [14].
125 Exhibit 5, [16].
126 Exhibit 9, annexure 25, p 153.
127 Exhibit 5, [19].
128 Exhibit 5, [20].
129 Exhibit 9, annexure 33, p 177.
130 Exhibit 5, [12].
131 The Builder did not invoice the Homeowners for the work and they, therefore, did not pay for it.

(a) fencing and sleeper wall work. Mr Morgan's evidence was this caused three days' delay;[132]

(b) extend BBQ deck area. Mr Morgan's evidence was this caused a one-day delay;[133]

(c) front deck work. Mr Morgan's evidence was this caused three days' delay.[134]

[165] In the absence of contrary evidence, I accept Mr Morgan's evidence as to the delay caused by these variations, which could not reasonably have been contemplated at the time of entering into the Contract. The total delay caused by these matters is seven days.

[166] Mr Wyatt conceded during his oral evidence that at the time the Contract was entered into the use of rosewood to match the windows for the seat and handrail, as distinct from other timber, was not originally agreed and that it arose as a result of discussion between the parties and the Homeowners' architect as 'it was never really detailed' in the plans. He accepted that the work described was performed, the Builder issued an invoice for it to the Homeowners and it was paid. He was unable to comment upon whether it would take extra time.

[167] Mr Morgan's evidence was that this variation, the subject of invoice 292 caused three days' delay.[135] In the absence of contrary evidence, I accept Mr Morgan's evidence as to delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[168] The Builder submitted invoice 316 dated 8 April 2015 with the application commencing this proceeding and is unpaid. Mr Morgan's evidence is that the Homeowners requested additional electrical works namely a new distribution board, security wiring and 34 additional down lights. Mr Wyatt's evidence is that the electrician advised that a new distribution board was required, the Homeowners suggested security wiring be installed and they requested wall lights be changed to downlights. The Builder contends that nine wall lights were replaced by 34 downlights. Mr Wyatt's evidence was that he could not remember how many downlights were requested to replace the wall lights.

[169] The Contract electrical plans contain a notation querying whether additional lights were required.[136]

[170] Mr Morgan's evidence was that this variation, the subject of invoice 316, caused five days' delay.[137] In the absence of clear contrary evidence, I accept Mr Morgan's evidence as to the work requested and the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

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132 Exhibit 5, [25].
133 Exhibit 5, [28].
134 Exhibit 5, [29].
135 Exhibit 5, [8].
136 Exhibit 4, annexure 1, p 22.
137 Exhibit 5, [10].

[171] Mr Wyatt accepted that a change to the structural framing Contract design was required as a result of advice from the engineer, those works were the subject of invoice 286, which was paid by the Homeowners. He was unable to comment on whether this variation work would require extra time.

[172] Mr Morgan's evidence was that this variation caused a one-day delay.[138] In the absence of contrary evidence, I accept Mr Morgan's evidence as to the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[173] Mr Morgan's evidence was that the painting PS allowance was for the extension works, subsequently the Homeowners requested the existing cottage, internally and externally, to also be painted. His evidence was that there were other special requirements, which were not specified at the time the Contract was entered into. The Contract in evidence before me does not contain a painting schedule. Mrs Wyatt's evidence was that she provided a hand-written painting schedule shortly before the painters were to commence. The evidence is also that the Homeowners requested the window frames to be stained with a particular dark stain product.

[174] Mr Wyatt's evidence was that the Homeowners' expectation was that whole house would be painted at least internally because the extension joined the existing cottage.

[175] The works are described as alterations and extensions. I find that the Contract scope of works does not clearly specify that the whole house was to be painted internally or internally and externally. I find that this additional work was a variation.

[176] Mr Wyatt accepted that invoice 295 in respect of painting was issued and paid, that the works were performed but not to the standard he expected for the price.

[177] Mr Morgan's evidence was that this variation caused five days' delay.[139] In the absence of contrary evidence, I accept Mr Morgan's evidence of the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[178] Mr Wyatt conceded during his oral evidence that the requirement for extra cladding at the front entry was not contemplated at the time the Contract was entered into. He accepted that the work described was performed, the Builder issued invoice 287 for it to the Homeowners and it was paid. Mr Morgan's evidence was that this variation caused a one-day delay.[140] In the absence of contrary evidence, I accept Mr Morgan's evidence of the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[179] Mr Morgan's evidence is that at the time the Contract was entered into no decision had been made as to the external cladding to be used so the work was included as a PS allowance and that the original time frame was based upon the work being outsourced. Mr Wyatt's evidence is that he can recall a conversation about cladding products, saving costs by choosing the product used and the Builder performing the

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138 Exhibit 5, [15].
139 Exhibit 5, [18].
140 Exhibit 5, [17].

works. His evidence is that it was never discussed as to who would be installing the cladding and there was no discussion about additional time if the Builder was to perform the work. His evidence as to the timing of such conversation(s) was not specific.

[180] Mr Morgan's evidence was that this variation caused 31 days' delay.[141] In the absence of clear contrary evidence, I accept Mr Morgan's evidence that the building period was agreed at a time when the Builder contemplated this work would be outsourced and of the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[181] Mr Wyatt conceded during his oral evidence that the Homeowners requested the removal of joinery under a master bedroom window, which caused a change to the way the window was supported. Mr Wyatt's evidence was that he was not qualified to say whether the change would cause delay.

[182] Mr Morgan's evidence was that this variation caused a one-day delay.[142] In the absence of contrary evidence, I accept Mr Morgan's evidence of the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[183] Mr Wyatt conceded during his oral evidence that work to remove rotten chamferboard and to supply and install new boards was performed with the agreement of the Homeowners, which work was not contemplated at the time the Contract was entered into and that it would take 'a little bit more time.'

[184] Mr Morgan's evidence was that this variation caused a one-day delay.[143] In the absence of clear contrary evidence, I accept Mr Morgan's evidence of the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[185] Mr Wyatt conceded during his oral evidence that additional niches, that were not on the plans, were installed in the upstairs bathroom at the Homeowners' request. He also conceded it would have taken extra time to perform this varied work. Mr Morgan's evidence was that this variation caused a three hour delay.[144] In the absence of contrary evidence, I accept Mr Morgan's evidence of the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[186] Mr Wyatt conceded during his oral evidence that the removal of the front yard tree and its disposal was work performed by the Builder, which was not contemplated at the time the Contract was entered into. He also conceded it would have taken extra time to perform this varied work. His evidence was that he thought the varied work took a morning. Mr Morgan's evidence was that this variation caused a two day delay.[145] I accept that the delay caused by varied work does not necessarily equate to the time taken to complete the varied work but may include other consequential

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141 Exhibit 5, [22].
142 Exhibit 5, [27].
143 Exhibit 5, [30].
144 Exhibit 5, [31].
145 Exhibit 5, [32].

delay. In the absence of clear contrary evidence, I accept Mr Morgan's evidence of the delay caused by this varied work, which could not reasonably have been contemplated at the time of entering into the Contract.

[187] Mr Morgan's evidence was that there were changes to the pool enclosure in terms of the directions of the battens and incorporating an opening for the pool blanket and that the changes caused a two day delay.[146] Mr Wyatt denied these were changes requiring additional labour and materials. On the limited evidence before me, I am not satisfied that that these changes caused the delay claimed.

[188] Mr Wyatt during oral evidence conceded that a new letterbox was installed into the blockwork at the Homeowners' request. He accepted that it may have taken some additional time but was not qualified to say. Mr Morgan's evidence was that this variation caused a five hour delay.[147] In the absence of clear contrary evidence, I accept Mr Morgan's evidence of the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[189] Mrs Wyatt's oral evidence was that during the course of the Contract the Homeowners requested the booth seat be constructed in a way that would make it easy for removal and reinstallation to allow for it to be upholstered. Mr Morgan's evidence was that this request required the Builder to redesign the seat and required alterations to materials from those planned to be used and this variation caused two days' delay.[148] Mrs Wyatt did not accept that the design changed because it was 'still the same shape'.

[190] I am not satisfied that just because the shape did not change there was not a change in design or materials to allow for easy removal and reinstallation. In the absence of clear contrary evidence, I accept Mr Morgan's evidence of the delay caused by this variation, which could not reasonably have been contemplated at the time of entering into the Contract.

[191] The total delay caused by these further matters is 53 days.

[192] Mr Morgan's evidence was that if the contractor selected by the Homeowners to fabricate and install concrete benchtops had carried out the site measure as originally requested the installation would have been in mid-January 2015 so that as at 30 March 2015 when the Homeowners purported to terminate, the works had been delayed by 76 days.[149] The evidence relating to this matter is that some of the delay was caused by the contractor and some by the Builder.

[193] The evidence is that:

(a) when Mr Gatehouse originally attended the site, the cupboards were not properly affixed to allow for measurement;

(b) he was due to attend for the site measure in early January 2015 but the Builder cancelled the appointment as it had purported to suspend the works, when it was not entitled to do so;

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146 Exhibit 5, [33].
147 Exhibit 5, [34].
148 Exhibit 5, [26].
149 Exhibit 5, [23].

(c) subsequently Mr Gatehouse was not able to attend to the measurement as he was away on leave and ill on his return.

[194] I am not satisfied that the works were delayed by 76 days by matters outside of the Builder's control, which were not foreseeable at the time the Contract was entered into.

[195] It is not necessary to make a finding as to the delay outside of the Builder's control that was not foreseeable as, on my calculation:

(a) the period 1.5 times the original building period of 189 days was 283.5 days.

(b) the delays, as found, which were not foreseeable, leaving aside the concrete benchtop delays, totalled 120 days.

(c) allowing for those delays, the actual building period would be required to be at least 403.5 days before the Homeowners were entitled to terminate under the Act.

[196] At the time the Homeowners purported to terminate the Contract the actual building period was 385 days.

Defective and incomplete work

[197] I find that the reasonable costs to rectify and complete, which the Builder would have incurred, but for the Homeowners' purported termination and for which an adjustment in the Homeowners' favour should be made is $28,931.32.[150]

[198] Not surprisingly, given the Homeowners purported to terminate the Contract prior to the Builder reaching Practical Completion, there were quite a few items of defective or incomplete work.

[199] The evidence as to the work outstanding at the time of the purported termination is not as precise as it might have been. Mr Morgan gave evidence that there was still about a week's worth of work to be done other than installation of the benchtops by the sub-contractor[151] and about a week of work to attend to minor defects and further PS/PC variations.[152]

[200] Having regard to the evidence of defective and incomplete work set out below, most of which was minor, and which collectively is small compared to the adjusted Contract price, I find that the works were substantially complete. Most of the work remaining was in the nature of items that would usually be attended to by the Builder in the lead up to handover. I therefore find that the Builder is entitled to the balance of the contract sum less appropriate adjustments for costs it would have incurred, if it had been permitted to complete the Contract.

[201] The Homeowners rely upon expert evidence given by representatives of MB.[153] Mr Carpenter inspected the works on 14 April 2015 a relatively short period after the Homeowners purported to terminate the Contract and prepared a report.[154] Mr

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150 Costs in rectification of defective works totalling $20,563.47 and costs to complete totalling $8,367.85.

151 Exhibit 4, [108].

152 Exhibit 26, [3].

153 Primarily Mr Carpenter and Mr Thompson.

154 Exhibit 35.

Carpenter identified items of unsatisfactory work. He did so one room at a time rather than by trades across the entire works. This has had flow on consequences as to how evidence has been presented.

