DISTRICT COURT OF QUEENSLAND

CITATION:	*Pescott v Noonbrace Pty Ltd t/as Jason Burr Constructions* [2010] QDC 81
PARTIES:	**DEAN PESCOTT and CATHY PESCOTT** (applicants) v **NOONBRACE PTY LTD t/as JASON BURR CONSTRUCTIONS** (respondent)
FILE NO:	2695 of 2009
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Commercial and Consumer Tribunal
DELIVERED ON:	12 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	16 February 2010
JUDGE:	Robin QC DCJ
ORDER:	**Leave to appeal, appeal allowed, with judgment for the applicants for increased sum.**
CATCHWORDS:	*Byrnes v Jakona Pty Ltd* [2002] FCA 41, cited *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, considered *Federal Commerce v Molena Alpha* [1979] AC 757, cited *Fitzgerald v Masters* (1956) 95 CLR 420, considered *Fruition Marketing No. 2 Pty Ltd v Advance National Services Pty Ltd* [2009] QSC 88, considered *McDonald v Douglas Shire Council* [2002] QCA 387, cited *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359, cited *Summers v The Commonwealth* (1918) 25 CLR 144, considered *Wenn v Café San Paul Pty Ltd* [2007] QDC 217, cited *Commercial and Consumer Act 2003* (Qld), s 100 *Domestic Building Contracts Act 2000* (Qld), s 66 Application for leave to appeal Tribunal decision in a building dispute – Tribunal rejected Owner's claim for cost of completing residence on basis the parties had abandoned the building contract (no contention to that effect being made) – requisite error of law found in Tribunal's failure to recognise Owner's entitlement at common law (over and

above rights under the contract) to determine the contract for repudiatory breach by the builder – whether an unjustified progress claim could be a breach of contract.

COUNSEL: S J Given for the applicants

T Pincus for the respondent

SOLICITORS: Files Stibke for the applicants

Everingham lawyers for the respondent

[1] **ROBIN QC DCJ:** This is an appeal from the Commercial and Consumer Tribunal which under s 100(1) of the *Commercial and Consumer Tribunal Act 2003* lies only by leave of the Court on the ground of error of law or excess or want of jurisdiction. Only error of law is contended for here.

[2] To obtain leave, the applicants must show a reasonable prospect of establishing an error of law and that it was one which could have materially affected the decision under appeal: *McDonald v Douglas Shire Council* [2002] QCA 387 [5] and [24].

[3] The parties entered into a building contract for construction of a residence. Certain difficulties delayed the start of construction and thereafter the parties found it difficult to get on. The Tribunal became involved when Noonbrace commenced a proceeding to recover the progress payment it claimed on the basis of completing the "pre-paint" stage. Noonbrace was successful in that, establishing an entitlement to $75,818.99 and in addition $18,879.00 interest (calculated at 15% under the building contract) for late payment. The amount of the progress payment proper had been paid into the Tribunal by the Pescotts.

[4] The Tribunal proceeding was commenced on 9 January 2008. Other issues than the progress payment were presented to the Tribunal for its decision. Noonbrace failed in respect of claims for certain extras or variations because a requirement for writing was not satisfied. Noonbrace claimed for a small amount of painting, but did no further work. The defects in the builder's work were substantial. The Tribunal had evidence as to the cost of rectifying defects from Mr Lack, of $82,000.00 and Mr Loi in an amount of a couple of thousand dollars higher; the former's evidence was preferred and the Pescotts were adjudged entitled to the $82,000.00 plus a few days' liquidated damages for delay to 31 December 2008. The poor quality of the work may be judged from the cost to repair defects looming so large in comparison with the total contract price which was to be paid in accordance with:

"METHOD B

The parties agree:

(i) that the **Progress Payments** set out in Section 66 of the Act do not apply; and

(ii) that instead, the percentages of the **Contract Price** and amounts payable at the completion of each Stage are as follows:

