CITATION: *Thurlow & Innocenzi v The Architects Studio* [2005] NTMC 044

PARTIES:	ANDREW THURLOW & SUZANNE KATHERINE INNOCENZI v THE ARCHITECTS STUDIO
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court Act
FILE NO(s):	20307071
DELIVERED ON:	21 July 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	7, 8 & 9 February 2005
JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

CONTRACT – WHETHER BUDGET A TERM OF THE CONTRACT – WHETHER TIME A TERM OF THE CONTRACT – QUESTION OF LOSS

REPRESENTATION:

Counsel:

Plaintiff:	Ms Sally Gearin
Defendant:	Ms Judith Kelly

Solicitors:

Plaintiff:	Withnall Maley
Defendant:	Cridlands

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 044
Number of paragraphs:	99

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20307071

BETWEEN:

ANDREW THURLOW
1st Plaintiff

SUZANNE KATHERINE INNOCENZI
2nd Plaintiff

AND:

THE ARCHITECTS STUDIO
Defendant

REASONS FOR DECISION

(Delivered 21 July 2005)

JENNY BLOKLAND SM:

Introduction

1. This matter concerns an action in contract brought by Andrew Thurlow and Suzanne Innocenzi against The Architects Studio Pty Ltd "the defendant" claiming $29,879 plus costs of $695.72. The Amended Statement of Claim filed at the commencement of the hearing alleges breach of contract. Further the plaintiff alleges breach of duty of care; the duty owed is said to be the provision of a service in a professional and timely manner; the duty to inform and seek instructions as to design and/or modifications; to inform on the probability of failing to comply with budgets; to design within express budget estimates and within instructions.

2. Apart from some formal matters in the pleadings, the defendant denies the plaintiff's case, in particular that it was in breach of contract or that it was in breach of its acknowledged duty of care.

3. In short, the plaintiffs, Mr Andrew Thurlow and Ms Suzanne Innocenzi who purchased a block of land in Bayview in early 2000 and approached the defendants, 'The Architects Studio' to design their house to be built. The plaintiffs claim that following a number of meetings a contract was concluded with an essential term of the contract being that there was a budget of $250,000. The significance of that term is disputed by the defendants.

4. When tenders were sought for the construction of the house, tenders were first received in the order of $412,000 to $570,000. The plaintiffs allege that even after attempts to re-cost and review the project were made, the house which was the subject of the contract with the defendant could never be built.

5. The plaintiffs allege they spent certain particularised sums on fees, plans and associated documents and were still unable to build their house for the agreed sum. Part of the loss alleged by the plaintiffs are the amounts that the plaintiffs say they were entitled to by virtue of the *NT Government First Home Owner's Grant* and *Quick Start NT New Home Builders Grant* that they would have been entitled to had the house been completed in the relevant time frames which they assert are part of the contract.

6. Paragraph (2) of the Amended Statement of Claim alleges the Particulars of the Contract as follows:

    (a) For the defendants to design a home within the plaintiff's budget expressed to be $250,000;

    (b) For the defendant to provide the architectural services to the plaintiffs for a fee of $18,750.

(c) For the defendant to prepare the initial schematic design and to document and supervise design to completion of construction within 35 weeks;

(d) For the defendant to engage consultants on behalf of the plaintiffs to:

(i) Undertake structural design documentation;

(ii) Obtain building certification; and

(iii) Obtain plumbing certification.

(e) To provide a specialist consultant for a budget estimate before proceeding to documentation stage;

(f) To ensure the home was designed within the covenants for Lot 6163 Bradhurst Street, Bayview;

(g) It was an express term of the contract that the defendant prepare the documentation and supervise construction to ensure meeting of the requirements of the Northern Territory of Australia's First Home Owner's Grant and Quick Start Grant concessions.

Particulars of Concessions

(i)	First Home Owners Grant	$7,000.00
(ii)	Quick Start NT home building grant	$5,000.00

(h) To call in tenders in a timely fashion and in such a way as to provide a reasonable time frame to allow proposed tenderers sufficient time to properly prepare tenders;

(i) An implied term to give business efficacy to the contract that the defendant report to the plaintiffs regularly and seek

instructions for any design changes and for the plaintiffs to be kept informed of progress and given copies of design documentation;

(j) An implied term that the defendant would exercise all reasonable care skill and diligence in carrying out professional duties as an architect in or about the supervision of the professional services from the schematic design to completion and construction.

7. It is alleged that on or about 9 January 2001 the plaintiffs accepted the terms and conditions of contract for the defendant to provide architectural services.

8. For its part the defendant denies these particulars, save paragraphs (d), (f) and (i), and states that the plaintiffs provided the defendant with a "wish list" for the design of the house and informed the defendant that the *indicative* budget was $250,000; that the defendant recommended a cost consultant be engaged to provide a detailed cost estimate before proceeding to the documentation stage: (Further Amended Notice of Defence, para 2). The particulars as acknowledged by the defendant are:

(i) To provide the architectural services to the plaintiffs for the fee of $18,750.00 inclusive of GST, plus $1,890 for landscape drawings.

(ii) To design, in so far as was permissible, a house which was in accordance with the plaintiffs' instructions as varied from time to time.

(iii) To prepare the initial schematic design and to document and supervise design to completion of construction, which process would typically take 35 weeks.

(iv) To recommend to the plaintiffs companies which would be engaged by the plaintiffs to provide a detailed cost estimate of the house before proceeding to the documentation stage.

(v) To put the design documentation out to tender.

(vi) To negotiate with builders and assist the plaintiffs choose a builder with whom to contract, and administer the contract eventually entered into between the plaintiffs and the builder.

Evidence Called On Behalf of The Plaintiff

Ms Suzanne Innocenzi

9. Ms Innocenzi gave evidence on behalf of the plaintiffs. It was acknowledged that she was primarily involved in the consultation and negotiations with the defendant's architect Mr McNamara. Ms Innocenzi explained in evidence that at her initial meeting with a Mr Fletcher from The Architects Studio she was asked to provide a "wish list" (T p. 20); that she told Mr Fletcher she would like to spend "about $250,000" (T p. 20) and she asked if this would be adequate, to which he replied "yes". She asked about how long it would take to build the house and she says Mr Fletcher told her "approximately 35 weeks". After that meeting she sent a letter (Exhibit P1) to the defendant titled "wish list", the relevant parts stating:

> Following is the list you asked us to put together for our house.
>
> - 3 bedrooms – one with ensuite (this isn't hugely important).
> - 1 guest room – separate from our rooms (I was thinking maybe a separate bungalow?).
> - 1 main bathroom.
> - 1 kitchen – not huge.
> - 1 playroom for the children.

- 1 lounge room for the adults.
- 1 study/office – we don't like "study nooks', it needs to be a separate room.
- Laundry.
- Downstairs toilet.
- Separate "quiet room" where we can read, maybe this could be incorporated into the study.

Peter, we'd like the house to be quite open and airy, but it's important that the "private" rooms such as bedrooms and main bathroom are away from "public" spaces such as lounge room, kitchen etc. We'd also like rooms that open onto verandas since we'd spend a lot of time outside.

10. On 9 January 2001 the plaintiffs were written to by the defendant, a letter entitled

> "Re: Fee Offer For Architectural Services. Lot 6163 Bradhurst St. Bayview" (Exhibit P 2 in these proceedings).

The relevant parts at this stage are:

> "We have received your "wish list" of spaces which appears to be achievable within a budget which we understand to be $250,000. This cost of cause (sic) will vary depending on the overall area of the house and finishes selected. We will provide an opinion of probable cost with the initial sketch plans so as a brief can be finalised that is within your budget".
>
> "We understand that you would generally like the house to be open with good ventilation as well as maintaining privacy to bedroom areas and neighbours. This suits us as well as the work we usually do focuses on creating these types of environments with the aim of creating cool and comfortable spaces and consequently large savings in energy consumption".
>
> "Our fees allow for the full range of services, described in the publication attached 'You and Your Architect'. From the initial schematic design stage through to completion of construction, the process typically takes about 35 weeks plus a further 26 weeks to monitor the building for any defects that may subsequently arise".