[202] Another representative of MB, a quantity surveyor, set out his opinion of the costs to rectify the defects identified[155] and the costs to complete.[156] Some of the same items have been included in both the defective work attachment and the costs to complete attachment resulting in overstatement, when adding the totals of each. In relation to the costs to complete, the report did not take into account whether or not the items fell within PC or PS allowances, which had been exceeded.

[203] The Builder relies upon expert evidence given by Mr Helisma, who inspected the works on 10 August 2015.[157] By the time Mr Helisma inspected the works, the Homeowners had engaged the new builder, who had performed some works listed in the MB report.[158]

[204] Two Joint Expert Reports were prepared.[159] The initial Joint Report set out evidence of agreed defective work and the reasonable costs of rectification.[160] The experts considered that actual costs should be adopted as reasonable for incomplete work. This view did not take into account whether or not the items fell within PC or PS allowances, which had been exceeded. Actual costs are not necessarily reasonable.

[205] Mr Wyatt's evidence is that they spoke to two builders who declined to quote on the works to be completed and then in May 2015, Mr Cuckson agreed to complete the work identified in the MB report.[161]

[206] The Supplementary Joint Report set out evidence of incomplete work.[162] Mr Helisma provided an affidavit clarifying his views.[163] Mr Helisma's evidence was that the joint expert reports did not consider the impact of PS or PC items and while he clarified his opinion on some items he noted there could be others.[164] If incomplete work within PC or PS items had been permitted to be completed, the Homeowners would not necessarily be entitled to an adjustment in their favour, whether or not they had validly terminated.

[207] The parties did not require the experts to give oral evidence but rather they filed a joint statement setting out their respective positions on some items of defective and incomplete works.[165]

[208] Where the experts differ or there is ambiguity, I generally prefer Mr Helisma's evidence because his evidence set out in greater detail his reasoning than the evidence given by the various MB representatives. Representatives of MB did not

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155 Exhibit 35, attachment C.
156 Exhibit 35, attachment D.
157 Exhibit 33 and Exhibit 30.
158 Exhibit 35.
159 Exhibit 7 and Exhibit 34.
160 Exhibit 7.
161 Exhibit 28, [3] – [4].
162 Exhibit 34.
163 Exhibit 30.
164 Exhibit 30, [18].
165 Exhibit 39.

give express evidence as to whether items were major or minor defects or major or minor incomplete works. Where neither party's experts express a view on these matters, I have drawn conclusions based on the reasonable costs of attending to them.

Defective work

[209] The Homeowners contend that the reasonable cost to rectify defective work was $22,712.97.

[210] The Builder was required to carry out the works under the Contract in an appropriate and skilful way and with reasonable care and skill.[166]

[211] The Builder contends that the defective work would have been rectified prior to handover or within the defects liability period but it was prevented from performing this work by the Homeowners' wrongful termination so that no amount should be allowed in determining the amount owing as between the Builder and the Homeowners.

[212] The Builder conceded that the reasonable cost to rectify defective work was $14,612.08 in the event I found the Homeowners' termination was valid. The Builder did not pursue a contention that the labour rate adopted by the experts should be reduced.[167]

[213] Although the Homeowners wrongfully prevented the Builder from rectifying the defective work, I find that it is more likely than not that the Builder would have incurred some costs in doing so. In the absence of alternative evidence, for example, about whether sub-contractors were responsible for the defect and would have rectified at no cost to the Builder, it is appropriate to make findings based largely on the experts' evidence as to the reasonable costs of rectification to allow an adjustment to be made.

[214] References are taken from the initial Joint Report unless otherwise noted.[168]

<u>Item 1/32 Ground floor multi-purpose room - walls</u>

[215] I find that the work was defective and that the reasonable cost of rectification was $248.26.

[216] Mr Helisma's evidence is, and I accept, that this is a minor defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[169]

[217] The experts agreed, and I accept, that the reasonable cost of rectification was $248.26.

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166 Exhibit 9, annexure 4, cl 35.1 (d).
167 Exhibit 26. Submissions filed 19 October 2016, [237].
168 Exhibit 7.
169 Exhibit 33, 1.38.

Item 2/33 Ground floor multi-purpose room – timber windows stain inconsistent coating

[218] I find that the work was defective and that the reasonable cost of rectification was $99.21.

[219] The evidence is that at the time of Mr Carpenter's inspection, prior to any subsequent painter's work, the stain coating was inconsistent.

[220] Mr Helisma's evidence is, and I accept, that this is a minor defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[170]

[221] The experts agreed, and I accept, that the reasonable cost of rectification was $99.21.

[222] Mr Morgan contends that the inconsistent finish is attributable to the particular product selected by the Homeowners as there was evidence that the defect remained despite subsequent painting work by another painter between Mr Carpenter's and Mr Helisma's inspections.

[223] I prefer the evidence of the independent experts that the work was defective.

[224] In any event, there is insufficient evidence before me that the Builder wrote to the Homeowners advising against the use of this product before it was applied but was directed to use it. Such evidence would provide a defence to a claim for breach of a warranty under the Act.[171]

Item 3/34 Ground floor multi-purpose room – bolt

[225] I find that the work was defective and that the reasonable cost of rectification was $71.

[226] Mr Helisma's evidence is, and I accept, that this is a minor defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[172]

[227] The experts agreed, and I accept, that the reasonable cost of rectification was $71.

Item 4/35 Ground floor multi-purpose room – pine external wall bottom plate

[228] I find that the work was defective and that the reasonable cost of rectification was $41.50.

[229] Mr Helisma's evidence is, and I accept, that this is a minor defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[173]

[230] The experts agreed, and I accept, that the reasonable cost of rectification was $41.50.

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170 Exhibit 33, 1.44.
171 The Act, s 51(2).
172 Exhibit 33, 1.51.
173 Exhibit 33, 1.64.

Item 5/36 - Ground floor multi-purpose room – termite management

[231] This separate claim is not pursued by the Homeowners.[174] The experts agreed that there was no rectification work required other than that in item 4 above.

Item 6/37 – External wall cladding – Colourbond – capping/storm seals

[232] I find that the work was defective and that the reasonable cost of rectification was $470.40.

[233] The evidence is that capping or storm seals were not installed. External cladding was a PS item.[175] The evidence is that the Builder issued the Homeowners with credit note No 296 for cladding in the sum of $8,265.[176]

[234] The experts considered this was defective work. They agreed, and I accept, that the reasonable cost of attending to this work was $470.40.

[235] Mr Helisma's evidence is, and I accept, that this is a minor defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[177] His evidence was also that the joint expert reports did not consider the impact of PS or PC items and while he clarified his opinion on some items he noted there could be others.[178] The Builder contends this is incomplete work.

[236] Although the item could be regarded as in the nature of omitted work, I find that it was defective work. The giving of a credit in December 2014 is inconsistent with a contention that the works should be regarded as incomplete in late March 2015 rather than defective. I prefer the evidence of the independent experts.

Item 7/38 - External wall cladding – Colourbond – window flashings gaps

[237] This separate claim is not pursued by the Homeowners.[179] The experts agreed that the work to attend to this item was included in the agreed cost of the work in respect of Item 6 above.

[238] The evidence is that there were gaps beneath the windows. Mr Helisma's evidence is, and I accept, that this is not a major defect and may be considered incomplete work, which would ordinarily be completed by the Builder during the normal course of the work before handover.[180]

Item 8/39 - External wall cladding – Colourbond – swarf and metal shavings

[239] I find that the work was minor incomplete work and that the reasonable cost of attending to this item was $35.50.

[240] The evidence is that there was some swarf or metal fillings on the head flashings.

[241] The experts agreed, and I accept, that the reasonable cost of attending to this item was $35.50.

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174 Submissions 18 January 2017, [140].
175 Exhibit 9, annexure 4, Schedule 4.
176 Exhibit 26, annexure 6.
177 Exhibit 33, 1.75.
178 Exhibit 30, [18].
179 Submissions 18 January 2017, [140].
180 Exhibit 33, 1.80.

[242] Mr Helisma's evidence is that this is not a 'major defect' and may be considered incomplete work, which would ordinarily be completed by the Builder during the normal course of the work before handover.[181] I accept that this is incomplete work as the work is in the nature of a final site clean, which the Builder had not yet had the opportunity to perform.

Item 9/40 - External wall cladding – Colourbond – lapped wall sheet joint

[243] I find that the work was defective and that the reasonable cost of rectification was $1,335.50.

[244] The experts considered this was defective work and agreed that the reasonable cost of rectification was $1,335.50.

[245] Mr Helisma's evidence is, and I accept, that this is a minor defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[182]

[246] The Builder contends that the item identified was a temporary measure[183] until new sheeting arrived and should be regarded as incomplete work. External cladding was a PS item.[184] The evidence is that the Builder issued the Homeowners with credit note No 296 dated 2 December 2014 for cladding in the sum of $8,265.[185] The giving of a credit in December 2014 is inconsistent with a contention that the works should be regarded as incomplete in late March 2015 rather than defective. I prefer the evidence of the independent experts.

Item 10/41 - External wall cladding – Colourbond – flashings to walls poorly cut

[247] I find that the work was defective and that the reasonable cost of rectification was $2,243.52.

[248] Mr Helisma's evidence is, and I accept, that items 10 and 11 were minor defects and they would ordinarily be rectified by the Builder during the normal course of the work before handover.[186]

[249] The experts considered this was defective work and agreed that the reasonable cost of rectification was $2,243.52. I accept the evidence of the independent experts.

Item 11/42 - External wall cladding – Colourbond – window flashings

[250] This separate claim is not pursued by the Homeowners.[187]

[251] The evidence is that the work was unsatisfactory. The experts agreed that the work to attend to this item was included in the agreed cost of the work in respect of Item 10 above.

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181 Exhibit 33, 1.85.
182 Exhibit 33, 1.92.
183 As identified in the MB report.
184 Exhibit 9, annexure 4, schedule 4.
185 Exhibit 26, annexure 6.
186 Exhibit 33, 1.102.
187 Submissions 18 January 2017, [140].

Item 12/43 – Front entry deck steelwork

[252] I find that the work was defective and that the reasonable cost of rectification was $41.58.

[253] Mr Helisma's evidence originally was that this item was incomplete work, which would ordinarily be completed by the Builder during the normal course of the work before handover.[188] However, the experts agreed to include it in the joint report as defective work and Mr Helisma did not specifically amend his opinion afterwards.[189]

[254] The experts agreed, and I accept, that the reasonable cost of attending to this item was $41.58. I find this was minor defective work having regard to the agreed reasonable cost.

Item 13/44 – Ground floor foyer to stair 1 - tiles

[255] I find that the work was defective and that the reasonable cost of rectification was $218.

[256] The evidence is that there is damage to some tiles and the grouting is incomplete.

[257] Mr Morgan's evidence is that the tiles were supplied by the Homeowners in the condition described by the experts and the Builder was directed to lay the tiles regardless of the defect.[190] The Contract provided that the Builder could reject any defective materials supplied by the Homeowners and require their replacement.[191] There is insufficient evidence before me that the Builder wrote to the Homeowners advising against the use of the tiles before they were installed but was directed to use them. I am not satisfied the Builder has established a defence.[192]

[258] Mr Helisma's evidence is, and I accept, that the grouting was incomplete work which would ordinarily be completed by the Builder during the normal course of the work before handover.[193] He gave evidence that the cost to complete the grouting was $22.75.

[259] The experts agreed, and I accept, that the reasonable costs of attending to all of this item was $218 assuming tiles supplied by the Homeowners were available. I find this was minor defective work having regard to the agreed reasonable cost.