Note: The maximum Deposit cannot be more than 5% if the Contract Price is $20,000 or greater and 10% if less than $20,000. The amounts claimed must be directly related to the progress of the Works

State reason why Method A is not appropriate MORE COSTS INVOLVED IN GETTING TO FRAME ETC

Name of Stage or Description of Stage of Works if different from Method A	% of Contract Price	Value
Deposit	5% (refer note above)	√ $12,636.51
Base stage	10%	√ $25.273.00
Frame stage	25%	√ $63,182.50
Enclosed stage	20%	√ $50,546.00
	%	$
	%	$
Prepaint stage	30%	$75,819.00
Final stage	10%	$25,273.00
TOTAL	100%	$252,730.00"

[5] Under "Method A", in accordance with s 66 of the *Domestic Building Contracts Act*, the deposit could not have exceeded 5%, the frame stage would have been 15% and the enclosed stage 35%. There would have followed a "fixing stage" (20%) and "Practical Completion" (with the deposit aggregating 20%). There is no definition of pre-paint stage (by contrast with the other stages), which may have contributed to the dispute there was as to whether that stage had been reached.

[6] When differences arose between the parties over the appropriateness of the pre-paint stage progress claim, the Pescotts by their solicitors' letter of 9 January 2008 sought confirmation of Noonbrace's preparedness to participate in mediation/conciliation. By condition 28 of the building contract, disputes might be referred to the Queensland Master Builders Association for conciliation at any time, provided one of the parties was a member. That was the situation in respect of Noonbrace according to the box ticked in item 2 of the contract schedule.

[7] On the day of the letter Noonbrace lodged its application in the Tribunal. On 18 January 2008 a defence and counterclaim came in. The counterclaim sought rectification of matters referred to within 14 days, reduction of the "construction cost to the building" and/or reimbursement of the Pescotts for any "matters" not capable of being rectified, and liquidated damages. On 20 February 2008 a Tribunal member ordered the Pescotts to pay the amount of the outstanding pre-paint progress claim into the Tribunal's trust account by 4 March 2008 and that an inspector from the Queensland Building Services Authority inspect the premises and provide a report including details of the works the Authority considered defective or incomplete. An order for a further inspection by Mr Lack was made on 11 November 2008. A further amended defence and counterclaim (13 February 2009) quantified the reduction in construction cost and/or reimbursement as $91,217.00 for completion of the construction on top of Mr Loi's estimate of $84,575.00 for remedying defects identified by him and/or Mr Lack - also $30,000.00 for inconvenience, distress, etc., liquidated damages, some storage costs for "non-fitted joinery items", costs and orders

that the contract "be declared terminated and … that no further monies are payable to the Applicant".

[8] The most significant aspect is the $91,217.00 item, in respect of which the Pescotts failed in the Tribunal. I agree with the argument mounted on behalf of the Pescotts in this court and identify here the "error of law" that they must show to obtain leave to pursue the appeal, which leave is appropriate to be given.

[9] The effect of this aspect of the Pescotts' case is that (on Mr Loi's figures) they have to spend $91,217.00 to get construction finished, rather than $25,273.00 for the "final stage" as per "Method B". The building contract provided:

> "20. OWNER'S RIGHT TO TERMINATE CONTRACT
>
> 20.1 Owner's right to serve notice of intention to terminate contract
>
> If the Builder:
>
> (a) fails to proceed with the Works with due diligence or in a competent manner;
> (b) unlawfully suspends the carrying out of the Works;
> (c) refuses or persistently neglects to remove or remedy defective work or improper materials, so that the Works are adversely affected;
> (d) is unable or unwilling to complete the Works or abandons the Contract;
> (e) is in substantial breach of this Contract; or
> (f) fails to effect or maintain any insurance policy required by this Contract; the Owner may give a written notice to the Builder.
>
> (i) describing the alleged breach or breaches of the Contract by the Builder; and
> (ii) stating the Owner's intention to terminate the Contract unless the Builder remedies the alleged breach or breaches within a ten (10) Days after receiving the Owner's notice.
>
> 20.2 *If Builder fails to remedy breach, Owner may terminate the Contract*
>
> If the Builder fails to remedy the breach or breaches stated in any notice served by the Owner under Clause 20.1, the Owner may, without prejudice to any other rights or remedies, terminate this Contract by further written notice to the Builder, provided that such notice of termination shall not be given unreasonably or vexatiously and, if so given then any such notice of termination shall be null and void and of no force or effect.
>
> 20.3 *Owner may not terminate Contract in certain circumstances*
>
> The Owner may not terminate this Contact if the Owner is in substantial breach of this Contract.