"Our Fees – These are calculated in accordance with the Royal Australian Institute of Architects recommended fee scale. This takes into account the value of construction work proposed and the scope of architectural services involved".

"Based on a construction value in the order of $250,000 the RAIA scheduled fee is 10% of that figure of $25,000. We are able to offer the same level of service for 7.5% or $18,700 including GST".

"On this basis the various stages of our service would cost as follows:-

Stage 1	Schematic Design	(12.5%)	$2342.75
Stage 2	Design Development	(12.5%)	$2343.75
Stage 3	Contract Documentation	(50%)	$9375.00
Stage 4	Contract Administration	(25%)	$4687.50
		Total	$18750.00
Landscaping drawings			$1890.00

"Cost Consultant – We recommend engaging a cost consultant at the end of the sketch design phase to provide a detailed estimate of the cost of the house. The estimate is usually broken down into elements and consequently identifies where savings can be made, if required, as well as providing a good check that the building is within budget before proceeding to the documentation stage. The cost of a budget estimate would be in the order of $600. We can recommend reputable companies to you for this purpose".

11. The letter invites the plaintiffs to sign and return an acceptance if they decide to proceed. The evidence indicated that was done, although the defendant could not produce the acceptance on the call. (T p 22). The plaintiff alleges the booklet "You and Your Architect" referred to in the letter is incorporated into the contract as in these proceedings forms part of Exhibit P2.

12. Ms Innocenzi told the Court she viewed the initial sketch plan (Exhibit P4) on 23 January 2001 with Mr McNamara. She told Mr McNamara of changes

she wanted including separating the main bathroom and toilet; the position of the front staircase; the enclosing and extension of the middle deck; removal of the middle staircase; extension of the main bedroom; laundry to incorporate storage; extension of the main bedroom and extra storage downstairs: (T p 24), (and Exhibit D5). No discussion in relation to costs was involved at that time on her evidence, nor any discussion about times. She told the court the changes were made quickly and she approved the design. She told the Court she wanted to have the design costed by a quantity surveyor; she agreed to Rawlinsons on advice from the defendant being retained for that purpose at a cost of $425. Ms Innocenzi told the court she went through the costings obtained from Rawlinsons (Exhibit P8) and that she understood those to be costings for stage 1, the completed house (T pp 23-25).

13. Having read the document (P 8) she instructed some changes, as there were a number of items she had not had discussions about concerning finishes and aesthetics. At that point she identified that she did not want motorised adjustable louvres at $6,000 and did not want polycarbonate plastic (page 2 Exhibit P8), and Mr McNamara suggested glass instead. She also instructed she did not want three air conditioners and she understood that would be a saving of $5,400. Ms Innocnezi told the Court she noted the costing for stage 1 being $257,600 (Exhibit P7) and she had made some changes to the detailed costings (Exhibit P8) by taking some items out (T p 27).

14. Ms Innocenzi said that further she moved the walls of the living room and bedroom out and asked that the flooring not be cypress pine; she said at a later time she chose forest red gum. Ms Innocenzi said she was given no advice on the cost implications of this; her evidence was that she thought it was odd that there were such specific items in the Rawlinsons document and she says she was told it was all part of the design process – she believed she could suggest changes and changes would be made as part of the design process. (T p 27-28). Ms Innocenzi asked for the documentation process to

cease while she obtained finance – she said she understood the project was within budget and needed time to seek finance in the sum of $250,000. She subsequently obtained approval in principle and advised the defendant's architect accordingly. She then made changes to the kitchen layout of the living room. A further plan was prepared culminating in the plan in these proceedings Exhibit P9, a drawing dated August 2001. Ms Innocenzi was aware of and agreed there was a cost contingency noted in the Rawlinson's Cost Plan (P8, item 10) of $25,000. Ms Innocenzi told the Court her belief was that the contingency sum was proportional but that it wasn't spent at the stage of the costings. The plaintiff's belief, (based on P7 and P8) was that stage 1 was costed at around $213,000.

15. Although the dates are not precise in her evidence, Ms Innocenzi said the first call she had about the tenders was in late September 2001when she was advised that the first tender was $545,000. She explained to Mr McNamara that she would be unhappy about that and he told her to see when the rest of the tenders came in. The results of the tender process came in and are summarized in a letter to the plaintiffs from the defendant dated 19 October 2001 (Exhibit P11). Those tender submissions range from $545.667 to $412,500.00, and are acknowledged in that letter to be "well over your budget". Ms Innocenzi told the court her budget had not moved. Exhibit P11 also advises the plaintiff "Before proceeding any further we have requested the quantity surveyor review the tender drawings, providing a full tender estimate. We have also proposed to them a number of changes to the design, to bring the cost back to budget. Rawlinsons are presently costing these changes. Once this has been done we would like to meet with yourselves to discuss the direction with which to proceed. If it appears possible that a satisfactory outcome can be achieved in terms of both the cost and the design then we would recommend approaching the lowest tenderer, Gus Materazzo, to reprice the project incorporating the changes. Please note we are prepared to undertake any additional works required at

no extra cost to yourselves. We also understand the need to progress the work as quickly possible and will endeavour to do so".

16. One of the matters, in my view, that is emphasised by Exhibit P14, is the importance of the budget and tends to bolster my initial impression that objectively the contract budget was intended to be $250,000 and there is nothing in the letter comprising Exhibit P11, nor other correspondence before the court to indicate any variation from that. It is clear that tender results caused some significant shock to Ms Innocenzi.

17. Ms Innocenzi gave evidence (T35) of a re-costing by Rawlinsons (Exhibit P10) that she was not charged for. The total costing was $442,996. As a result of those re-costings the defendant prepared another set of drawings; Ms Innocenzi said that she was quite concerned with those drawings as the family living area in the middle had been made much smaller and, as there was a loft over it, she was concerned it would appear like a tunnel; she thought it appeared as an "upright tunnel" and that was obviously a problem for her; she told the court she made changes to that design as "Everything is sort of shrunk down and the living room had been chopped off basically" (T36). She said she did not instruct Mr McNamara to proceed to tender on that plan; she instructed that she needed an en suite in the main room but she was firm that she did not instruct him to proceed to tender. She said she agreed with his suggestion to get it re-costed.

18. Ms Innocenzi told the Court she was not shown the further document from Rawlinsons (Ex P14) until after the prices for builders "Jim and Pete" and "Lassitude" came back. She told the Court she did not go through this later Rawlinsons document in the same way as the first costings; she agreed savings were identified between herself and the defendant producing a cost estimate on the second tender plan on 26 November 2005 in the amount of $265,817. That amount is contained in a further document from Rawlinsons (Ex P15) that Ms Innocenzi says she didn't ever see; she said she received

another Rawlinsons document (Ex p12) that involved handwritten changes and savings, including reducing the floor area, and other changes suggested by Rawlinsons. The summary of the builders quotes are contained in Exhibit P16 (memo from Mr McNamara). Ms Innocenzi agreed she did not instruct anybody to build anything that the defendant designed for her. She said she did ring the builder who tendered the cheapest price (Materazzo) but she wasn't comfortable with what they had produced; she said it wasn't what she wanted; she had spent a lot of money on something she couldn't afford to build in 10-11 months; she said she wasn't close to getting a house and she was not happy with the design that was ultimately produced (T p38).