Item 14, 15 & 16/45 & 46 - Ground floor foyer to stair 1 - termite management system

[260] I find that the work was defective and that the reasonable cost of rectification was $300.

[261] The experts agreed, and I accept, that it would be reasonable to expect that the localised area where new work was performed included a requirement to expose a 75mm inspection zone and that the reasonable cost of rectification was $300. They also agreed that there was no requirement under the scope of work under the Contract to upgrade the termite management in other parts of the pre-existing home.

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188 Exhibit 33, 1.112.
189 Exhibit 30.
190 Exhibit 26, [37].
191 Exhibit 9, annexure 4, clause 23.3.
192 The Act, s 51(2).
193 Exhibit 33, 1.118.

[262] I find this was minor defective work having regard to the agreed reasonable cost.

Item 17/47 - Ground floor foyer to stair 1 - holes around light switch

[263] I find that the work was incomplete and that the reasonable cost of rectification was $100.

[264] The evidence is that there are some gaps or tears in the plasterboard around the light switch cover plate.

[265] Mr Helisma's evidence is that this was incomplete work, as this damage was likely to have been caused by the electrician, and it would ordinarily be completed by the Builder during the normal course of the work before handover.[194]

[266] The experts agreed, and I accept, that the reasonable cost of attending to this item was $100.

[267] I find this was minor incomplete work having regard to the agreed reasonable cost.

Item 18/48 – Bedroom 1 (adjacent to the front entry) - gap filler to built in cupboards and wall junction

[268] I find that the work was defective and that the reasonable cost of rectification was $151.88

[269] Mr Helisma's evidence originally was that this was incomplete work which would ordinarily be completed by the Builder during the normal course of the work before handover.[195]

[270] The experts agreed, and I accept, that the reasonable cost of attending to this item was $151.88.

[271] Mr Morgan contends that the work is attributable to the subsequent painter, which had performed work between Mr Carpenter's and Mr Helisma's inspections.

[272] The evidence is that at the time of Mr Carpenter's inspection, prior to any subsequent painter's work, the work was unsatisfactory. I prefer the evidence of the independent experts in the Joint Report,[196] that the work documented in Mr Carpenter's report was defective.

[273] I find this was minor defective work having regard to the agreed reasonable cost.

Item 19/49 - Bedroom 1 (adjacent to the front entry) - bedroom door paint incomplete

[274] I find that the work was defective and that the reasonable cost of rectification was $84.73.

[275] The evidence is that at least some doors had not been sealed with paint to the top and bottom edges.

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194 Exhibit 33, 1.142.
195 Exhibit 33, 1.150.
196 Exhibit 7.

[276] Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[197]

[277] The experts agreed, and I accept, that the reasonable costs of attending to this item was $84.73.

Item 20/50 - Bedroom 1 (adjacent to the front entry) – bedroom door paint poor – white paint drip on grey wall

[278] I find that the work was defective and that the reasonable cost of rectification was $162.

[279] Mr Helisma's evidence was that the drip had been removed by the time he attended. It appears from the Joint Report, that Mr Helisma agreed that the door should be recoated, having initially disagreed that it was defective work. On this basis the experts agreed, and I accept, that the cost to attend to rectifying both aspects of this item was $162.

[280] Having regard to the experts' agreed scope of work and the reasonable costs of rectification, I find that this item was a minor defect, which would ordinarily be rectified by the Builder during the normal course of the work before handover or during the defects liability period.

Item 21/51 - Bedroom 1 (adjacent to the front entry) – bedroom door margins inconsistent

[281] I find that the work was defective and that the reasonable cost of rectification was $53.35.

[282] The experts agreed, and I accept, that the hinge margins should be adjusted and that the reasonable cost of rectification is $53.35.

[283] Having regard to the experts' agreed scope of work and the reasonable costs of rectification, I find that this item was a minor defect, which would ordinarily be rectified by the Builder during the normal course of the work before handover or during the defects liability period.

Item 22/52 - Family bathroom – door paint incomplete

[284] I find that the work was defective and that the reasonable cost of rectification was $84.73.

[285] The evidence is that at least some doors have not been sealed with paint to the top and bottom edges.

[286] Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[198]

[287] The experts agreed, and I accept, that the reasonable cost of attending to this item was $84.73.

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197 Exhibit 33, 1.157.
198 Exhibit 33, 1.176.

Item 23/53 - door margins inconsistent

[288] I find that the work was defective and that the reasonable cost of rectification was $71.

[289] The experts agreed, and I accept, that the hinge margins should be adjusted and that the reasonable cost of rectification is $71.

[290] Having regard to the experts' agreed scope of work and the reasonable costs of rectification, I find that this item was a minor defect, which would ordinarily be rectified by the Builder during the normal course of the work before handover or during the defects liability period.

Item 24/54 – wall tiling

[291] I find that the work was defective and that the reasonable cost of rectification was $333.15.

[292] Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[199]

[293] The experts agreed, and I accept, that the reasonable cost of attending to this item was $333.15.

Item 25/55 – shower leaking

[294] I find that the work was defective and that the reasonable cost of rectification was $1,000.

[295] Mr Helisma's evidence is that this defect had been rectified prior to his inspection and that given the nature of the defect it was unlikely to have been identified prior to practical completion but would have been addressed by the Builder or its subcontractors during the defects liability period.[200]

[296] Mr Morgan's evidence is that as the Builder was not able to inspect or rectify the defect prior to the rectification work being undertaken and that the Queensland Building and Construction Commission was not notified the item should be deleted.[201] Ordinarily a contractor is entitled to an opportunity to rectify defective work.

[297] I find that it is more likely than not that the Builder would have incurred some costs in rectifying this defective work. In the absence of alternative evidence, I accept the experts' agreed evidence that the reasonable cost of attending to this item was $1,000.

Item 26/56 – Bedroom 2 – blank switch plate – adjacent hole

[298] I find that the work was defective and that the reasonable cost of rectification was $300.

[299] Mr Helisma's evidence is that this item had been rectified prior to his inspection. His evidence is also that this was incomplete work, the hole likely to provide access

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199 Exhibit 33, 1.196.
200 Exhibit 33, 1.205 and 1.207.
201 Exhibit 26, [49] – [51].

to wiring to allow electrical work to be completed, which would ordinarily be completed by the Builder during the normal course of the work before handover.[202]

[300] Mr Morgan's evidence is that the cover plate was to remain to allow access by electricians if there are electrical faults or inspections required.[203]

[301] Even if I accepted Mr Morgan's evidence, this would not address the unsatisfactory appearance of the hole adjacent to the cover plate.

[302] The experts agreed, and in the absence of any other evidence as to the scope of work to address the adjacent hole, I accept, that the reasonable costs of attending to this item was $300.

[303] I find this was minor defective work having regard to the agreed reasonable cost.

Item 27/57 –wall paint

[304] The Homeowners did not pursue this item. The evidence is that this item was insignificant and did not warrant separate rectification.[204] No separate amount was agreed in the Joint Report.

Item 28/58 – Bedroom 2 – hole near air-conditioner register

[305] I find that this item was minor incomplete work and that the reasonable cost of attending to this was $320.

[306] Mr Morgan's evidence is that the Builder had the grilles in stock, which would have been installed and covered any defect.

[307] Mr Helisma's evidence is that this item had been rectified prior to his inspection. His evidence is that this is not a 'major defect' and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[205]

[308] I find that this was incomplete work as the grille had not yet been installed at the time the Homeowners purported to terminate. There was no specific evidence before me that this work should be considered as part of the air-conditioning PC item such that no adjustment should be made, in the absence of such evidence, I find an adjustment should be made.

[309] The experts agreed, and I accept, that the reasonable costs of attending to this item was $320.

Item 29/59 – Living – wall paint

[310] This claim is not pursued by the Homeowners.[206]

Item 30/60 – cable

[311] This claim is not pursued by the Homeowners.[207]

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202 Exhibit 33, 1.212.
203 Exhibit 26, [52].
204 Exhibit 33, 1.219.
205 Exhibit 33, 1.222.
206 Submissions 18 January 2017, [140].
207 Submissions 18 January 2017, [140].

Item 31/61 & 32/62 – timber flooring - lack of perimeter expansion gap

[312] I find that this is defective work and that the reasonable cost of rectification is $2,000.

[313] Mr Helisma's initial evidence was that this item related to incomplete rather than defective work, which would be completed prior to handover.[208]

[314] The experts agreed, and I accept, that the costs of rectification on the basis of trimming the floor and installing sealant was $2,000.

[315] Mr Helisma gave evidence that the actual method used by the new builder to address this issue was to place a quad cover strip to cover the gap and that this was more properly considered incomplete rather than defective work and that the reasonable costs to complete was $1,170.40.[209] Mr Helisma's evidence is that of this amount he allowed $560 for labour and $610.40 for labour and materials.[210]

[316] The Builder contends that this is incomplete work. Timber flooring is a PC item. PC items are fixtures and fittings that the owner is to select after the contract is signed. The Contract provides that the allowance is the estimated price of supplying and delivering the item and does not include an amount for the contractor's margin.[211] The allowance was $10,710.[212]

[317] Mr Morgan gave evidence that the cost of providing flooring materials came to $9,834.73.[213] The difference between the allowance and these material costs is $875.27. Mr Morgan also contended that the allowance had been exceeded when including labour cost. The item is listed as a PC item not a PS item, which the Contract provides is the estimated price of providing the labour and materials and does not include the contractor's margin.[214] There is no specific evidence of the claimed labour costs before me.

[318] Mrs Wyatt's evidence was that the quad cover strip, to which Mr Helisma referred, was only a temporary measure.[215] I accept Mrs Wyatt's evidence and find this was defective work, for which the reasonable costs of rectification are $2,000.

Item 33/63 – Entry – linen cupboard joinery

[319] I find no adjustment is required in respect of this item.

[320] This work fell within the joinery sub-contractor Bika's scope of work.[216] The evidence is that Bika attended to this item by 7 July 2015. The Homeowners accept that Bika attended to complete its scope of works and any items of defective work at no additional charge.[217]

[321] The experts agreed that the reasonable costs of attending to this item was $140.

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208 Exhibit 33, 1.248.
209 Exhibit 30, [23] – [28].
210 Exhibit 33, attachment A, p 12.
211 Exhibit 9, annexure 4, clause 20.5.
212 Exhibit 9, annexure 4, Schedule 4.
213 Exhibit 26, annexure 8.
214 Exhibit 9, annexure 4, cl 20.6.
215 Exhibit 36, [3].
216 Exhibit 26, annexure 9.
217 Exhibit 39.

[322] Having regard to the experts' agreed scope of work and their evidence of reasonable costs of attending to it, I find that this item was a minor defect, which would ordinarily be rectified by the Builder during the normal course of the work before handover or during the defects liability period.

Item 34/64 – pine timber frame/doorway

[323] I find this item is not defective work.

[324] The evidence is that this item relates to the Builder closing off the new construction works from the remainder of the house. The experts had included an amount for removal work in the agreed amount of $317.

[325] Mr Helisma gave evidence that the removal of the partition and any patching and painting should be regarded as incomplete work.[218] I accept such work would have been attended to by the Builder prior to handover.[219] Mr Helisma's evidence is that the reasonable costs of the incomplete work is $157.80, as agreed by the experts at item 98, and that the reasonable costs of any rectification work for patching and painting required is included in item 40.

[326] I accept Mr Helisma's evidence that the removal work is not defective work and that the amount should be accounted for as incomplete work as set out in item 98.