20.4 *Owner's right to engage another Builder to complete the Works*

If the Owner terminates this Contract in accordance with this Clause, the Owner may engage another builder to complete the Work; and:

(a) if the reasonable cost to complete the Works exceeds the unpaid balance of the Contract Price, the excess amount is deemed to be a debt due and payable by the Builder to the Owner; or

(b) if the reasonable cost to complete the Works is less than the unpaid balance of the Contract Price, the remaining amount of the unpaid balance is deemed to be a debt due and payable by the Owner to the Builder.

21. OWNER'S STATUTORY RIGHTS TO TERMINATE CONTRACT

21.2 *Owner's right to terminate the Contract under Section 90 of the Act*

The Owner may terminate this Contract in accordance with section 90 of the Act if:

(a) the Contract Price increases by 15% or more after the Contract is entered into because of the operation of a cost escalation clause (as that term is defined in section 11 of the Act); or

(b) the Works have not been completed within one-and-a-half times (1 ½) the initial contract period, including allowed delays.

The Owner may only terminate the Contract under this Clause where the reason for the increased time or cost was something that could have been reasonably foreseen by the Builder on the date this Contract was entered into and, in the case of an increase in the Contract Price, the increase was not due to a delay for which the Owner or the Owner's Agent was responsible.

21.2 *Owner to give written notice to terminate contract*

To end the Contract under this Clause, the Owner must give to the Builder a signed written notice stating that the Owner is ending the Contract under Section 90 of the Act, and stating the ground, and the details of the ground, on which the Owner relies.

21.3 *Builder entitled to reasonable price if Contract ended*

> If the Contract is ended under this Clause the Builder is entitled to a reasonable amount for the value of the Works carried out under the Contract to the date the Contract is ended."

Clause 22 conferred rights on the builder corresponding with those in clause 20 belonging to the owner ("the Builder may, without prejudice…terminate…by further written notice" on failure to remedy as required by a written notice of intention to terminate) and clause 23 gave either party rights to terminate for various species of "insolvency": either party "may terminate…immediately on giving written notice", 23.2 Requirements of Notice providing that "a written notice under Clause 23.1 must state the ground or grounds…").

[10] Although not so describing itself, the Pescotts' claim for the cost of completion may be seen as the equivalent of what clause 20.4(a) provides for. The Tribunal appeared to approach the matter in this way, the reasons for decision stating:

> "70. The letter from the solicitors for the respondent dated 21 December 2007 gave a notice of intention of termination pursuant to clause 20.1, though the contract was never properly terminated pursuant to this clause as a subsequent letter was not forwarded. The parties have since operated on the assumption that the contract was not on foot. I am satisfied that the contract was abandoned by conduct or by implied agreement, and for the purposes of the liquidated damages clause I find the contract ended on the 31 December 2007. This is 10 days after the notice was given.
>
> 71 I am also satisfied that in a case where the contract was abandoned prior to the completion date, delay damages are only recoverable up to the date of the abandonment. The respondent is therefore only entitled to claim liquidated damages for 11 days at $20 per day or $220.00 from the 20 December 2007 until the 31 December 2007.
>
> 72 The respondents conceded that the contract has never been terminated pursuant to clause 20 but it was acknowledged that the contract has ended. The contract has not been formally terminated by either party by reason of the other's alleged breach. As stated above, I am satisfied the contract has been abandoned by conduct or by an implied agreement and consequently a claim for damages for loss of a bargain for breach of the contract is not now sustainable. Accordingly, the respondents' claim for the cost of completing the job is not permissible."