19. Ms Innocenzi said she told the Architects Studio she did not want to build the house on the last (third) sketch design. Ms Innocenzi said the Architect Studio told her that the fault lay with the quantity surveyor that did the costing in February 2001. Eventually the plaintiffs entered into a contract to have a house built by *Overlander Builders* in August 2002.

20. In cross-examination Ms Innocenzi agreed that she told Mr Fletcher she would like to spend $250,000 on her house and she agreed that she asked him if that was adequate. She agreed that Mr Fletcher had "roughly outlined" that it takes approximately 35 weeks; she agreed they discussed issues that may affect the timing of the project, such as the weather. The initial letter of offer from the defendant (Ex P2) was put to Ms Innocenzi, she agreed her understanding about the cost was in-line with the words "will vary depending on the overall area of the house and finishes selected" (T44). Ms Innocenzi agreed that she wanted construction costs in the order of $250,000.

21. In relation to the publication "You and Your Architect" comprising part of Exhibit P2, Ms Innocenzi agreed she had read those parts that advise on the requirement of specificity on all aspects of the project, including whether the budget includes professional fees and consultants or is related to the

actual cost of the works. Ms Innocenzi agreed that she did not state the house "must cost $250,000 or less". She agreed that she assumed the first sketch plan would be a house that could be built for roughly $250,000; she disagreed with the proposition that she was happy with the first sketch plan, she agreed she requested changes from the first sketch plan being: to separate the main bathroom and the toilet; to enclose the middle deck area; to change the front staircase; to make the bedrooms bigger; to allow the verandah to become a corridor; to make both the main bathroom and the main bedroom bigger; to add some extra enclosed storage downstairs. She agreed with the proposition that bigger houses cost more than smaller houses (T47). Ms Innocenzi said she agreed that she "now" knows that specialised timbers cost more than Cypress Pine but she didn't know that at the time; in re-examination she said that a supplier told her there was "not really" a huge difference in the price (T 69); she agreed she "now" knows that glass windows cost more than corrugated plastic. She disagreed that, by asking for changes in the sketch plan, the result would be a more costly house than that outlined in sketch plan one (T47-48). She disagreed that when she asked for the changes to the first sketch plan, Mr McNamara told her they would add cost (T48). When suggested to her that at a meeting concerning the second sketch plan Mr McNamara told her it would be getting more expensive, Ms Innocenzi disagreed that he had said that. She agreed Mr McNamara suggested a costs consultant be consulted to see if the house could be built within budget; she disagreed that there was doubt about the bigger house coming within budget.

22. Ms Innocenzi agreed that the costing that came back from Rawlinsons for the main dwelling (stage one) was $257 600; she considered that was within her budget; she was content to deal with stages two and three later (downstairs guestroom and landscaping). She agreed she was happy to go ahead with stage one. She said that upon approval of sketch plan 2 she had asked Mr McNamara to stop progress of the work to ensure she could obtain

the finance. After obtaining the finance she said she gave the go ahead (T50). She said she understood that the process with an architect takes place in a number of stages; she said she considered the conceptual design stage to be the end of sketch plan 2. She agreed she paid the invoice for stage 1; she agreed the next stage was the design development stage that she had input to; she agreed that that process involved both parties discussing changes and working up to a concept that both parties were happy with. Ms Innocenzi agreed that at some stage she decreased the deck and increased the living area; she agreed the wall was shifted to include the corridor; she agreed she made changes to the kitchen and bathroom. Although she agreed she made a change from cypress pine to Tasmanian Oak or Forest, she said she questioned that "very early in the piece." She said she went to suppliers to check and she did not believe it to be a lot dearer. She also said she identified the change from ripple plastic to glass windows early in the piece; she said she identified that before the costing; she did however agree this was all part of the design development. Ms Innocenzi did not agree the overall size of the house was bigger but she did agree that the changes would be adding some cost (T53). When asked whether that was inconsistent with her budget she stated it was not inconsistent as her understanding was that there was room to move given that she had deleted the motorized louvres and there was also the contingency. Ms Innocenzi agreed only that she believed the house would be "slightly perhaps" more expensive (T53). She agreed that after the design development stage she instructed Mr McNamara to draw up the detailed plans and put them out to tender. She agreed she paid the defendants for the design development stage (T53-54).

23. Ms Innocenzi agreed she received a very rude shock when she was advised of the tender results: (Ex P11). She agreed that in P11 Mr McNamara suggests going back to the Quantity Surveyors to review the tender drawings; she agreed she did not get a bill for that; she agreed he suggested changes to bring the matter back into budget; she agreed that if appropriate

changes could be made, the lowest tenderer would be asked to re-price the changes. She agreed she went to a meeting in October 2001 with Mr McNamara and agreed he gave her the new sketch design. She agrees there was discussion to make changes to the design to decrease the cost. Ms Innocenzi was adamant in her evidence that at that meeting she was given P17 (Sketch Plan) but not P12 (Rawlinson's costings); she disagreed with the suggestion that she told Mr McNamara to put it out to tender again; she agreed however that she asked him to draw up the design but to include an ensuite. She said she was not aware that on the basis of this meeting Mr McNamara drew up a second set of tender documents; she said she was aware he would get pricings and that it made sense if he sent the plans out.

24. Ms Innocenzi agreed that she believed Mr McNamara went ahead to get prices from the builders based on the sketch plan (attached to exhibit D1); in re-examination she said that she was not happy with the design; she said she did not tell Mr McNamara. She agreed those prices included a tender from Lassitude Pty Ltd for $274,000. She agreed she was sent a fax (Ex P16) from the defendant rating the lowest tenderer as "reasonable" at $1300 per square metre; she agrees that Mr McNamara suggested further changes to bring the house back to budget. Ms Innocenzi agreed she decided not to proceed with the changes; she agreed she made no further payments.

25. Ms Innocenzi agreed that Exhibit P2 did not include a reference to an agreement or undertaking that the process would be complete within 35 weeks; she agreed that on the basis of a programme for the works that she acknowledged was reasonable, contained in Exhibit P3, she would have expected to sign a contract with a builder in June or early July (T 62); she agreed the design development stage took longer than the programme for the works; she agreed she had received a fax from Mr McNamara of 2 July 2001 (Exhibit D2) concerning changes to the design; she agreed there was some delay due to her absence concerning her grandfather; she also agreed there was delay concerning approvals from the Bayview estate. Ms Innocenzi

agreed she did not raise the question of the home grants with Mr Fletcher at the first meeting; she agreed it did not appear in the fee letter. In re-examination she said she talked to the architects about the opportunity to apply for the second $5000 grant.

Wayne Petrie

26. The plaintiffs also called Mr Wayne Petrie whose expert report and c.v dated 17 August 2004 were tendered. Based on the materials supplied to him by the plaintiff's solicitors overall conclusions of the report were that the architect concerned did not act in a manner which reflected prudent practice; there was consistent lack of recorded communication or correspondence between the client and the architect; there appeared to be a lack of consultation and involvement of the client resulting in a lack of authorisation at appropriate stages. These overall conclusions cannot be accepted to their full extent without examining the basis of the report and the various qualifications and explanations necessarily made during evidence.

27. In examining the Commission itself, Mr Petrie's report notes there is nothing in the information to indicate the basis on which the client sought out the architect. He notes the earliest correspondence reflecting the relationship is the "wish list" fax that gave no indication of "time or budget" requirements but does reflect the fact of prior preliminary discussion. The first formal correspondence from the Architect Studio is the fee offer which confirms the budget but also suggests some flexibility contingent upon client requirements; it also reflects that a site inspection had occurred and a "*wish list*" received. The project procurement period of approximately 35 weeks was identified, as well as the 7.5% fee. The report suggests that following the architect's site inspection, study of the site contours and review of the "wish list", "some level of concern should have been

registered", instead of the architect indicating that the client's requirements were potentially achievable.