Item 35/65 – Study - data and power cabling

[327] This claim is not pursued by the Homeowners.[220]

Item 36/66 – Kitchen - timber windows - inconsistent coating

[328] I find that the work was defective and that the reasonable cost of rectification was $190.

[329] The evidence is that at the time of Mr Carpenter's inspection the stain coating was inconsistent.

[330] Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[221]

[331] The experts agreed, and I accept, that the reasonable cost of rectification was $190.

[332] Mr Morgan contends that the inconsistent finish is attributable to the particular product selected by the Homeowners as there was evidence that the defect remained despite subsequent painting work by another painter between Mr Carpenter's and Mr Helisma's inspections.

[333] I prefer the evidence of the independent experts that the work was defective.

[334] As stated earlier in these reasons there is insufficient evidence that the Builder wrote to the Homeowners advising against the use of this product but was directed to use it.

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218 Exhibit 33, 1.258.
219 Ibid, 1.259.
220 Submissions 18 January 2017, [140].
221 Exhibit 33, 1.272.

Item 37/67 – kitchen - screw in ceiling

[335] This claim is not pursued by the Homeowners.[222]

Item 38/68 – kitchen cupboard doors

[336] This claim is not pursued by the Homeowners.[223]

[337] The evidence is that the Builder's subcontractor completed and rectified this work after the purported termination of the Contract at no additional cost to the Homeowners. [224]

Item 39/69 – kitchen – gable ends

[338] This claim is not pursued by the Homeowners.[225]

[339] The evidence is that the Builder's subcontractor completed and rectified any necessary work after the purported termination of the Contract at no additional cost to the Homeowners.

Item 40/70 – kitchen - poor painting and finishing to Gyprock

[340] I find that the work was defective and that the reasonable cost of rectification was $720.

[341] The evidence is that there are a number of imperfections in the paint and walls.

[342] Mr Helisma's evidence originally was that some of the patching and painting may be more properly regarded as incomplete work as distinct from defective work, which would be carried out in conjunction with removing the temporary partitioning prior to handover.[226]

[343] However, the experts in the Joint Report agreed, and I accept, that the reasonable cost of rectification is $720.

[344] I find this was minor defective work having regard to the agreed reasonable cost.

Item 41/71 – loft and loft stair window – paint finish

[345] I find that the work was defective and that the reasonable cost of rectification was $320.

[346] Mr Helisma's evidence is that this defect had been rectified prior to his inspection. Mr Morgan's evidence was that it had not been rectified by the subsequent painter.[227] I prefer Mr Helisma's independent evidence. Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[228]

[347] The experts agreed, and I accept, that the reasonable costs of attending to this item was $320.

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222 Submissions 18 January 2017, [140].
223 Submissions 18 January 2017, [140].
224 Exhibit 39, [1].
225 Submissions 18 January 2017, [140].
226 Exhibit 33, 1.288.
227 Exhibit 26, [76].
228 Exhibit 33, 1.293.

Item 42/72 - loft and loft stair window – plaster and paint finish around verlux roof light

[348] I find that the work was defective and that the reasonable cost of rectification was $63.15.

[349] Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[229]

[350] The experts agreed, and I accept, that the reasonable costs of attending to this item was $63.15.

Item 43/73 & 44/74 - loft and loft stair window – door and door frame - bedroom door margins

[351] I find that the work was defective and that the reasonable cost of rectification was $144.15.

[352] Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[230]

[353] The experts agreed, and I accept, that the reasonable costs of attending to this item was $144.15.

Item 45/75 - loft and loft stair window – robe cupboards

[354] This claim is not pursued by the Homeowners.[231]

[355] The evidence is that the Builder's subcontractor completed and rectified any necessary work after the purported termination of the Contract at no additional cost to the Homeowners and prior to Mr Helisma's inspection.

Item 46/76 – Main bedroom – door latch/lock

[356] I find that the work was defective and that the reasonable cost of rectification was $25.

[357] There is evidence that the keeper required adjustment.

[358] Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[232]

[359] The experts agreed, and I accept, that the reasonable costs of attending to this item was $25.

Item 47/77 – Main bedroom – paint

[360] I find that the work was defective and that the reasonable cost of rectification was $147.66.

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229 Exhibit 33, 1.298.
230 Exhibit 33, 1.307.
231 Submissions 18 January 2017, [140].
232 Exhibit 33, 1.318.

[361] Mr Helisma's evidence is, and I accept, that this is a minor defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[233]

[362] The experts agreed, and I accept, that the reasonable costs of attending to this item was $147.66.

Item 48/78 – Main bedroom – gaps between bench worktops and the walls

[363] I find no amount is owing in respect of this item.

[364] This work fell within the joinery sub-contractor Bika's scope of work.[234] The Homeowners accept that Bika attended to complete its scope of works and any items of defective work at no additional charge.[235]

[365] Mr Helisma's evidence is that this defect had been rectified prior to his inspection. Mr Helisma's evidence is, and I accept, that this is a minor defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[236]

[366] The experts agreed that the reasonable costs of attending to this item was $160.

Item 49/79 – Main bedroom – en-suite wall tiling junction to ceiling

[367] I find that the work to rectify this defect separately would be duplicated by the agreed work to rectify item 51 below.

[368] The evidence is that the applied sealant at the junction of the wall tiles and the ceiling was unsatisfactory.

[369] Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[237]

[370] The experts agreed, and I accept, that the reasonable cost of attending to this item separately was $296.75.

[371] The Builder contends, and I accept, that this work duplicates part of the work to rectify item 51 below, which includes the complete removal and reinstatement of the floor and wall tiling.[238] I find that it is more likely than not that the complete removal and reinstatement of the wall tiling would require application of new sealant at the wall and ceiling junction.

Item 50/80 & 51/81 – en-suite tiling and waterproofing

[372] I find that the work was defective and that the reasonable cost of rectification was $9,271.

[373] Subsequent to the preparation of the initial expert reports a defect to the waterproofing membrane was identified. As part of the initial Joint Report, the

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233 Exhibit 33, 1.323.
234 Exhibit 26, annexure 9.
235 Exhibit 39.
236 Exhibit 33, 1.327.
237 Exhibit 33, 1.337.
238 Exhibit 7, attachment.

experts agreed a scope of work to rectify this defect and agreed that the reasonable cost of attending to this item was $9,271.[239] This scope of work would rectify any defective work identified as items 50 and 51.

[374] This defect became apparent after use and would ordinarily be rectified by the Builder during the defects liability period.

Item 52/82 – External – tiles surrounding pool – pool steps

[375] I am not satisfied that the Homeowners have established an entitlement in respect of this item.

[376] Mr Carpenter's evidence was that the tiles surrounding the pool had rusty marks and excess glue and the swimming pool step had rusty marks.[240] Attached to the MB report are photos of rusty marks. The MB report says the Homeowners told the expert that they were caused by the Builder's scaffold. On this basis, Mr Carpenter apparently considered the Builder responsible. The Builder denies that it is responsible. In particular, Mr Morgan denies that scaffold feet were placed into the pool during construction.[241]

[377] Mr Helisma's evidence is that he was not provided with pre-contract photographs to discount the possibility that these were pre-existing marks. His evidence was also that this may be considered incomplete work if the Builder was responsible for the marks.[242] No pre-contract photographs were in evidence before me.

[378] There is a direct conflict of evidence on this item. Mr Morgan gave evidence that Mr Wyatt agreed to arrange a pool blanket to protect the pool. The Homeowners gave evidence that they told Mr Morgan that they had been advised that a pool blanket would cause additional issues. Mr Morgan also gave evidence that he advised the Homeowners to engage a pool cleaner during construction, but they did not.[243]

[379] Mrs Wyatt's evidence is that they engaged a pool cleaner while they were away and on their return in July 2014 there were rust marks on the bottom of the pool from nails and bolts that were dropped and not retrieved, the Builder had placed the scaffold legs in the pool leaving rust marks and there was general rust sediment and discolouration from welding sparks and other substances falling into the pool.[244] Mrs Wyatt's statement attaches photos with a date of 12 January 2015, which show what appears to be rust discolouration.[245] There are no photos of the pool in July 2014 before me. Mrs Wyatt's evidence lacks detail as to the basis of her evidence. She does not, for example, say that she observed the scaffold legs in the pool on their return.

[380] The Contract provides that the Builder is to carry out the works in an appropriate and skilful way and with reasonable skill and care.[246]

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239 Exhibit 7.
240 Exhibit 35, [82].
241 Exhibit 26, [90].
242 Exhibit 33.
243 Exhibit 26, [88].
244 Exhibit 10, [60] – [61].
245 Exhibit 10, annexure 5, p 75 – p 77.
246 Exhibit 9, annexure 4, clause 35.1(c).

[381] Most of the evidence on this item relates to the rusty marks. The Homeowners' claim appears to be that the Builder failed to carry out its works with reasonable skill and care so as to prevent damage to the pre-existing works.

[382] There is insufficient evidence for me to be satisfied that the excess glue identified was part of the Builder's scope of works or a consequence of a lack of reasonable care.

[383] If I accept that the Builder caused the rusty marks, about which there is some doubt, there is no specific evidence as to what a reasonably prudent contractor would have done to protect the pre-existing works or the regularity with which it ought to have cleaned the site, including the pool, to prevent damage to pre-existing works in circumstances where the Homeowners agreed to clean the pool. I am not, therefore, satisfied that the Builder breached its obligation.

[384] Further, given the Homeowners engaged a cleaner, during a period where at least some of this damage is said to have occurred, I am not satisfied that the responsibility for the rusty marks ought to fall solely upon the Builder.

[385] The experts agreed, and I accept, that the reasonable cost of attending to this item was $300. Having regard to the agreed reasonable cost, this would, if proved, be regarded as minor.

Item 53/83 – External – drummy render

[386] The Homeowners do not pursue this item.

Item 54/84 – External – fibre cement wall poorly finished

[387] I find that the work was defective and that the reasonable cost of rectification was $71.

[388] The evidence is that this work was unsatisfactory.

[389] Mr Helisma's evidence is, and I accept, that this is not a major defect and it would ordinarily be rectified by the Builder during the normal course of the work before handover.[247]

[390] The experts agreed, and I accept, that the reasonable cost of attending to this item was $71.

Item 55/85 & 56/86 – downpipe – no spreader – laps of roof sheeting to be sealed

[391] I find that this work is minor incomplete rather than defective work. The PS allowance has been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[392] Mr Helisma's evidence is that these items were incomplete work rather than defects.[248] At the time of his inspection a spreader had been installed. The experts agreed, and I accept, that the reasonable cost of attending to these items was $362.15.

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247 Exhibit 33, 1.367.
248 Exhibit 30, [29].

[393] Having regard to the agreed scope of work and the agreed reasonable costs of attending to these items I find that these were minor incomplete work, which would have been attended to by the Builder prior to handover.

[394] The Builder contends, and I agree, that this is incomplete work. Plumbing is a PS item with an allowance of $15,000.[249] Mr Morgan gave evidence that the Plumbing allowance had been exceeded prior to the date of purported termination.[250] The Homeowners accept that they agreed to a variation in January 2015 for plumbing over the budgeted PS allowance.[251]

[395] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[252]

Item 57/line 71 – air-conditioning duct

[396] I find this is minor incomplete work and that the reasonable costs of attending to this item is $100. A credit in excess of this amount has been allowed against the PC allowance. The Homeowners are not entitled to further adjustments in their favour.