[11] Once a contract is abandoned, pursuit of claims or damages under it is problematic, as illustrated by the interesting old case of *Summers v The Commonwealth* (1918) 25 CLR 144 at 151 ff:

> " … the plaintiff took no step towards performing his contract, which originally was to have been completed in four months. He seems to have maintained his determination not to proceed on the defendant's basis, and to have acquiesced in considering his obligation at an end.

> The Department also considered it at an end, because they procured the marble from Walker and it has been used in London. After 18th June 1914 the next date I have is 4th May 1916, when the writ was issued.
>
> Whatever the terms of a contract may be, it is possible for the parties so to conduct themselves as mutually to abandon or abrogate it. A position not altogether dissimilar arose in the case of *De Soysa v De Pless Pol* (1). There, neither party had repudiated or refused to perform the contract, nothing in the nature of rescission had occurred, but, said Lord Atkinson for the Privy Council (2):- "One party to a contract is not bound to give to the other unlimited time after a day named to do that which the other has contracted to do.
>
> There must be some point of time at which delay or neglect amounts to refusal...In truth, the projects seem to have been to a great extent, if not altogether, abandoned by all the parties concerned." In my opinion, that is the legal position here. Informally, but effectively, the parties have so acted in relation to each other as to abandon or abrogate the contract.
>
> …
>
> The plaintiff's claim for damages, therefore, must fail for two reasons: (1) want of readiness and willingness to perform his contract on the agreed basis; (2) mutual abandonment or abrogation of contract.
>
> …
>
> There remains only the claim for the return of the £25 deposit. That having been deposited on the special terms of the written contract and that contract having been in law terminated, not by virtue of any provision contained therein but by virtue of tacit mutual abandonment, the abandonment must include abandonment of the right to retain the £25 any longer. …
>
> …
>
> The defendant counterclaims £50 for breach of covenant against assigning. … But as the Commonwealth intimated … it would not press this counterclaim, … I give judgment for the defendant upon it for the undoubted breach, for Is., but only on the basis mentioned, namely, that no damages are awarded on the plaintiff's claim.
>
> Judgment will be entered on the claim for the plaintiff Peterson for £25, the amount of the deposit, and on the counterclaim for the defendant for Is."

[12] The applicants submit that the Tribunal was wrong in law in finding abandonment. It appears (although the transcript of Tribunal proceedings is not available except in the

form of a digital recording) that no party submitted in the Tribunal that there had been abandonment; it is said that the principles accepted in *Fruition Marketing No 2 Pty Ltd v Advanced National Services Pty Ltd* [2009] QSC 88, at p 21 of Fryberg J's reasons are not satisfied:

> "It is accepted by both side (sic) before me that any termination of a contract by abandonment must be the result of mutual abandonment, that is, either both parties abandoning the contract and evidencing that abandonment by some action, or at least one party abandoning it and the other accepting that abandonment. Unless it can be seen that the plaintiff abandoned the compromise (sic) contract or accepted the defendant's abandonment of it, it would remain on foot."

[13] Abandonment, it seems to me, is not to be found lightly; it was not found by Fryberg J, nor by the High Court in *Fitzgerald v Masters* (1956) 95 CLR 420, despite the passage of many years with nothing done. The conclusion was different in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 where it was said at 434 that by the date of commencement of the proceedings "neither party, whatever may have been the reasons, regarded the contract as being still on foot. Neither party intended that the contract should be further performed. In the circumstances the parties must be regarded as having conducted themselves so as to abandon or abrogate the contract." In an English case mentioned in the helpful discussion in *Greig and Davis, The Law of Contract* at 1188-1194 is reference to a pithy description of Rowlatt J: "the matter is off altogether" (p 1190). It seems to me that when the matter was in the Tribunal, the parties were far from regarding the building contract as off altogether: they were pursuing their versions of their respective rights under it with vigour.