28. Mr Petrie's report notes there is a contradiction in the fee proposal. He notes the architect initially suggests he will provide an opinion of probable cost with initial sketch plans; later it is recommended that a cost consultant be engaged to provide a detailed estimate at the end of the sketch design. Mr Petrie notes that it is prudent practice for a schematic design to be accompanied by a cost estimate; the report states that an elemental cost analysis or cost plan should be provided at the completion of design development. He says a pre-tender estimate may have provided significant value to the architect and client and is not unusual.

29. Mr Petrie's report further identifies that the fee letter indicates the service would be provided in accordance with "You and Your Architect". He notes that this makes particular reference to budget planning and work undertaken in each of the service stages; it also sets out the need for the client to be part of the team and to ensure approval is given at each stage. His report indicates that the material provided reflects limited involvement by the client and minimal recorded communication between the parties. His report states that an architect would be expected to engage in more professional communications and duly record progress.

30. Under the heading "The Design Concept" the report notes that the fax from Rawlinsons indicates a cost consultancy for a fee of $425.00, however beyond a reference to another house, it is noted there is no clarification as to what the cost consultant would provide for the fee. The report notes that Rawlinson issued a revised cost plan on 15/2/01, however no record of the original cost plan was given in the material provided. The report notes the cost is presented in three stages, however there is no evidence that suggests a reason for proceeding in this manner. The report notes it is "most unfortunate" that the cost plan doesn't reference drawings used in

preparation of its presentation. The report also notes that given that the Rawlinson cost plan was in excess of the client budget – it would be expected that the architect would have discussed and documented correspondence with the client in relation to budget issues, general market and cost premiums. The report suggests client involvement could have been optimized, allowing a full understanding of the project. The report also notes the tax invoice is the only evidence of completion of the Design Development; there is no record of material presented to the client or of client advice accepting the design development or instructing the architect to proceed with documentation.

31. Under the heading "Construction Documentation" the report notes there is no record of events or project communication during the documentation phase despite an expectation that considerable communication between architect and client would occur. He notes that in the material provided to him there is no evidence of specifications or cost report for client consideration or client authorisation of the tendering of the project.

32. Under the heading "Tender" the report notes the tender appears to have been called before the completion of documents; it notes this is "difficult to understand"; it states the actions of the architect on this point "could be questioned". The report notes the correspondence acknowledging the tenders are over budget. The report states this could have been identified by a pre-tender estimate. The report says that if one assumes the cost plan was valid, then a change of circumstances must have occurred, however there is no evidence of this being communicated to the client. It is noted in the report the proposal to review the tenders was a valid action however it is difficult, according to the report, to reconcile the ability to bring the tender close to the budget without significantly reworking the design.

33. Under the heading "Re Tender" the report notes the architect could have engaged with the lowest tenderer to identify ways of cost saving. He notes

he had no evidence of this occurring. The report queries why the re tender was an addendum and did not form part of the re tender given the circumstances called for ensuring a comprehensive undertaking in the tender process.

34. In examination in chief Mr Petrie confirmed the importance of presenting the budget in the format described by the Royal Australian Institute of Architects ("RAIA") practice notes. He said this would give the client a clearer understanding of the likely allocations of monies within the budget; Mr Petrie gave examples of the issues that may require such clarification. Mr Petrie also noted there was no information to suggest that there was any communication between the architect and the client which clarified how the budget was being managed or costs occurring at the conclusion of each of the various design stages as recommended by the practice notes (T 73). Mr Petrie also confirmed in evidence his criticism regarding the lack of evaluation in relation to the reality of the client requirements in the context of the particular site contours and complexities associated with the site under inspection. He suggested there were a number of simple tests which could be applied to indicate whether the budget is realistic or achievable. Mr Petrie also confirmed in his evidence in chief there was no elemental cost plan or cost analysis provided at the completion of design development. He understood the cost plan prepared by Rawlinsons actually occurred at the end of the sketch design stage, not the design development. Further, it remained unclear to Mr Petrie as to which drawings constituted the information or preparation of the cost planning. He said the expectation that estimates will be provided near the conclusion of three stages, one of which is design development, is confirmed in the RAIA Practice notes and in "You and Your Architect". Mr Petrie confirmed that he had no evidence to suggest there was any cost reporting after Rawlinson's initial plan, despite the recommendations in "You and Your Architect"(T76) which suggests that cost reporting is required.

35. Mr Petrie's evidence was that it would have been prudent for the architect to engage the services of a cost consultant in obtaining the estimate. He suggests this would allow for a higher level of accuracy as he said, it's "not our area of specific expertise."

36. In relation to Rawlinson's cost plan, Mr Petrie highlighted that it was unusual for a cost plan to be delivered without referencing the material on which the cost plan was made, as he suggests occurred in this case. He said the result of that omission is that "it would be very difficult to say that the cost plan represented that particular design at that stage" (T77). Mr Petrie also highlighted what he considered a "management issue" in relation to the cost plan, suggesting that comments regarding either the method of construction or a design element which is creating a premium, as well as an indication of how the cost per square metre relates to market conditions, are normally expected. He confirmed in his evidence that these are matters that should have been identified to the client and would have been a way to test the accuracy of the Rawlinson estimate (T 77).

37. Mr Petrie suggested in his evidence in chief that the lack of formal submission of drawings, reports or cost plans to the client indicates there is no opportunity for formal client approval. In relation to the fax of 2/7/01 to the client, concerning the proposal for a larger living room, Mr Petrie is critical of the failure to include a report of the impact of that change. He suggested that if such changes are not reported on, any subsequent decisions are owned by the architect who must, (in his view), take responsibility for it (T78).

38. Under cross examination, concerning the budget, Mr Petrie was shown Exhibit P2, in particular, "We've received your wish list of spaces which appears to be achievable within our budget which we understand to be $250,000". "The cost of cause (sic) .. will vary depending on the overall area of the house and the finishes selected"…. "They are based on a

construction value in the order of $250,000, the RAIA schedule fee is 10%". He was asked whether this communicates that the architects understanding is that the budget is in the order, or approximately $250,000 construction costs. Mr Petrie agreed but qualified the answer querying whether the $250,000 was a net construction cost or a cost including GST. He said that issue would normally be clarified to a client so they understood the "buying power relationship" of that $250,000. He said it would be normal practice to have such clarification. He accepted the suggestion of Ms Kelly that "in this day and age" the cost estimates from the quantity surveyors would be inclusive of GST (T79).

39. He agreed that although he had made the comment that the architect should have considered the reality of building on a sloping site, he did not in fact know whether this architect had considered that factor. He confirmed that all he was saying was that based on the evidence before him; he was unable to determine what took place; he agreed it was difficult to comment on because construction rates in Darwin were unknown to him. He acknowledged he was unable to make any comment about whether it was possible to design a house in accordance with the "wish list" for the cost of $250,000 due to his lack of knowledge regarding Darwin construction rates, however, he said he would expect a Darwin architect to possess such knowledge (T 80)

40. Concerning the Practice Notes he was asked about the two ways a client might state the cost budget (referring to page two of the report). The following was drawn to his attention: "The approximate cost for the budget in which case the architect should aim at this figure, although the client should accept a reasonable margin, up or down"; the further clarification was put to him, "The alternative way is a maximum cost, in which case the architect should aim at a figure less than this by a reasonable margin." He was asked whether he agreed this was sound practice. He agreed it was but qualified his answer stating "Yes, on the condition that we know – if the

price is said to be around such and such, it doesn't mean that you look for a 20% increase in it, it means that you are really targeting that sum of money, otherwise why give that sum of money. He was asked if he agreed a reasonable hit would be 10% up or down. He answered at the stage of schematic design, yes. When questioned further on this point he stated that the margin keeps refining throughout the process to the point that at the pre-tender stage it would be expected to be plus or minus 5%(T 80. When questioned further about this point, he still thought the cost breakdown should be within the 5% margin.