[397] Ducted air-conditioning was a PC item with a $23,000 allowance. The evidence is that a credit adjustment for air-conditioning was issued in the sum of $2,500 (excl GST).[253]

[398] Mr Helisma's evidence is that this item was incomplete work rather than defective.[254] The experts agreed, and I accept, that the reasonable costs of attending to this item is $100.

[399] Mr Morgan gave evidence, and I accept, that this was incomplete work as the Builder was waiting on the delivery of the custom grilles, which when installed would have attended to this item.

Summary

[400] On my calculation the reasonable cost of rectification of defective work, including some work considered below totals $20,563.47.

Incomplete work

[401] The Homeowners contend that the reasonable cost to complete incomplete work was $42,522.11.[255] This amount includes a 10% amount for preliminaries, fees and QBCC allowance, a 20% amount for builder's supervision and a 20% profit margin applied to item costs totalling $27,257.76. They contend that substantial work was required to be completed at the time of purported termination.[256]

[402] The Builder conceded that the reasonable cost to complete incomplete work was $4,149.42.

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249 Exhibit 9, annexure 4, Schedule 4.
250 Exhibit 26, annexure 5.
251 Exhibit 39.
252 Exhibit 31.
253 Exhibit 26, annexure 6, p 65.
254 Exhibit 30, [33].
255 Submissions 18 January 2017, [150]; Exhibit 34.
256 Submissions 18 January 2017, [145].

[403] References to item numbers are taken from Mr Helisma's report unless otherwise noted.[257] The Supplementary Joint Report considered costs to complete.[258] References to agreed costs to complete are taken from the Supplementary Joint Report. Mr Helisma clarified some items but also casts doubt on the agreed amounts stating that:

> Where costs provided by the Respondents correlated with the MB Schedule, those costs were adopted. The accuracy of the costs submitted to the Experts could not be justified.[259]

[404] I have considered all the evidence before me to make findings of amounts, which on the balance of probabilities, reflect the costs that the Builder would have incurred in completing the works for which an adjustment in the Homeowners' favour ought to be made so that the Builder is placed in the same position as it would have been had the Homeowners not wrongfully prevented it from completing the works under the Contract.

Item 58 & 59 - joinery – handles to joinery

[405] The Homeowners do not pursue these items. Joinery was completed by the Builder's subcontractor after termination at no additional costs to the Homeowners.

Item 60 – supply and install door stop

[406] I find the reasonable costs to complete is $24.14.

[407] The experts agreed the reasonable cost to supply and install was $50.16. Mr Helisma changed his opinion to $24.14 after making enquiries on the pricing of the particular door stop to be supplied. For the reasons set out earlier, I prefer Mr Helisma's evidence.

[408] Having regard to the reasonable cost to complete this was minor incomplete work.

Item 62 – painting – window frame

[409] The Homeowners do not pursue this item. The experts agreed no separate amount was payable and that any work required was included in item 47.

Item 63 - painting – door frame

[410] The Homeowners do not pursue this item. The experts agreed no separate amount was payable.

Item 64 - final coat paint to all walls

[411] I find the Homeowners are not entitled to a further adjustment in their favour.

[412] Mr Carpenter's report does not identify why a final coat of paint to all walls was required. Mrs Morgan's evidence was that all painting was complete except for minor defective work. The Homeowners dispute this contention.

[413] I am not satisfied on the balance of probabilities that this was incomplete work.

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257 Exhibit 33.
258 Exhibit 34.
259 Exhibit 30, [14], [15].

[414] If I am incorrect, this work would be minor incomplete work as the experts agreed the reasonable cost was $540.70.

[415] In any event, the evidence is that the painting PS had been exceeded.[260] Mrs Morgan's evidence is, and I accept, that such work, if required to be completed, would have been at additional cost to the Homeowners.[261]

Item 65 - remove door and paint base – re-hang

[416] I find the reasonable costs to complete is $77.60.

[417] Mr Helisma clarified that the amount of $100 identified in the Supplementary Joint Report was the claimed actual cost, which was inserted in error. His evidence is that in the absence of evidence to justify this cost, the experts agreed the reasonable cost was $77.60. I accept the independent experts' evidence.

[418] Having regard to the agreed reasonable cost to complete this was minor incomplete work.

Item 66 – mechanical – supply & install mechanical grille

[419] I find the reasonable cost to complete this work was $199. A credit in excess of this amount has been allowed against the PC allowance. The Homeowners are not entitled to further adjustments in their favour.

[420] Mr Morgan's evidence was that the Builder had the custom-made grilles in store and would have completed this work prior to handover.[262]

[421] The Supplementary Joint Report identifies this work was performed by the air-conditioning contractor. Ducted air-conditioning was a PC item with a $23,000 allowance. The evidence is that a credit adjustment for air-conditioning was issued in the sum of $2,500 (excl GST).[263]

[422] The experts agreed, and I accept, that the reasonable cost to complete was $199. Having regard to the agreed reasonable cost to complete this was minor incomplete work.

Item 67 – electrical – install bedhead light

[423] I find the reasonable cost to complete was $88.25. The PS allowance has been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[424] The evidence is that the actual cost was $149.62. The experts agreed the reasonable cost to complete was $88.25. I accept the independent experts' evidence. Having regard to the agreed reasonable cost to complete this was minor incomplete work.

[425] Electrical work is a PS item with an allowance of $11,000.[264] Mr Morgan gave evidence that the electrical allowance had been exceeded prior to the date of

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260 Exhibit 9, annexure 25, p 146.
261 Exhibit 31.
262 Exhibit 26, [109].
263 Exhibit 26, annexure 6, p 65.
264 Exhibit 9, annexure 4, Schedule 4.

purported termination.[265] The Homeowners accept that they agreed to a variation in January 2015 for electrical work over the budgeted PS allowance.[266]

[426] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[267]

Item 68 – Master bedroom - Ceiling light and fan installation

[427] The PS allowance has been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[428] The experts agreed the reasonable cost was $88.25. Mr Helisma clarified that the MB report did not refer to fans and referred only to the incomplete installation of ceiling light and that this had been overlooked at the conclave.[268] In his view the item should be reduced to installation of a light only. In his original report he estimated the cost as $45.27.

[429] Mr Morgan's evidence is that the Builder had supplied and installed three fans in accordance with the contractual BVN Donovan Hill drawings, including the one for the master bedroom. His evidence was that the Builder had applied a credit for supplied lighting against the practical completion claim.[269]

[430] This claim was in respect of installation only. The evidence is that the electrical PS allowance had been exceeded at the time of the purported termination. If the Builder had been allowed to complete this would have been additional work at the cost of the Homeowners.

[431] Having regard to the reasonable cost to complete this was minor incomplete work.

[432] Mrs Morgan's evidence is, and I accept, that any such work, when completed, would have been at additional cost to the Homeowners.[270]

Item 71 - Mirror to vanity in master en-suite

[433] I find the reasonable cost to complete was $224.19.

[434] Mr Morgan's evidence is that this was part of the joinery PC item, which allowance had been exceeded. The item relates to fixing the mirror not to the supply, which I accept formed part of the joinery sub-contractor's scope of work.[271]

[435] I find that the fixing of the mirror was incomplete work. Joinery was a PC and not a PS item allowance and so an adjustment is appropriate.

[436] The experts agreed, and I accept, the reasonable cost was $224.19.

[437] Having regard to the reasonable cost to complete this was minor incomplete work.

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265 Exhibit 26, annexure 4.
266 Exhibit 39.
267 Exhibit 31.
268 Exhibit 35, attachment D, line 16.
269 Exhibit 26, annexure 11; Exhibit 27.
270 Exhibit 31.
271 Exhibit 26, annexure 9, p 78.

Item 72 – en-suite - supply & install shower screen

[438] I find that this was incomplete work at the time of purported termination and that the reasonable cost to complete was $1,500. I find the Homeowners are entitled to a further adjustment of $460.50.

[439] The Contract provided for a Shower Screen PC item allowance in the amount of $2,500.[272] The evidence is that adjustment note 310 dated 31 March 2015 was issued in respect of shower screens in the sum of $1,513.64, being the remaining allowance of $1,376.04 plus GST.[273]

[440] The experts agreed, and I accept, that the reasonable cost to complete was $1,500, comprising $945 for supply 'plus 3 hours'.

[441] The reasonable cost to complete should be reduced by $945 plus GST[274] for supply of the screen so that there is not a double accounting for this work in view of the credit note.

[442] The Builder contends that this item falls within the scope of joinery work, which is a PS allowance.[275] As highlighted earlier, joinery was in fact a PC item not a PS item. I am not satisfied that the installation of a shower screen is joinery work. Such work usually involves wooden components. I am not satisfied that installing a shower screen involves wooden components.

Item 73 – en-suite - supply & install concrete vanity benchtop

[443] I find that this was incomplete work at the time of purported termination and that the reasonable cost to complete was at least $500. The Homeowners are not entitled to any adjustment in their favour.

[444] The Builder contends that the item fell within the joinery PS item allowance, which had been exceeded.[276] Mr Wyatt gave evidence that James Gatehouse of Mixed Element attended to finish installing concrete benchtops including in the en-suite after the purported termination and prior to when the new builder commenced on or about 15 June 2015.[277] Mixed Element's quote for the en-suite top was to supply and install for $620 (incl GST).[278] Mrs Wyatt's evidence was that installation commenced on or about 7 April 2015.[279]

[445] As the sub-contract with Mixed Element was for the supply and installation, I accept that although the joinery allowance was a PC allowance this work fell within the allowance, which had been exceeded at the time of the purported termination.

[446] The experts agreed the reasonable costs was $500. Mr Helisma clarified that there was really no detail allowing the experts to quantify this item and that it should be reviewed. In view of the Mixed Element quote I accept that the reasonable costs to complete was at least $500 but not more than $620. Having regard to the reasonable costs to complete, I find this was minor incomplete work.

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272 Exhibit 9, annexure 4, Schedule 4.
273 Exhibit 26, annexure 6, p 67.
274 $1,039.50.
275 Final submissions filed 19 October 2016, attachment 3.
276 Submissions 19 October 2016, attachment 3.
277 Exhibit 28.
278 Exhibit 10, annexure 10, p 85.
279 Exhibit 10, [112].

[447] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[280]

Item 74 – en-suite fix joinery handles

[448] I find that this was incomplete work at the time of purported termination and that the reasonable cost to complete was $210. The Homeowners are not entitled to any further adjustment.

[449] The Builder contends that the 'joinery PS' item allowance had been exceeded. Bika's quote included fitting of handles.[281] The evidence is that Bika completed its scope of work after the purported termination at no additional cost to the Homeowners.

[450] In the absence of other evidence, I accept the experts' evidence that the reasonable costs to complete was $210. Having regard to the reasonable costs to complete, I find this was minor incomplete work.

Item 75 – en-suite - supply & fix vanity joinery unit

[451] I find that this was incomplete work at the time of purported termination and that the reasonable cost to complete was $105. The Homeowners are not entitled to any further adjustment.

[452] Mr Morgan's evidence is that this item had been installed by Bika prior to the purported termination.[282] The MB report identifies this as incomplete work.[283] I prefer MB's evidence as the independent expert.

[453] The evidence is that Bika completed its scope of work after the purported termination at no additional cost to the Homeowners.

[454] The experts agreed the reasonable cost to complete was $105. Having regard to the reasonable costs to complete, I find this was minor incomplete work.

Item 76 – en-suite - soft closer – main bathroom

[455] I am not satisfied that the Contract called for a soft closer toilet in the main bathroom. I am not satisfied that this was incomplete work.