[14] I do not understand how it could be said against the Pescotts in particular that they expected nothing that might happen in future to be resolved by reference to the contract. The basis for the Tribunal's reliance on the parties' supposed "assumption that the contract was not on foot" is very likely, para 2 of Mr Given's written submissions dated 6 July 2009:

> "2. **HAS THE CONTRACT BEEN VALIDLY TERMINATED**
>
> 2.1 *Dorter & Sharkey*, Building and Construction Contracts in Australia, 2nd Edition, paragraph 12.16 express the view that there is a presumption that common law rights are not excluded in a contract unless there is an express intention to do so. Reference is made to *Architectural Installation Service Ltd v James Gibbons Windows Ltd*[1] where it was held that there was no reason for the implication of a term to the effect that the relevant termination clause was to be the only machinery for terminating the contract to the exclusion of the parties' common law rights of termination. The comments of Deane J in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[2] are noted where he stated that it is a matter of construction whether a specific contractual right to terminate excludes the common law right to terminate also.

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1 (1989) 46 VLR 91.

2 (1985) 157 CLR 17 at 59.

> 2.2 It is submitted that Clause 20 does not expressly or impliedly exclude the right to termination of the contract by means other than under that Clause. By the conduct of the parties, the contract is obviously no longer on foot."

There was no assertion or concession by the Pescotts of the contract being abandoned, on the basis of material available to me.

The context is an assertion being made that the contract's ceasing to be on foot was a consequence of the Pescotts' terminating it for breach by Noonbrace. Assuming that no debt arises under cl 20.4(a) (because no "further written notice" under cl 20.2 was given), the Owners in the circumstances were said to show "repudiatory breach" by Noonbrace as described in cases such as *Byrnes v Jakona Pty Ltd* [2002] FCA 41 at paragraphs 74-77 and *Federal Commerce v Molena Alpha* [1979] AC 757, as referred to therein. The written outline filed in support of the appeal in paragraph 3.9 states:

> "3.9 In *Kevest v Spiteri & Ors* (2002) NSWSC 22, the Court did not disturb the decision of the Tribunal set out at page 4 of the Judgment which, it is submitted correctly summarises that relevant principles applicable to the current case –
>
> > *"15. The reasons also contained the following:-*
> >
> > *"72. The respondent failed to build the house in accordance with council approved plans; they changed the engineering design of the house unilaterally thereby reducing the structural integrity of the building; it failed to comply with the default notice to rectify; it sought a progress payment in breach of the contract; it misled the applicants when signing the final plans; it suspended the works without proper reason.*
> >
> > *73. The applicants are also able to rely upon all breaches of the contract by the respondent. They are not limited to the matters raised in the notice. When all of the breaches are taken into consideration, the applicants were justified in terminating the contract: Architectural Installation Services Ltd v James Gibbons Pty Ltd (1989) 46 BLR 91.*
> >
> > *74. All of these matters are in breach of the contract. These matters together, constitute a fundamental breach of contract giving rise to the applicants' right to terminate as well as giving rise to the applicants' right to damages: Minion v Graystone Pty Ltd (1990) 1 Qd R 157.*
> >
> > *75. The Tribunal is satisfied that the notice served on the respondent by the applicants was a valid notice and that the respondent failed to comply with the notice served upon it. As such, the contract has been validly terminated by the*

applicants in accordance with their rights under the contract."

16. Despite what may be deduced from the Amended Points of Claim, it is common ground that the issue of a determination of the agreement at common law (by acceptance of repudiation) was not agitated by the parties. Also, it was common ground that issues related to the validity of the notices were also not agitated."