41. Concerning the involvement of the client, it was suggested to Mr Petrie that his comments concerning communication were really a comment on 'record keeping". Mr Petrie answered that the records he had to investigate were scant, there was little recorded. He agreed he was not able to say that communication didn't take place at a verbal level. He agreed with the proposition that when his report states there was no evidence of the formal submission of drawings nor records of the client accepting the schematic design and giving approval to proceed to the next stage, he didn't actually know whether or not drawings were in fact handed over and approvals given and the like. He agreed that what this meant was there were no file notes about it or they weren't discovered. He was asked whether he would expect an architect to proceed to the next stage of design if the client hadn't given approval. He answered by saying "I would not make comment on that because there will be some people in our profession, unfortunately, that would proceed without client acknowledgement or instruction to proceed. Done in good faith but not a very good business sense." Hypothetically, he was asked whether he would expect such a person to get paid for their schematic design. He answered "Yes, but you don't know our profession very well" (T 82).

42. Mr Petrie was asked whether the design development stage was one that was done in close consultation with the client. He said the end results certainly

were but there are periods when the design concept is worked up in further detail so that there can be confirmation of costs, construction, materials and the like which is done in great detail with consultants and conveyed with the understanding and appreciation of the client. It was suggested to Mr Petrie that this was the phase where the client might move the kitchen around or move a wall "here and there". Mr Petrie disagreed with this stating that the design development phase is one of refinement rather than of re-doing. He said it was a very unfortunate set of circumstances at the end of the schematic design that the concept is not agreed to. He said that was the stage when most of the dialogue should have happened, (that is, during the schematic design phase) rather than the design development phase.(T83)

43. Mr Petrie agreed that approval to draw the contract drawings happens first. After that, it would be decided to go to tender. He reiterated there was no documentation, as far as he was concerned, evidencing approval to go from the design development stage to the contract documentation stage. Specifically, Mr Petrie's comment "Similarly, there is no request by the architect, or advice from the client authorising the tender of the project" was drawn to his attention. He agreed with counsel that his view was that an architect should obtain authorisation to proceed to contract documentation. He agreed that was also referred to as "documenting the design" (T 84). He agreed that what he meant was that there was no file note to show authorisation on the part of the client. A document was read to him as "phone call Suzanne, proceed with documentation of revised design proposal including en suite". Mr Petrie said he would expect to find an abundance of such notes relating to those sorts of instruction. Given that note, Mr Petrie was asked if he would expect such a client, who had given the go ahead to get prices from builder, would authorise the putting out of the documented design to builders to tender a price. Mr Petrie said he would never make that assumption (T85). Mr Petrie maintained that there is a distinction between seeking builder's prices from them and going to tender. He said

there was a difference between the builder's price and the builder's tender. (T 85).

44. The defendant's counsel introduced a hypothetical scenario into the cross examination, questioning Mr Petrie as to professional practice standards in relation to a tender analysis after tenders have been submitted and are higher than expected. Mr Petrie suggested that it would be necessary to include the client if the architect then prepared a sketch design which makes cost savings and sends this to the quantity surveyor for a cost estimate. He suggests that not to include the client in this process is not good practice as it goes behind the client's back.

45. Mr Petrie agreed that the fax (Ex D1) containing details of minor changes to the document design was satisfactory. He suggested he would add only the information on cost implications. Mr Petrie agreed with the suggestion that there would be an expectation of communication between the client and the architect in relation to cost implications (T 88.) Mr Petrie agreed that his opinion was that he thought there should be three sets of quantity surveyor involvement. He agreed that would cost the client money. Mr Petrie did not agree with the proposition that if the client had worked on the design development stage with the architect, the quantity surveyor involvement could be exempted at the end of the design development stage. Mr Petrie thought that was a risky decision that he would want the client "to own". In relation to the professional role of an architect in relation to estimates provided by a quantity surveyor, Mr Petrie's evidence in cross examination suggests that it is acceptable for an architect to believe that the quantity surveyor has completed his work as he was expected to do. He qualified this by saying unless "something really stood out", then he "would ask the question." (T 90-91).

46. Ms Kelly suggested that the assumption made by Mr Petrie (on page 9 of his report) "that the cost plan was valid" was questionable. She raised the

possibility with the witness that the "cost plan might be crook". Mr Petrie agreed that was a possibility. Mr Petrie also suggested that a reason the cost estimate was out so much could have been if the original cost report was done prior to engineering services being provided and if there was a complexity in structure that was not assessed at the time of the initial assessment (T 92). Mr Petrie agreed it was common place for architects to give initial estimates based on a square metre rate and to test the budget against that format (T 93). Mr Petrie agreed that was a way the budget could have been tested. It was suggested to Mr Petrie that it would be reasonable for an architect to get an approximate budget by taking a cost per unit area. Mr Petrie agreed, qualifying the answer by stating "So long as he takes the right cost per unit area."

47. In re-examination Mr Petrie said he could not reconcile the lowest tender of $412,500 with the Rawlinson's estimate of $257,000. In relation to the schematic design and the August 2001 documentation, Mr Petrie said he didn't believe they could be wholly and soley representative of the material that Rawlinsons based their estimate on. He reiterated that the design development stage is a stage of refinement, although it doesn't completely exclude changes, that is unusual for the design development period. Mr Petrie said he could not draw the conclusion that the document that had been put to him dated 29 October 2001 was in fact the design proposal presented to and authorised by the client. Further, in relation to a document put to him dated 30 October, he said he was unable to draw any correlation between that and other documentation. Mr Petrie said his point was that the changes being made post tender should have been identified and discussed with the client much earlier in the process. He concluded that topic by stating "I just don't understand how you can go from 275 to 412 to 247 and then come back and tell the client that there's maybe another $30,000 in that saving. I find that quite incredible."

The Defendant's Case

48. Ms Kelly outlined the defendant's case suggesting that the evidence does not establish the existence of a contract in the terms pleaded or breach of any contract or breach of duty of care. The defendant's case is that it has not been established that anything the defendant did or did not do was the cause of any loss or damage by the plaintiff. The defendant's case is that there is a contract for the performance of architectural services by the defendant for the plaintiffs. It is said the terms of the agreement are set out in Exhibit P2. The defendant's case is that they were to undertake the design of a house for the plaintiffs in four stages for the fee structure set out in the Exhibit P2. That was to be done in consultation with the client aiming for a construction cost of the house for approximately $250,000. The defendant does not accept there was a term that the process must be complete within 35 weeks but there was a timetable presented to the plaintiffs which extended over approximately 35 weeks. It is acknowledged that the timetable blew out for a number of reasons. The defendant says those reasons were not all of the defendant's making. The defendant says what occurred is that after the first tenders went out in September, those tenders were much higher than anticipated by the architect. As a result there was consultation between the architect and the plaintiff. The defendant identified cost savings in conjunction with the quantity surveyor and modified the design. It is suggested the costings were within the client's budget and that the clients discussed the proposal, took that design away and then telephoned the architect to ask him to go ahead and proceed to document the design but to add an en suite. In accordance with instructions to "go ahead", the defendant suggests the design was documented and put to tender. One of those tenders came back at $274,000 There were further discussions about cost savings that could be made. By the end of November 2001 the client had paid only one set of fees to the architect and the consultant to produce a design that had been approved. It is alleged the plaintiffs approved the design to go to documentation. On the question of whether the availability of the grants

formed part of the contract, the defendant denies that there was a term that meant the work would be complete in order to allow the plaintiffs to access the first home owners grants. The defendant says however that if the plaintiffs had gone ahead with the contract after tender, they may well have been able to access the second of those grants.