[456] The Homeowners do not pursue this en-suite item but do pursue the failure to supply and install a soft closer toilet in the main bathroom.[284] The experts agreed the reasonable cost to supply and install was $276.

[457] The evidence is that sanitary ware was a PC item with an allowance of $8,000.[285] Mrs Morgan's evidence is that the sanitary ware allowance was exhausted.[286] The evidence is that the plumbing PS had been exceeded. The Homeowners accept that

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280 Exhibit 31.
281 Exhibit 26, p 78, p 79.
282 Exhibit 26, annexure 11.
283 Exhibit 35.
284 Exhibit 39, 3b.
285 Exhibit 9, annexure 4, schedule 4.
286 Exhibit 31, annexure A.

they agreed to a variation in January 2015 for plumbing over the budgeted PS allowance.[287]

[458] The Builder contends that a soft closer toilet was not specified for the main bathroom.[288] Mr Morgan's evidence is that the main bathroom toilet as specified by the Donovan Hill Revision E schedule dated 23 April 2014 was ordered.[289] The Homeowners do not point to any specific evidence that this schedule was incorrect or otherwise not applicable.

[459] Mrs Morgan's evidence is, and I accept, that if such work was incomplete work, when completed, it would have been at additional cost to the Homeowners.[290] Having regard to the reasonable cost to complete this would have been minor incomplete work.

Item 77 – fix tapware, mixers and spouts

[460] I find the reasonable cost to complete this work was $276. The plumbing PS allowance has been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[461] The Builder contends, and I accept, that the plumbing PS item allowance had been exceeded. I also accept that this work falls within the scope of the plumbing PS item.

[462] The Contract provided for a PS item allowance for plumbing in the sum of $15,000. Mr Morgan gave evidence that the Plumbing allowance had been exceeded prior to the date of purported termination.[291] The Homeowners accept that they agreed to a variation in January 2015 for plumbing over the budgeted PS allowance.[292]

[463] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[293]

[464] The experts agreed the reasonable cost to complete this work was $276. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 78 & 79 – painting

[465] The Homeowners do not pursue these items.

Item 80 – electrical – supply and install lightbulbs

[466] I find the reasonable cost to complete this work was $50. The Homeowners are not entitled to further adjustments in their favour.

[467] The Builder contends that a credit for the lighting PC allowance was provided and the electrical PS item had been exceeded at the time of the purported termination.

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287 Exhibit 39.
288 Exhibit 26, annexure 11.
289 Exhibit 27.
290 Exhibit 31.
291 Exhibit 26, annexure 5.
292 Exhibit 39.
293 Exhibit 31.

[468] The evidence is that credit note 311 dated 31 March 2015 was issued in the amount of $2,719.59, being $2,472.35 plus GST.[294] The Homeowners accept that they agreed to a variation in January 2015 for electrical work over the budgeted PS allowance.[295]

[469] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[296]

[470] The experts agreed the reasonable cost was $50. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 82 – skylight window frame paint

[471] I find this item duplicates the work in item 47. The Homeowners are not entitled to further adjustment in their favour.

[472] The experts agreed the reasonable cost was $99. Mr Helisma clarified, and I accept, that this work was incorrectly included as incomplete work as the work had already been included as item 47 and the costs to complete incomplete work should be reduced.

[473] In any event, this item relates to minor incomplete painting and the painting PS had been exceeded prior to the purported termination, so no adjustment in the Homeowners' favour is appropriate.

Item 84 – loft - push closer to door

[474] I find the reasonable cost to complete this work was $24.14.

[475] Mr Morgan's evidence is that this item had been installed prior to the purported termination.[297] I prefer the evidence of the independent experts.

[476] The experts agreed the reasonable cost was $50.16. Mr Helisma changed his opinion to $24.14 after making enquiries on the pricing of the particular door stop to be supplied. I prefer the evidence of Mr Helisma.

[477] Having regard to the reasonable cost to complete this was minor incomplete work.

Item 85 - fix loft joinery handles

[478] I find that this was incomplete work at the time of purported termination and that the reasonable cost to complete was $210. 40. The Homeowners are not entitled to further adjustment in their favour.

[479] The Builder contends that the 'joinery PS' item allowance had been exceeded. Although the joinery allowance was a PC allowance, Mr Morgan's evidence is that Bika's quote included fitting of handles.[298] I accept Bika's quote included fitting of handles.[299] The evidence is that Bika attended to completing its scope of work after the purported termination at no cost to the Homeowners.

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294 Exhibit 26, p 68.
295 Exhibit 39.
296 Exhibit 31.
297 Exhibit 26, annexure 11.
298 Exhibit 26, p 94.
299 Exhibit 26, p 78, p 79.

[480] The experts agreed the reasonable cost was $210.40 although the report notes that 'scope not provided'.

[481] In the absence of other evidence, I accept the experts' evidence that the reasonable costs to complete was $210.40.

[482] Having regard to the reasonable cost to complete this was minor incomplete work.

Item 86

[483] No amount was agreed by the experts. The Homeowners do not pursue this item.

Items 88, 89, 90 & 95 - painting

[484] No separate amount was agreed by the experts. The Homeowners do not pursue these items.

Item 96 – install wall light

[485] I find the reasonable cost to complete this work was $50.16. The electrical PS had been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[486] The Builder contends that the electrical PS item had been exceeded at the time of the purported termination. The Homeowners accept that they agreed to a variation in January 2015 for electrical work over the budgeted PS allowance.[300]

[487] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[301]

[488] The experts agreed the reasonable cost was $50.16. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 98 – Kitchen – removal of timber stud wall to entry

[489] I find the reasonable cost to complete this work was $157.80.

[490] The experts agreed, and I accept, that the reasonable cost was $157.80.[302] Having regard to the reasonable cost to complete, this was minor incomplete work.

Item 100 – manage installation of concrete kitchen bench tops

[491] I find the reasonable cost to complete this work was $420.80.

[492] Mixed Element's quote for the kitchen benchtop and island was to supply and install for $6,540 (incl GST).[303] The Builder contends that the 'joinery PS' item allowance had been exceeded. The joinery allowance was a PC allowance. This item appears to be in respect of the Builder's co-ordination with the supplier of the benchtops. I am not satisfied that this work falls within a PC allowance as distinct from a PS allowance.

[493] Mr Wyatt gave evidence that James Gatehouse of Mixed Element attended to finish installing concrete benchtops including in the kitchen after the purported termination

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300 Exhibit 39.
301 Exhibit 31.
302 See items 34 and 40 above.
303 Exhibit 10, annexure 10, p 85.

and prior to when the new builder commenced on or about 15 June 2015.[304] Mrs Wyatt's evidence was that installation commenced on or about 7 April 2015.[305]

[494] The experts agreed, and I accept, the reasonable cost was $420.80. Having regard to the reasonable cost to complete, this was minor incomplete work. The Homeowners' purported termination prevented the Builder from undertaking this work and charging the Homeowners for it.

Item 101 - fix kitchen joinery handles

[495] I find the reasonable cost to complete this work was $420.80. The Homeowners are not entitled to further adjustments in their favour.

[496] The Builder contends that the 'joinery PS' item allowance had been exceeded. The joinery allowance was a PC allowance. Bika's quote included fitting of handles.[306] The evidence is that Bika completed its scope of work after the purported termination at no additional cost to the Homeowners.

[497] The experts agreed the reasonable cost was $420.80. Having regard to the reasonable cost to complete, this was minor incomplete work.

Item 102 – Completion of rangehood installation including sheeting, tiling and making good

[498] I find the reasonable cost to complete this work was $500.

[499] The Homeowners accept that the rangehood had been installed at the time of purported termination.[307] Mr Morgan's evidence is that there was a small amount of tiling to be completed.[308]

[500] I prefer the evidence of MB, the independent expert, that there was more than tiling work to be performed.

[501] The evidence is that tiling was a PS allowance, which had been exceeded at the time of purported termination and the supply of tiles was a PC allowance, which had also been exceeded.[309] In the absence of evidence as to the breakdown of the costs as between tiling and other work, I accept that the reasonable cost was not more than $500 as agreed by the experts. Having regard to the reasonable cost to complete, this was minor incomplete work.

Item 103 & 105 – fix tapware, mixers & spouts and install zip tap

[502] I find the reasonable cost to complete this work was $286.44. The plumbing PS allowance had been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[503] The Contract provided for a PS item allowance for plumbing in the sum of $15,000. Mr Morgan gave evidence that the Plumbing allowance had been exceeded prior to

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304 Exhibit 28.
305 Exhibit 10, [112].
306 Exhibit 26, p 78, p 79.
307 Exhibit 39, [4b].
308 Exhibit 26, annexure 11.
309 Exhibit 31, annexure A.

the date of purported termination.[310] The Homeowners accept that they agreed to a variation in January 2015 for plumbing over the budgeted PS allowance.[311]

[504] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[312]

[505] The experts agreed the reasonable cost to complete this work was $286.44. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 104 – dishwasher supply & install

[506] I find the reasonable cost to complete this work was $4,000. The electrical and plumbing PS allowances for installation work has been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[507] Appliances were a PC allowance item in the amount of $12,000. Mr Morgan's evidence is that the dishwasher cost $3,051.50.[313] His evidence was that he had paid for the dishwasher, which was in storage and that the installation component involved electrical and plumbing trades. Both the electrical and plumbing PS allowance had been exceeded prior to the purported termination as referred to earlier in these reasons. The evidence is that Bika returned and completed its scope of work at no additional cost to the Homeowners.[314]

[508] The experts agreed the reasonable cost was $4,000. Having regard to the cost of the dishwasher appliance I find that reasonable costs of installation was $948.50.

[509] Mrs Morgan's evidence is, and I accept, that such installation work, when completed, would have been at additional cost to the Homeowners.[315]

[510] If the Homeowners had not invalidly purported to terminate, the dishwasher held in storage would have been installed. I accept Mrs Morgan's evidence that the Builder attempted to return the dishwasher to the supplier, to mitigate its loss, but that request was refused.[316]

Item 106 – kitchen paint

[511] The Homeowners do not pursue this item. No separate amount was agreed by the experts.

Item 107 – install kitchen appliances

[512] I find the reasonable cost to complete this work was $1,200. The electrical PS allowance had been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[513] The Builder contends that all appliances other than the dishwasher had been installed at the time of termination. The Homeowners contend that the cooktop, fridge, zip tap as well as the dishwasher had not been installed.

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310 Exhibit 26, annexure 5.
311 Exhibit 39.
312 Exhibit 31.
313 Exhibit 26, annexure 12.
314 Exhibit 39.
315 Exhibit 31.
316 Exhibit 31, [62].

[514] The experts agreed, and I accept, the reasonable cost is $1,200.

[515] As the kitchen benchtop supplier had not installed the benchtops prior to the purported termination I accept the Homeowners' evidence that the cooktop had not been installed. I prefer the evidence of MB, the independent expert.

[516] The Supplementary Joint Report identifies this work as electrical.[317] The electrical PS allowance had been exceeded prior to the purported termination as referred to earlier in these reasons. Having regard to the reasonable cost to complete this was minor incomplete work.

[517] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[318]

Item 108 – electrical – bench light

[518] The Homeowners do not pursue this item. No separate amount was agreed by the experts.

Item 109 – supply and install mechanical duct grille

[519] I find the reasonable cost to complete this work was $108.60. A credit in excess of this amount has been allowed against the PC allowance. The Homeowners are not entitled to further adjustments in their favour.