3.10 The effect of these authorities is that quite apart from the mechanism under the contract for termination, there had been a significant repudiatory breach of the agreement by the Respondent entitling the Appellants to treat the contract as at an end. That being the case, it is submitted that as a question of law, the Member was wrong in failing to find that the contract was properly terminated at law. The Appellants were, as part of their remedies, entitled to completion of the construction (less of course, a credit to the Respondent for the final stage payment under the contract)."

[15] The underlining is Mr Given's. The lack of response to the written notice the Pescotts did send would, in my view, be in the present circumstances within the principle; I have misgivings about the relevance of the progress claim aspect, being doubtful whether a progress claim made without justification can amount to a breach of contract. The second underlined passage is supported by *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 377 and other authorities. Even if the applicants' stance regarding the progress claim is wrong, that was not the sole ground open to them for reacting to "significant repudiatory breach" by treating the contract as at an end. The next step in the case is to rely on:

"3.11.1 *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 377 –

"But the rule is of general application in the discharge of contract by breach, and enables a party to any simple contract who fails or refuses further to observe its stipulations to rely upon a breach of conditions, committed before he so failed or so refused, by the opposite party to the contract as operating to absolve him from the contract as from the time of such breach of condition whether he was aware of it or not when he himself failed or refused to perform the stipulations of the contract. 'It is a long established rule of law that a contracting party , who, after he has became entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not'.

3.1.2 *Progressive Mailing House Pty Ltd v Tabalia Pty Ltd* (1985) 157 CLR 17 at 55 –

> "*It follows from the foregoing that, in the circumstances which had arisen, the landlord had both a contractual right to terminate the lease by re-entry under cl 10.1 for breach of covenant and, on the application of the ordinary principles of contract law, a common law right to terminate for fundamental breach. The landlord was not obliged to elect between the two grounds for terminating the lease: it was entitled to rely upon them both. A party entitled to terminate a contract for repudiation or fundamental breach may rely upon both a specific contractual right to terminate the contract and the common law right to terminate unless, as a matter of construction, the former excludes the latter: see eg Rawson v Hobbs (44); Shepherd v Felt and Textiles of Australia Ltd (45) and, generally, the cases referred to in Carter, Breach of Contract (1984), pars, 914, 1006. More specifically, where a contractual right to terminate for past breach and common law right to terminate for repudiation or fundamental breach exist concurrently, the reliance upon the contract involved in the exercise of the contractual right to terminate will not preclude the recovery of damages for loss of the future benefit of the contract by reason of repudiation or fundamental breach unless the contract expressly or impliedly so provides: cf. Yeoman Credit Ltd v Waragowski (46).*

3.11.3 *Mertens v Home Freeholds Co.* (1931) 2 KB 526 at 535 –

> *"I do not think that is the right measure. I think the right measure is correctly stated in Hudson n Building Contracts, 4th ed, vol 1., p.491 on the authority of an American case: Hirt v Hahn (1). 'B. agreed to erect a house for the plaintiff according to plans by a certain day. The defendants were B's sureties. After partly completing, B ceased work, and the plaintiff, after giving notice to the sureties, entered and completed and sued the sureties. Held, that the measure of damages was what it cost the plaintiff to complete the house substantially as it was originally intended, and in a reasonable manner, less any amount that would have been due and payable to B by the plaintiff had B completed the house at the time agreed by the terms of his contract." It is true that that is an American case. Though I cannot put my finger on them for the moment I feel satisfied that there are English cases which fix the same measure of damages. At any rate for the purpose of this case it is sufficient to say we all consider that the proper measure of damages for the breach of a building contract such as this."*

[16] I agree with Mr Given that failure to provide the further written notice under cl 20.2 to validly terminate the contract was not necessary for the appellants to validly terminate the contract. Clause 20.2 expressly acknowledges that the owner may have recourse to

other rights or remedies. *(*Cf *Wenn v Café San Paul Pty Ltd* [2007] QDC 217, [57]-[62].)