Gregory McNamara

49. The defendant's witness was Mr Gregory McNamara who worked as an architect for the defendant at the material time. He agreed he did not attend the initial meeting between Mr Fletcher and the plaintiffs. Mr Fletcher was on leave and requested Mr McNamara do the fee proposal on the plaintiffs' project. Mr McNamara said he read the proposal (in Exhibit P1) and spoke to Ms Innocenzi and prepared the fee proposal contained in Exhibit P2. He said he received a call from Ms Innocenzi stating she accepted the fee proposal and he commenced to prepare the sketch design. He told the Court he prepared the sketch design (Exhibit P4) by reference to the "wish list"; he said there was a budget in the order of $250,000 so the sketch design was prepared for that budget (T 105). Mr McNamara told the Court he measured the areas and worked out a floor plan that matched the kind of budget proposed. Mr McNamara said he'd done a job of a similar nature. He said the other job wasn't a complete house but it was a separate dwelling on a block in the range of $1100 or $1200 per square metre, so he used a figure of about $1300 a square metre in producing the sketch plan. He said he chose the higher rate to allow for a bit of error; he said he visited the site (T 106).

50. Mr McNamara stated that the next contact he had with either of the plaintiffs was in a meeting with both plaintiffs. In this meeting Mr McNamara presented the sketch design and he states that there was a "very good response" and the plaintiffs intended to "go away and dwell on it." The next contact was at a subsequent meeting in which the plaintiffs expressed that

they wished to incorporate some changes to the sketch plan (T106). Mr McNamara states that these major changes involved enclosing the central veranda and bedroom wing, as well as other details which he could not recall. These instructions were incorporated into another sketch plan, the 'second sketch plan' (T107).

51. Mr McNamara then explained the basic features of both the first (P4) and second (P5) sketch plan, indicating the major areas of change in the second sketch plan. These changes primarily involved the enclosing of particular spaces and the addition of masonry (T108). Mc McNamara then held a subsequent meeting with Ms Innocenzi and possibly Mr Thurlow, (he was unable to recall whether Andrew was present). Mr McNamara suggested the outcome of this meeting was that the plaintiffs were "very happy with the arrangement" and thus a cost consultant was recommended. This cost consultant was Rawlinsons.

52. A quote was received from Rawlinsons. This quote was accepted by Suzanne, who then authorised Mr McNamara to proceed with that cost plan. (T109) Mr McNamara subsequently had a meeting with Don Hill from Rawlinsons in which they "went through the elements of the cost plan" (T109). The cost plan referred to the second sketch plan, P5. During this meeting Mr Hill asked some questions regarding details of the sketch plan and marked the responses down on his own copy of the sketch plan. Mr McNamara also stated that he gave information regarding the finishes and "as much as a description as we could at that… point" (T110).

53. Mr McNamara then received a cost plan prepared by Rawlinsons, which he "went through…to see whether there was any obvious errors or the like" (T110). He noted that there wasn't much allowed for driveways and ground works and explained to Rawlinsons that they would need to address these items in the plan. The evidence tendered in relation to this cost plan appeared to be incomplete and was entered at this stage in proceedings as an

"incomplete document" (T111). Mr McNamara subsequently received a revised cost plan from Rawlinsons, P8. He explains the essential difference between P8 and D3 is the incorporation of the items that "they missed in the first instance…the driveway areas essentially" (T112).

54. Mr McNamara then presented the revised cost estimate at another meeting with Ms Innocenzi and possibly Mr Thurlow, (Mr McNamara is unable to recall whether Mr Thurlow was present), and suggests that "we were all happy that the cost plan was within range of their budget" (T112). Mr McNamara then proceeded to go into the next stage of the project, the design development and contract documentation stage, however he was unable to recall when he received those instructions to proceed; "I don't recall whether at that meeting we were requested to proceed or whether that happened later" (T112).

55. Mr McNamara stated that in the design development stage "there is a lot of developing of details and fine tuning of elements and getting into the nitty gritty of stuff" and suggested that it is a stage in which "there's a fair bit of contact with, generally speaking, of clients" (T112). During this period Mr McNamara states that he met with Ms Innocenzi "several times." In these meetings Ms Innocenzi suggested various changes. Changes which were adopted into the 'final document' included increases in area, different planning arrangements for the kitchen, a change from polycarbonate to glazing in the living area and changes to finishes, namely from a Cyprus-pine floor to a Tasmanian oak floor (T113). Mr McNamara acknowledged that these changes did increase the cost but suggested that "we're always aware that the budget…there wasn't a lot of room for manoeuvre in the budget" and "we talked about these things fairly informally…but they were discussed" (T113). As a result of the discussions there was a decision to break down the tender into components "so if a tender came in over, which we were expecting, things could be taken out" (T113). Mr McNamara acknowledged that he expected the tender prices to be above the budget due

to the increases in area and finishes as well as various other elements. However his evidence also suggested that although he believed that $30 000 may have been added to the project "it may have been that the tender came in fine and we wouldn't have to take those things out" (T114). Further he suggested a reason for adding them at that stage was that "you got the full value of things if they were put into the project in the beginning, as opposed to doing them as add-ons later" (T114). Mr McNamara indicates that he "believes" he did communicate to Ms Innocenzi that the changes may result in an additional cost of $30 000 (T114).

56. Mr McNamara confirmed that the next phase in the project was that the plan was sent out to tender and tender results were returned. Mc McNamara then sent a fax to Ms Innocenzi and Mr Thurlow in relation to the tender results: (Exhibit P11). Mr Hill from Rawlinsons was also consulted to advise why the cost had "come in as high as it did from the tenders" (T115). Rawlinsons was given a copy of P10, the tender estimate, which estimates the cost of works based on the contract documents sent, and is "the same drawing as the builders have costed" (T116). Rawlinsons then produced a "reasonable price" for the construction of the house based on this document (T116).

57. A letter was then sent to the plaintiffs describing "what we were going to do", which was to "look at whether…there was a possibility of making some changes to the design that would bring the cost back…within the budget." Mr McNamara cannot recall when exactly this letter was sent. (T116) Mr McNamara confirms that even if the course of action had been slightly changed and a tender estimate had been received before the plan was put out to tender, he probably still would have taken "the same steps we were taking…to look at the design…to suggest changes…that would bring it back to a point where it was within that budget…we were all so mindful of the fact we weren't" (T116). He indicates that the suggestions in the letter to the clients would have also been the same (T116).

58. The next step was that Mr Hill and Mr McNamara had a meeting to determine ways in which costs could be cut out of the building. Mr McNamara then produced a "little sketch design showing a possibility of this reduced scope of works" (P17). Mr Hill was then requested to recost this plan and subsequently another cost estimate was produced, P12. A meeting was then held with the plaintiffs and they were presented with a sketch plan and a proposal to bring the house back within the range of the budget. Mr McNamara suggests that "using Don's figures…it may be possible to bring it back in the order of 264,000, if we made these changes" (T118). No decision was made at this meeting and the plaintiffs left the meeting indicating they were going to contact Mr McNamara to indicate whether they wanted to proceed. Ms Innocenzi subsequently contacted Mr McNamara by telephone and Mr McNamara noted this phone conversation, D4. In this conversation Ms Innocenzi indicated that she wanted to proceed and also that she wanted the en suite to be incorporated into the plan. Mr McNamara subsequently revised the sketch plan to incorporate the en suite, D5. A fax, D1, was then sent to the plaintiffs on the 30/10 to which D5 was attached. Mr McNamara states that he believes that the plaintiffs then requested the plans be proceeded with (T119).