[520] Mr Morgan's evidence was that the Builder had the custom-made grilles in store and would have completed this work prior to handover.[319]

[521] The Supplementary Joint Report identifies this work was performed by the air-conditioning contractor. Ducted air-conditioning was a PC item with a $23,000 allowance. The evidence is that a credit adjustment for air-conditioning was issued in the sum of $2,500 (excl GST).[320]

[522] The experts agreed, and I accept, the reasonable cost is $108.60. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 110 – Concrete floor skim coat

[523] I find the reasonable cost to complete this work was $3,300.

[524] The experts agreed, and I accept, that the reasonable cost is $3,300.

Item 111 - seating

[525] The Homeowners do not pursue the claim for this item. The evidence is that the joiner completed the work after the purported termination at no cost to the Homeowners.

Item 113 – skirting to stairs

[526] I find the reasonable cost to complete this work was $63.

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317 Exhibit 34.
318 Exhibit 31.
319 Exhibit 26, [109].
320 Exhibit 26, annexure 6, p 65.

[527] Mr Morgan's evidence is that these were installed prior to the purported termination. MB's report identifies this as work to be completed. I prefer the evidence of MB, the independent expert.

[528] The experts agreed, and I accept, the reasonable cost to complete is $63. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 114 & 115 – painting

[529] I find the reasonable costs of attending to this minor defective work was $98.90.

[530] Mr Carpenter described the incomplete work as 'allow additional paint coat to uncompleted walls' and 'paint to skirting'.[321] Mr Morgan's evidence is that the painting work in this area had been completed prior to the purported termination and that the Homeowners were to supply and install wallpaper in this area.[322] Painting is a PS allowance in the amount of $23,000 and as noted earlier in these reasons the PS allowance had been exceeded.

[531] The experts agreed the reasonable cost is $842.90, which included $744 for walls and $98.90 for skirtings.[323] Mr Helisma clarified that the item should be reviewed based on advice that the walls were to be wallpapered and therefore the painting should be limited to skirtings at a reasonable cost of $98.90.

[532] Mrs Wyatt conceded that the walls were to be wallpapered by a third party and this work did not form part of the Builder's scope. Her evidence was that the walls were to be prepared for wallpaper and the ceiling, skirting and 'arks' were to be painted.[324]

[533] Mr Carpenter's report does not identify painting to ceilings and 'arks' as incomplete nor give any detailed information as to the state of the 'uncompleted walls'. There is insufficient evidence for me to be satisfied that the walls had not been prepared as required. I am not satisfied, on the balance of probabilities, that this was incomplete work. If I am incorrect, this work would be minor incomplete work. In any event, the evidence is that the painting PS had been exceeded so no adjustment in the Homeowners' favour would be made.[325]

[534] Mrs Morgan's evidence was that all painting was complete except for minor defective work. The Homeowners dispute this contention.

[535] I accept Mr Helisma's evidence that the skirting's painting should more properly be regarded as defective work. Having regard to the agreed costs, this is minor defective work which would ordinarily be completed prior to completion.

Item 116 – electrical - install wall light

[536] I find the reasonable cost to complete this work was $50.16. The electrical PS allowance had been exceeded. The Homeowners are not entitled to further adjustments in their favour.

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321 Exhibit 35, attachment D, p 2.
322 Exhibit 26, annexure 11.
323 Exhibit 35, attachment D, p 2 of 4.
324 Exhibit 36, [5].
325 Exhibit 9, annexure 25, p 146.

[537] Mr Morgan's evidence is that these were installed prior to the purported termination. MB's report identifies this as work to be completed. I prefer the evidence of MB, the independent expert.

[538] The electrical PS allowance had been exceeded prior to the purported termination as referred to earlier in these reasons.

[539] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[326]

[540] The experts agreed, and I accept, the reasonable cost to complete is $50.16. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 117 – Study – replace Laminex desk edging with timber

[541] I find the reasonable cost to complete this work was $100. The Homeowners are not entitled to further adjustments in their favour.

[542] The evidence is that this item fell within Bika's scope of works. The Homeowners accept that Bika attended to rectify and complete all its works at no additional cost.

[543] The experts agreed, and I accept, the reasonable cost to complete was $100. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 118 – door stop

[544] I find the reasonable cost to complete this work was $24.14.

[545] Mr Morgan's evidence is that this was installed prior to the purported termination. MB's report identifies this as work to be completed. I prefer the evidence of MB, the independent expert.

[546] The experts agreed the reasonable cost was $50.16. Mr Helisma changed his opinion to $24.14 after making enquiries on the pricing of the particular door stop to be supplied. I prefer Mr Helisma's evidence. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 119 & 120 - painting

[547] The Homeowners do not pursue these items. No separate amount was agreed by the experts.

Item 124 - fix Bed 1 joinery handles

[548] I find the reasonable cost to complete this work was $210.40. The Homeowners are not entitled to further adjustments in their favour.

[549] The Builder contends that the 'joinery PS' item allowance had been exceeded. The joinery allowance was a PC allowance. Bika's quote included fitting of handles.[327] The evidence is that Bika completed its scope of work after the purported termination at no additional cost to the Homeowners.

[550] The experts agreed the reasonable cost was $210.40. Having regard to the reasonable cost to complete this was minor incomplete work.

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326 Exhibit 31.

327 Exhibit 26, p 78, p 79.

Item 125 – door

[551] The Homeowners do not pursue the claim for this item. The item had been completed prior to Mr Helisma's inspection. No separate amount was agreed by the experts.

Item 126 – bed 1 - door stop

[552] I find the reasonable cost to complete this work was $24.14.

[553] The experts agreed the reasonable cost was $50.16. Mr Helisma changed his opinion to $24.14 after making enquiries on the pricing of the particular door stop to be supplied. I prefer Mr Helisma's evidence. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 127 – painting

[554] The Homeowners do not pursue this item. No separate amount was agreed by the experts.

Item 128 & 129 – painting

[555] I find the reasonable cost to complete this work was $50. The painting PS allowance had been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[556] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[328]

[557] The experts agreed, and I accept, the reasonable cost for painting the new skirting under the desk was $50. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 130 – remove temporary fan

[558] I find the reasonable cost to complete this work was $68.31. The electrical PS allowance had been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[559] The Builder contends that this item was pre-existing and was not part of the Builder's scope. The Homeowners dispute this contention.[329] Neither party referred me to specific contract documents in support of their contentions. MB's report identifies this as work to be completed. I prefer the evidence of MB, the independent expert.

[560] In any event, the electrical PS item allowance had been exceeded prior to the purported termination.

[561] Mrs Morgan's evidence is, and I accept, that such work, if required, when completed, would have been at additional cost to the Homeowners.[330]

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328 Exhibit 31.
329 Exhibit 39, [5].
330 Exhibit 31.

[562] The experts agreed, and I accept, the reasonable cost for attending to this item was $68.31. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 131 – supply & install new ceiling fan

[563] I find the reasonable cost to complete this work was $486.62. The electrical PS allowance had been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[564] Mr Morgan contends that this item was not part of the Builder's scope.[331] MB's report identifies this as work to be completed. I prefer the evidence of MB, the independent expert.

[565] In any event, the electrical PS item allowance had been exceeded prior to the purported termination.

[566] Mrs Morgan's evidence is, and I accept, that such work, if required, when completed, would have been at additional cost to the Homeowners.[332]

[567] The experts agreed, and I accept, the reasonable cost for this item was $486.62. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 132 - Supply and install ceiling light

[568] I find the reasonable cost to complete this work was $168.31. The electrical PS allowance had been exceeded and a credit has been allowed for the lighting PC allowance. The Homeowners are not entitled to further adjustments in their favour.

[569] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[333]

[570] The experts agreed, and I accept, the reasonable cost for this item was $168.31. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 133 – Bed 1 - supply and install new light switch cover

[571] I find the reasonable cost to complete this work was $88.31. The electrical PS allowance had been exceeded and a credit has been allowed for the lighting PC allowance. The Homeowners are not entitled to further adjustments in their favour.

[572] The electrical PS item allowance had been exceeded prior to the purported termination. Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[334]

[573] The experts agreed, and I accept, the reasonable cost for this item was $88.31. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 135 – Bed 2 – carpentry – door stops

[574] I find the reasonable cost to complete this work was $24.14.

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331 Exhibit 26, annexure 11.
332 Exhibit 31.
333 Exhibit 31.
334 Exhibit 31.

[575] Mr Morgan's evidence is that the door stop had not been able to be installed prior to the purported termination as the carpet had not at that time been installed.

[576] The experts agreed the reasonable cost was $50.16. Mr Helisma changed his opinion to $24.14 after making enquiries on the pricing of the particular door stop to be supplied. I prefer Mr Helisma's evidence. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 136 & 137 – painting

[577] The Homeowners do not pursue these items. No separate amount was agreed by the experts.

Item 140 – Bathroom – supply & install concrete vanity benchtop

[578] I find that this was incomplete work at the time of purported termination and that the reasonable cost to complete was at least $210.40. The Homeowners are not entitled to any adjustment in their favour.

[579] The Builder contends that the item fell within the joinery PS item allowance, which had been exceeded.[335] Mr Wyatt gave evidence that James Gatehouse of Mixed Element attended to finish installing concrete benchtops including in the main bathroom after the purported termination and prior to when the new builder commenced on or about 15 June 2015.[336] Mixed Element's quote for the bathroom top was to supply and install for $1,080 (incl GST).[337] Mrs Wyatt's evidence was that installation commenced on or about 7 April 2015.[338]

[580] As the sub-contract with Mixed Element was for the supply and installation, I accept that although the joinery allowance was a PC allowance this work fell within the allowance, which had been exceeded at the time of the purported termination.

[581] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[339]

[582] The experts agreed the reasonable costs was $210.40. In view of the Mixed Element quote I accept that the reasonable costs to complete was at least $210.40 but not more than $1,080. Having regard to the reasonable costs to complete, I find this was minor incomplete work.

Item 141 – Bathroom – supply and install door stop

[583] I find the reasonable cost to complete this work was $51.45.

[584] Mr Morgan's evidence is that this was installed prior to the purported termination. MB's report identifies this as work to be completed. I prefer the evidence of MB, the independent expert.

[585] The experts agreed, and I accept, the reasonable cost was $51.45. Unlike other doorstop items, Mr Helisma did not expressly change his view. Having regard to the reasonable cost to complete this was minor incomplete work.

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335 Submissions 19 October 2016, attachment 3.
336 Exhibit 28.
337 Exhibit 10, annexure 10, p 85.
338 Exhibit 10, [112].
339 Exhibit 31.

Item 142 - Bathroom – painting

[586] The Homeowners do not pursue these items. No separate amount was agreed by the experts.

Items 143 & 144 – painting

[587] I find that the reasonable cost to attend to this item of defective work was $202.80.

[588] Mr Morgan's evidence was that there were floor to ceiling wall tiles in this area and therefore only the ceiling and window frames would require painting and that this painting work had been completed prior to the purported termination.

[589] MB's report identifies this as work to be completed. In view of Mr Morgan's evidence, I find, that it is more likely than not, that this is work requiring rectification.

[590] The experts agreed, and I accept, that the reasonable cost was $ 202.80. Having regard to the reasonable cost, I find this was minor defective work.

Item 145 – Bathroom – electrical - supply & install 2 wall mount lights

[591] I find the reasonable cost to complete this work was $100 plus the cost of the lights. The electrical PS allowance had been exceeded and a credit has been allowed for the lighting PC allowance. The Homeowners are not entitled to further adjustments in their favour.