[17] The Tribunal appears to have overlooked those parallel rights, founding himself on the Pescotts not having taken requisite steps to protect their claim to compensation for loss of their bargain under the contract. I regard it as an error of law to fail to acknowledge the relevance of (let alone to give effect to) the common law rights identified.

[18] Although this consideration does not affect the determination of the various questions before the court, it might be noted that the consequences of the Tribunal's finding abandonment of the building contract rather than termination thereof "under the contract or otherwise at law" are dire for the appellants. Such a termination is a condition of a valid claim under the insurance which the Pescotts took out with the Building Services Authority in respect of the construction. A copy of the policy was provided to the court after the hearing by Mr Given, as he had foreshadowed. They are placed by the Tribunal rulings in the position of having to pay $91,217.00 (if Mr Loi is right) to complete work which Noonbrace was obliged to carry out for not much more than $25,000.00. That sum bears no relation to what might have been the cost to Noonbrace of doing the work; it is clear that a favourable structure for progress payments from its point of view, loading up the payments for earlier stages, was adopted.

[19] Leave to appeal ought to be granted on the basis of the error of law identified. I do not accept the contentions that there is a "repudiatory breach" in respect of pursuit of the pre-paint stage progress claim. The extent of defects in the work that was done, as accepted in the Tribunal, may qualify as "repudiatory breach", but there is room for argument about that. However, failure to comply with the clause 20.1 Notice in the circumstances does amount to repudiatory breach, as no reasonable justification appears for Noonbrace's failure to do anything thereafter, within 10 days or ever. The contract itself acknowledges that those circumstances as sufficient to permit termination by the Owner.

[20] The grounds for appeal relied on were stated in the Notice of Appeal subject to leave:

> "The Tribunal Member erred in law in:
> (a) failing to find that the contract in existence between the Appellants and the Respondent was terminated at law;
> (b) failing to find that the Appellants were entitled to liquidated damages as a result of the Respondent's failure to achieve practical completion under the terms of the contract;
> (c) failing to find that the Respondent was not entitled to recover from the Appellants the sum of $75,818.99 on the basis that the 'pre-paint' stage of construction had not been reached;
> (d) failing to find that the Appellants were entitled to have the construction of their premises completed;
> (e) failing to find that the sum of $91,217.00 worth of the work was needed to finish the construction to trigger the 'final stage' payment under the contract rather than the $25,273.00 allowed under the contract;

(f) failing to find that the Appellants were entitled to general damages for distress and inconvenience for breach of contract;

(g) failing to find that if the contract has been validly terminated, having regard to the original contract price, the agreed variations, the payments that have been made, the stage of construction reached, the rectification and other costs, in addition to the $75,818.99 to be returned from the Tribunal Trust to the Appellants, the Respondent is further indebted to the Appellants in the sum of $58,804.84 which is calculated in the following way –

-	Contract price	$252,730.00
-	PLUS variations	$ 7,867.32
-	LESS amount paid	$159,505.43
-	LESS credit for cabinet work	$ 8,500.00
-	LESS credit for bathroom/laundry/ kitchen fitout and tiles	$10,473.72
Total		***$82,118.17***
-	LESS costs of completing the construction	$ 91,217.00
-	LESS costs of rectifying the existing works	$ 84,575.00
-	LESS liquidated damages from Jan '08 to date	$ 10,950.00
-	LESS damages for inconvenience and distress, say	$ 30,000.00
	SUBTOTAL	(-$134,623.83)
-	LESS credit for the Tribunal refund	$ 75,818.99
TOTAL		**(-$ 58,804.84)**

(h) alternatively, failing to find that if the contract has not been validly terminated, the Respondent must pay to the Appellants the sum of $133,548.72, calculated in the following way –

-	Rectification costs	$ 84,575.00
-	PLUS credit for cabinet work	$ 8,500.00
-	plus credit for bathroom/laundry/ kitchen fit-out and tiles	$ 10,473.72
-	PLUS damages for inconvenience and distress, say	$ 30,000.00
TOTAL		**$133,548.72"**