59. Design development contract documentation for the second sketch plan began. These plans were dated as November 2001. These plans were then put out to tender to three builders and three responses were received. This included a tender from Mr Matarazzo for $274, 756. Mr McNamara sent a fax to the plaintiffs on the 30/11 outlining the tender results and making recommendations to them, P16. The fax identified a number of changes which could be made to the design to bring the cost down another $43 000, even though Mr McNamara believed the quote from Mr Matarazzo was in "the order of the budget" (T121). Shortly after, this fax was formalised in a letter, P13. The letter acknowledged that Mr McNamara understood that the plaintiffs had "some concern about the size of the living room" (T122). Mr

McNamara confirms that he had some communication with Ms Innocenzi "about the project at this point" however initially he was unsure "whether that phone call came before this formal letter or after" (T122). Mr McNamara was then able to confirm evidence, in the form of a file note (D8), which indicated that the phone call actually came first. The note indicated that Ms Innocenzi was unsure as to whether she wanted to proceed, due to concerns regarding the living area, and that she will contact Mr McNamara in 2 weeks time (T122).

60. Mr McNamara then sent a letter on the 5th of December to the plaintiffs, in which he made some suggestions about increasing the size of the living room and ways that this might be accomplished, P13. Mr McNamara does not believe that the plaintiffs responded to these suggestions. Mr McNamara states that he could have accommodated the plaintiffs concerns about the size of the living room and explained to the court what steps he would have taken, including a further meeting with the plaintiffs and a direct negotiation with Mr Matarazzo regarding the desired changes. (T123)

61. Mr McNamara then explained P14 to the court. He states it is a "tender estimate of the same set of drawings again that the builders received for the final tender" (T123). He suggests that this tender was created on the initiative of Rawlinsons, not at his request and was received shortly before the tenders came in. The estimate of $318,000 was "at that point too high" and thus Mr McNamara responded by presenting Rawlinsons with a list of "items which could easily be removed from the scope of works, to bring that budget back into line" (T124). Rawlinsons then provided Mr McNamara with a summary, P15, which incorporated those changes and resulted in a lower price estimate of $265,817.

62. Mr McNamara also confirmed that he received a tender price of $274,756 from Lassitude. This estimate was based on the same documentation as the Rawlinsons costing of P14. Mr McNamara then explained that the object of

a cost consultant is to give an estimate of a project which comes "somewhere in the middle" (T125). Mr McNamara stated that he does not believe that Rawlinsons charged for the extra work they completed in relation to P14 and P15 or the first tender estimate they did after the first tenders came in (T126).

63. In relation to the tender estimates given by Rawlinson, Mr McNamara confirmed that there was a big difference between the original cost estimate of $257,000 and the tender estimate of $442,996, given after the tender prices came in (T126/7). He suggests that there were probably several factors involved in that cost increase, including "changes to the design in terms of area increase and finishes and the like" (T127). Mr McNamara approximates these changes as totalling $30,000. He also notes that there was a fairly large increase in steel cost in that period but concedes that this would not have had a substantial impact on the cost. He suggests the only way he could account for this "major blow out in cost" would be if the initial estimate did not correctly reflect the sketch plan (T127). Mr McNamara does not accept that there could have been a change in complexity of engineering detail between the initial sketch plan and the tender documents which could account for the change in the estimates. He acknowledges that in the initial sketch design there "obviously isn't a lot of detail shown" but states that he considers it "the job of the cost consultant to interpret that detail into that…to establish a budget" (T127).

64. In cross examination Ms Gearin asked Mr McNamara whether he was an experienced architect in 2001; he replied he was registered for about two years at that time; he said he "believed" he was a member of the RAIA at the time; he agreed it was good practice to comply with RAIA practice notes; he agreed he has designed one house previously; he agreed he did not tell the plaintiffs he had designed one house (T128). Mr McNamara said he understood the budget to be "in order of 250, 000" and he understood that to be inclusive of GST. Mr McNamara said his fee breakdown in the letter Ex

P2 was a method recommended by the RAIA; Mr McNamara agreed he consulted with Ms Innocenzi after 9 January 2001.

65. Concerning the budget, he was asked (T131) "You were aware and accepted that the budget was 250,000 didn't you?" He answered "that it was confirmed in – that was put into the fee letter as confirmation of essentially the contract"; he reiterated the words in the contract were "in the order of $250 000." He agreed that what was meant and that his understanding was that the wish list appeared to be achievable within a budget of $250,000 (T131). He agreed the RAIA fee schedule was ordinarily 10% of the budget being $25,000 but he was able to offer (as set out in P2, the same level of service for 7.5% or $18,750).

66. Mr McNamara agreed to the need for a quantity surveyor as it was important; he agreed with the suggestion that price was a fundamental term. He agreed that time was also a fundamental term.

67. After some hesitation, Mr McNamara agreed the booklet "You and Your Architect" actually set out what the schematic design was (T133). He agreed that the booklet set out what a schematic design was but qualified that stating "Yeah, but it's not always necessary to do all those things that are in there."

68. Mr McNamara agreed P5 was the schematic design and he agreed he had put all of the items from the *wish list* in P1 into the design of the house that would cost $250,000 inclusive of GST. He qualified that by stating that they did discuss "stages"; he agreed that following P5 he recommended and had the plaintiff's approval to consult Rawlinsons; he agreed he gave Rawlinsons a copy of P5 but he had no note to that effect; he gave them no other document; he was asked whether he had made a note of the finishes and answered that the finishes and structures were discussed at a meeting with the quantity surveyors; he initially said there was an "indication" from the clients as to finishes; he said that was contained as a drawing given to

the quantity surveyor; that document was not produced when called for. He agreed P5 did not identify motorised louvres, pine floors nor single leaf timber doors; he said he believed he had those discussion with the plaintiff and agreed there was no documentary evidence of it (T141).

69. Mr McNamara said he could not recall what the figure on D3 of $205,962 included; he agreed the contingency figure was 10% being $20,596, preliminaries were 12% and the total would be $253,744; he said he did not know if the driveway was included in these calculations (T142). In answer to whether he could recall if the driveway was in the "stage 1 total", he gave an incomprehensible answer: "I don't know. Part of that, can I just explain, I recall part of that – the reason for stage - for putting it in that format is because the quantity surveyor hadn't – it wasn't – didn't appear to me clear that it was – he wasn't clear in those stages so that was part of that exercise in putting those elements into those stages and that was part of what I gave back to the quantity surveyors what I wanted in those stages clearly." After being taken through a number of references to the Rawlinson's figures, cross referenced to P5, it was suggested to him that he told the plaintiffs they could have their house for $257,000 inclusive of GST. Mr McNamara answered "I don't think that was presented to the clients" (T145). He agreed that stage 1 did include the downstairs guest room with a toilet, wash and hand basin (T147-148); he agreed that the items in the initial "wish list" were incorporated into the plan and that was all costed by Rawlinsons for $257,600 (T148-149). Mr McNamara did qualify this answer saying the enclosure of that space and the finishing was part of "stage 2." Mr McNamara agreed after being taken to the relevant documents that the items on the wish list were incorporated into the costing (Ex P8). As to whether they were all incorporated into stage 1 he said, "not entirely", what was missing was the guest and study room; he said the reference to "stage 1 guest" referred to the storeroom and WC and structural works; the walls and finishes to the study and guest room were included in stage 2.

70. Mr McNamara said the upstairs items that had not been included were the study and office that were part of stage 2, although there was a loft space that he said could be a study.