[592] The experts agreed the reasonable cost was $568.31. Mr Helisma clarified that this item should be reviewed. He considered MB may have included work, which had already been performed at that time. In his view $100 is reasonable to fit off the two external fittings. I prefer Mr Helisma's evidence as there is no explanation as to the MB estimate.

[593] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[340]

[594] Having regard to the reasonable cost to complete this was minor incomplete work.

Item 146 - Bathroom – fix tapware, mixers and spouts

[595] I find the reasonable cost to complete this work was $136.64. The plumbing PS allowance has been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[596] Mr Morgan gave evidence that the Plumbing allowance had been exceeded prior to the date of purported termination.[341] The Homeowners accept that they agreed to a variation in January 2015 for plumbing over the budgeted PS allowance.[342]

[597] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[343]

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340 Exhibit 31.
341 Exhibit 26, annexure 5.
342 Exhibit 39.
343 Exhibit 31.

[598] The experts agreed, and I accept, the reasonable cost was $136.64. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 151 – Downstairs entry – carpentry – track rail to slide laundry door

[599] I find the reasonable cost to complete was $205.20.

[600] Mr Morgan contends that in order to save on costs it was agreed that the existing sliding door to the carport was to be removed and reused with the existing track for the laundry door.[344] The Homeowners dispute this contention.[345]

[601] Mr Morgan does not point to a variation documenting this agreement. The Builder was obliged to document any such variation.[346] In the absence of such documentation I am not satisfied that such an agreement was made.

[602] The experts agreed, and I accept, the reasonable cost was $205.20. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 152 – Downstairs entry – electrical – supply and install new light switch cover

[603] I find the reasonable cost to complete this work was $50.16. The electrical PS allowance had been exceeded and a credit has been allowed for the lighting PC allowance. The Homeowners are not entitled to further adjustments in their favour.

[604] The electrical PS item allowance had been exceeded prior to the purported termination.

[605] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[347]

[606] The experts agreed, and I accept, the reasonable cost was $50.16. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 153 – Downstairs entry – electrical – connect ceiling light to entry switch

[607] I find the reasonable cost to complete this work was $50.16. The electrical PS allowance had been exceeded and a credit has been allowed for the lighting PC allowance. The Homeowners are not entitled to further adjustments in their favour.

[608] Mr Morgan's evidence is that there was no ceiling light scheduled for the entry.[348] I was not referred to any particular contract document to support this contention. MB's report identifies this as work to be completed. I prefer the evidence of MB, the independent expert.

[609] In any event, the electrical PS item allowance had been exceeded prior to the purported termination. Mrs Morgan's evidence is, and I accept, that such work, if required, when completed, would have been at additional cost to the Homeowners.[349]

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344 Exhibit 26, annexure 11.
345 Exhibit 39, [6].
346 Exhibit 9, annexure 4, clause 16.
347 Exhibit 31.
348 Exhibit 26, annexure 11.
349 Exhibit 31.

[610] The experts agreed, and I accept, the reasonable cost was $50.16. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 154 – Downstairs entry – electrical – install wall light

[611] I find the reasonable cost to complete this work was $50.16. The electrical PS allowance had been exceeded. The Homeowners are not entitled to further adjustments in their favour.

[612] The electrical PS item allowance had been exceeded prior to the purported termination. Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[350]

[613] The experts agreed, and I accept, the reasonable cost was $50.16. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 155 – Multi-purpose room – finish off joinery base – now 'manage installation of joinery unit'

[614] I find the reasonable cost to complete this work was $200.20. The Homeowners are not entitled to an adjustment in their favour.

[615] The Builder contends that the joinery unit was installed prior to termination. Mr Morgan refers to photos attached to Mrs Wyatt's statement but does not identify which photographs.[351] I was unable to identify the photographs said to support this contention. The Homeowners dispute this.[352]

[616] Mrs Wyatt's evidence is that this work fell within Bika's scope of work and that Bika returned to complete this work after the purported termination.[353] I accept Mrs Wyatt's evidence. The evidence is that Bika returned and rectified or completed any work within their scope at no cost to the Homeowners.

[617] Mr Helisma clarified that upon review of the MB report there was no evidence of this incomplete work and therefore the scope of any incomplete work is unknown and the amount previously agreed in the amount of $200.20 should be deleted.

[618] The MB report provided and Mr Helisma initially agreed that the reasonable cost was $200.20. In the absence of other evidence, I accept this as the reasonable costs to complete this minor incomplete work.

Item 156 - Multi-purpose room – fix handles to joinery unit

[619] I am not satisfied that this was incomplete work under the Contract. Even if it was incomplete work the Homeowners are not entitled to any adjustment in their favour.

[620] The Builder contends that the 'joinery PS' item allowance had been exceeded. The joinery allowance was a PC allowance. Bika's quote included fitting of handles where specified.[354] The Bika proposal in evidence before me, which was accepted

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350 Exhibit 31.
351 Exhibit 26, annexure 11.
352 Exhibit 39, [7].
353 Exhibit 36, [7].
354 Exhibit 26, p 78, p 79.

by the Homeowners, shows that the multi-purpose room cabinetry was to have a handle free profile.[355] I am not satisfied that handles were part of the scope.

[621] In any event, the evidence is that Bika completed its scope of work after the purported termination at no additional cost to the Homeowners.

[622] The experts agreed the reasonable cost was $210.40. If the scope had been amended to include handles, having regard to the reasonable cost to complete this would be minor incomplete work.

Item 157 – painting sills

[623] The Homeowners do not pursue this item. No separate amount was agreed by the experts.

Item 158 – replace downlights

[624] The Homeowners do not pursue this item. No separate amount was agreed by the experts.

Item 159 – External works – entry gate

[625] The Homeowners do not pursue this item. No separate amount was agreed by the experts.

Item 164 – External – Front entry – lay tiling on screed outside multi-purpose room

[626] I find that the reasonable costs to complete was $1,210. The tiling PS item had been exceeded. The Homeowners are not entitled to further adjustment.

[627] The Builder contends that as at the time of the purported termination the outstanding work on the screed was only two square metres. The Homeowners dispute this contention.[356] Mr Morgan gave evidence that the area was nine square metres.[357]

[628] MB's report states that this item relates to installation only. I prefer the evidence of MB, the independent expert. Tiler was a PS item.[358] Mrs Morgan's evidence is that the Tiler PS allowance had been exceeded.[359]

[629] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[360]

[630] The experts agreed, and I accept, the reasonable cost was $1,210. I prefer the evidence of the independent experts. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 165 – Roof – gable end boards

[631] I find that the reasonable costs to complete was $360.40.

[632] Mr Morgan's evidence was that he did not understand what this item was referring to and queried whether it formed part of the Builder's scope of work or related to

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355 Exhibit 26, p 78, p 81.
356 Exhibit 39, [8].
357 Exhibit 26, annexure 11.
358 Exhibit 9, annexure 4, Schedule 4.
359 Exhibit 31, [55].
360 Exhibit 31.

defective painting work.[361] MB's report identifies this as work to be completed. I prefer the evidence of MB, the independent expert.

[633] The experts agreed, and I accept, the reasonable cost was $360.40. Having regard to the reasonable cost to complete this was minor incomplete work.

Item 166 – remove satellite dish

[634] I am not satisfied this was incomplete work under the Contract.

[635] Mr Morgan's evidence is that this did not form part of his scope of work.[362]

[636] The experts agreed the reasonable cost was $300. Mr Helisma clarified that after review of the drawings, in his opinion, the agreed amount should be deleted as there is no reference to this work.[363] I accept Mr Helisma's evidence.

[637] If this was incomplete work, having regard to the agreed reasonable cost, it was minor incomplete work, which would have been within the electrical PS allowance.

[638] Mrs Morgan's evidence is, and I accept, that such work, if required, when completed, would have been at additional cost to the Homeowners.[364]

Item 167 & 168 – pool frameless glazed balustrade and gate

[639] The Homeowners do not pursue these items. No separate amount was agreed by the experts.

Item 171&172 – side/rear – plumb sump out to roadway - supply & install sump pump

[640] I find that the reasonable costs to complete was $5,873.12. I am not satisfied that the Homeowners are entitled to any adjustment in their favour.

[641] Mr Morgan's evidence is that this work was within the scope of works described as water tank and pumps PC allowance in the amount of $3,500 and within the scope of the plumbing PS allowance in the amount of $15,000 and that the Builder held the pump in storage at the time of the purported termination, having paid for it.[365] The evidence is that the water tank and pumps PC allowance and the plumbing PS allowance had both been exceeded.

[642] The experts agreed, and I accept, the reasonable cost was $5,873.12 relying upon evidence of the actual costs incurred by the Homeowners. Mr Wyatt gave evidence that Niche Reform performed this work at a cost of $5,873.12.[366] The only invoice from Niche Reform I have located in the evidence before me is for other work.[367] There is no evidence before me as to the cost allocation between the supply of the pump, its installation and the other work. There is insufficient evidence upon which I could determine an adjustment in favour of the Homeowners.

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361 Exhibit 26, annexure 11.
362 Exhibit 26, annexure 11.
363 Exhibit 30.
364 Exhibit 31.
365 Exhibit 26, annexure 11.
366 Exhibit 1, annexure 62, p 70.
367 Exhibit 1, annexure 59, p 33.

[643] If the Homeowners had not invalidly purported to terminate, the sump pump held in storage would have been installed.

Item 173 – Plumb RWTs

[644] I find that the reasonable cost to complete was $299.88. The PS allowance had been exceeded. The Homeowners are not entitled to further adjustment in their favour.

[645] Mr Morgan's evidence is that this work fell within the plumbing PS allowance and that the plumbing PS allowance had been exceeded.

[646] Mrs Morgan's evidence is, and I accept, that such work, when completed, would have been at additional cost to the Homeowners.[368]

[647] The experts agreed, and I accept, the reasonable cost was $299.88. Having regard to the agreed reasonable cost, it was minor incomplete work.

Summary

[648] I find that an adjustment in the Homeowners' favour in the amount of $8,367.85 in respect of incomplete work should be made.

[649] On my calculation the total reasonable cost of completing incomplete work at the time of the purported termination for which an adjustment in the Homeowners' favour should be made as it reflects the cost to the Builder to complete the work is $7,607.14, which includes items initially categorised as defective work, set out above. To this amount, I accept, an amount for preliminaries and fees at the rate of 10% of the costs should be applied.[369]

Other damages

[650] The Homeowners claim $10,780 for the costs of preparing the MB report. In view of my findings that the Homeowners did not validly terminate the Contract, the Homeowners are not entitled to this amount as damages.

[651] The Homeowners claim $649 to have a locksmith change the locks. In view of my findings that the Homeowners did not validly terminate the Contract, the Homeowners are not entitled to this amount as damages.

Summary

[652] The Homeowners are to pay the Builder damages in the amount of $35,535.77 calculated as follows:

(a)	Contract price	$ 603,434.26 (incl GST)
(b)	Variations	$ 82,455.57
Sub-total		$ 685,889.83
(c)	Less payments	$ 595,374.69
Sub-total		$ 90,515.14

368 Exhibit 31.
369 Exhibit 34.

(d)	Less adjustment credits	$ 26,048.05
Sub-total		$ 64,467.09
(e)	Less reasonable costs	
	(i) defects	$ 20,563.47
	(ii) incomplete	$ 8,367.85
Total payable to Builder		$ 35,535.77

Costs

[653] Although some submissions on costs have been made, I make directions for submissions in relation to costs, including reserved costs, so that those submissions may take into account my findings that neither party has succeeded on all of the party's claims.