[21] The first ground (a) is made out. At the appeal hearing (b) was not really pressed. It seems nothing has been done by the Pescotts to get their house completed. Surely accrual of liquidated damages comes to an end at some point. I am not persuaded that what the Tribunal has done requires correction. As to (c) Mr Given may be correct that, at common law, the progress payment for the pre-paint stage could not properly have been claimed on account of deficiencies in the work. However, the Tribunal, relying on Mr Dixon's definition of pre-paint stage (for lack of anything in the contract) found the stage had been reached and that deficiencies in the work done did not preclude the claim's being validly made. The Tribunal, having reached that point, noted contractual provisions requiring progress claims to be paid in full, albeit on a

provisional basis subject to appropriate adjustment in due course. That this is the nature of progress claims under building contracts in common use and also under relevant legislation is well known. The allowance of interest may appear harsh (and did to me); the Pescotts have been without use of the amount of a progress payment for nearly a year – by the same token. Noonbrace has not enjoyed the money, either. No doubt the contract authorises the exaction of interest. Mr Given made no complaint about it.

[22] I accept Mr Pincus' argument that in the circumstances of this appeal, everything to do with the contentious pre-paint stage progress claim concerns questions of fact, not of law. Mr Given's strenuous arguing that his clients could point to error of law in this regard I found unconvincing; further, on the assumption that the error of law that has been identified to support the appeal has the effect that the appeal itself is "at large", I am not persuaded that the Tribunal erred or requires correction on appeal.

[23] Ground (a) having been established, it follows in the circumstances under consideration that (d) is also established. So far as the evidence goes, there is only Mr Loi's estimate for the purposes of (e). My inclination is to accept that amount. To the extent that the Tribunal rejected Mr Loi, that seems to me to have just been in relation to the sum necessary to correct established defects, Mr Lack's slightly lower estimate having been accepted. I understand that some criticisms of Mr Loi's work were made, such as his lack of proper access to the premises and even to the specifications. Similar disabilities did not dissuade the Tribunal from accepting Mr Lack. I am satisfied it was open to the Tribunal to accept the $91,217.00 sum, and would be inclined to do so myself in the appeal. However, I think it may be just to allow Mr Pincus to establish, if he can by reference to the evidence the Tribunal had, that there is something wrong with Mr Loi's figure, perhaps that the matter ought to go back to the Tribunal for quantification of this aspect. I would prefer to spare the parties the trouble and cost of further hearings.

[24] Nothing emerged in the appeal, so far as I am aware, to support (f) as a legal or factual issue to concern this court. I am willing to allow Mr Given an opportunity to persuade me that that view is mistaken.

[25] I have some difficulty in fully understanding (g) and (h) which include detail not examined at the hearing of the appeal. There was a lot said in relation to Mr Loi's figure of $84,575.00, with suggestions made that it was not open to the Tribunal to reject that figure, that rejection somehow involved an error of law. I cannot agree. There is no reason to interfere with the Tribunal's preference for the marginally lower $82,000.00 advanced by Mr Lack.

[26] The parties will have the opportunity to make further submissions. They may be able to agree on final orders in the appeal which give effect to this court's views. I accept that I may have overlooked something which was an issue in the appeal and application for leave, as argued, but my present intention is to interfere with what has happened only by adjusting accounts to credit the Pescotts (or give them judgment) for $91,217.00 (or whatever is the appropriate amount) less $25,273.00. There may well be costs issues to sort out as well. The Tribunal intimated that no order for costs would be made, unless the parties presented argument otherwise; my impression is that neither side did. The outcome of the appeal, the necessary leave for which has been obtained, is that it will be allowed, with the consequence that the applicants' situation

will be markedly better than it was under the Tribunal determination. On the face of things, they should get costs.

[27] The court will hear further from the parties.