71. Mr McNamara said he went through the cost plan that was $257, 000; he agreed changes were suggested by Ms Innocenzi; he agreed she didn't want the motorised louvres and that created a saving of about half of the $6,000; he agreed Ms Innocenzi didn't want the split system air conditioning at $5,400, although in re-examination he noted after viewing P 20 that the split system air conditioning was retained in the bedrooms (T 185); he agreed the change to glass from polycarbonate was an additional $2,500; he agreed she didn't want cypress pine and other timbers were discussed; he said he advised Ms Innocenzi on the difference in price but can't recall what that difference was; he agreed that on that basis he was instructed to go to the schematic design stage.

72. Mr McNamara agreed the schematic design was complete on 29 January 2001 and he then moved to the design development stage; in relation to the proposed programme of works he could not say whether the clients agreed that was suitable; he agreed he had been told they would like to move in before Christmas; Mr McNamara agreed that the changes suggested did not change the overall area of the house that would have been 301 metres (T163); he agreed that his August drawings were greater than 301, namely 303, approximating $30,000; he said he did not write to the clients advising of the cost consequences; he said he discussed with them generally some "overruns" (T164); he didn't recall any particular conversations; he said he had the "sense that there was a cost overrun" and that was conveyed to the clients and that they would go to tender on that (T164-165). He then said he thought he may have identified $20-30,000 needed to be added to the project. He later said he may not have said it "specifically in these words, no but there was a general understanding I believe that there was going to be some increase in cost."

73. Mr McNamara agreed that none of the 17/9 tender addenda to his drawings changed the items on the "wish list" that were included in the August drawings (T168); he agreed they did not change the area; he agreed the addenda included clarifications; he agreed there were additional costs as a result of the addenda; he agreed the Architect Studio prepared a specification (P20) indicating the anticipated order of cost was $240,000; he agreed that figure was put in as an indication to tenderers but was hesitant about what the figure represented. He was asked about the figure $240,000 as follows: Question: *Because that's what you anticipated, wasn't it*? Answer: *In the order of – that was put in as indication to tenderers that the house was – was that kind of size, I s'pose or that kind of cost, yes.* Question: *We're talking that kind of range*? Answer: *Yes, I didn't particularly given them any accurate costing on that, no. That wasn't an accurate figure. That was an indication of a quality of construction, sorry that's not the right words, that was an indication of, you know what I'm trying to say.* Question: *Well no, you have to say it unfortunately*? Answer: *That was to say this tender is around that mark.* Question: *As opposed to $350,000 or $450,000? As opposed to, yes – or $50,000?* Answer: *Yes, yep, okay all right.*

74. Mr McNamara agreed it was fair to say he was shocked at the tender results; that he wrote to the plaintiffs on or about 19 October (Ex P11); he agreed there was something "very wrong"; he agreed he contacted Rawlinsons to find out the problem. He added this was to see if the project could be brought back to budget; he could have done this, (he agreed), by designing a different house or a smaller house (T 170). Mr McNamara agreed the further costing by Rawlinsons indicated the house could not be built within the nominated $250,000; he agreed he was trying to bring the design back to a point where the costings would be back to $250,000; he agreed that the costings contained in ExP12 were revised down to 174 square metres although he said they were not "his" figures so he did not want to interpret

them – he said ".. all we were interested in was the final figure. These are the workings of Rawlinsons and how we got there is inside his head. These are his calculations and I can't interpret those calculation for you, sorry" (T 172). Mr McNamara said that he proposed changes to Rawlinsons during a meeting, it was not by letter, nor were any notes taken, but it was by way of a proposed revised plan; he did not show that proposed revised plan to the plaintiffs before the meeting in October 2001; as a result of that meeting, Rawlinsons produced P12; he agreed he did no analysis of what was in P12; when asked whether he knew the new plan was revised down to 114 square metres he said he could not comment on it because they were Rawlinsons figures; after he had the meeting with Rawlinsons he wrote to the plaintiffs advising them he had made some changes and organised a meeting with them on 25 October; he agreed that there was no floor area identified on P 17; he agreed it was a different house to the August drawings saying he wanted to keep the general concept of the house but at the same time take out a substantial area; he said he was also looking at staging the work further (T 175-6).

75. In terms of the difference between P17 and the August drawings, he said the living space at the front verandah was removed and that space changed into one verandah space; the family room was made marginally smaller; some area was taken out of the bedroom; there were areas generally taken out of the back; the laundry was smaller and window areas were reduced; the en suite was taken off the main bedroom; there was no separate play room for the children; there was not a particular living area for adults but there was a large dining and deck area that was an adult space; the laundry contained the storage; the laundry on that plan was next to the bathroom upstairs. Mr McNamara agreed he told the plaintiffs he was prepared to undertake additional work at no cost to them.

76. Mr McNamara said he was aware of the need to progress works quickly; he agreed he was aware that there were certain government grants available at

certain times; as to whether he knew they were available to the plaintiffs if the work could be started before the end of the year he said "the grants were changing but there were grants available in certain periods yes. That I was aware." On whether he knew those grants were available in November he said "I don't recall the actual time that I became aware of those grants or that grant or there were several grants going around that I was aware of" (T 179). Later in cross examination Mr McNamara was shown his letter of 5 September (P13) stating "This combined with the Government rebates on offer, of up to $19,000, represents, we believe, very good value." He agreed with the proposition that at 5 December 2001 he believed the plaintiffs were entitled to up to $19,000 in government rebates (T 184).

77. Ms Gearin cross examined on Exhibit D4, (Mr McNamara's file note of 29 October), in particular the words "Proceed with documentation of revised design proposal". He agreed this revised design proposal was to provide sufficient detail of design documentation for a proper costing to be done; he agreed it was in effect a new schematic design; he said there was at that time an instruction from Ms Innocenzi to include an en suite and this was prepared in a further sketch. Mr McNamara explained he then prepared D6, the documentation that went to the second round of tender and those were supplied to Rawlinsons; a costing was received from Rawlinsons on 23 November 2001; he agreed that costing was not in budget being $318,396; he agreed he sought a further costing from Rawlinsons that resulted in a reduced costing to $265,817. Mr McNamara explained this was achieved through identifying elements that could have been taken out without effecting the general concept and brought the budget down by $50,000. He agreed that the second round of tenders that were received in December were over budget. He did not agree that with further changes proposed it was a different house; he said the style, concept, the finishes the spaces were all in keeping with the original house (T 181-182). He disagreed that

it was uncommon to reduce the costing by $50,000 within a few days (T 182).

78. Ms Gearin also drew his attention to his letter of 5 September where he stated: "We can make some more changes. We understand that you have some concerns about the size of the living room. …some of the proposed cost reductions could be used to increase the size of the living area by adding 1.5 metres in length.." The proposal was that such an increase might cost in the order of $8,000. Mr McNamara agreed he was unable to find a builder who would tender for the construction of any of his designs for the plaintiff's house within their budget of $250,000 inclusive of GST.

Observations on the Evidence

79. In my view all witnesses were trying to be honest in their recollections. There is a difference in my view in the degree of reliability between the two parties. For Ms Innocenzi and Mr McNamara the events in question took place throughout 2001. The trial was February 2005. Notwithstanding that both parties probably had cause to recall events and view documents in the preparation of this matter, there is naturally a question of reliability concerning the level of accurate recollections. In my view Ms Innocenzi was far more precise in her recollections and answers to both counsel in her evidence on the substantive matters in dispute. The design and construction of her house appeared to be a major event in her life that she took very seriously and diligently. She was very particular at the outset about what she wanted, both in terms of the general concept and in terms of her particular instructions on different aspects of the design. She was cautious about issues of cost noting that most of the changes she had recommended from the initial plans were costs that would most probably, (according to the particular costs that were presented to her), represent a decrease in costs. She did not appear to possess a malevolent attitude towards the defendant, but her frustration became evident from the time of the first failed tender

process. Mr McNamara, by comparison was vague and at times mildly unresponsive to questions. That was my initial impression of his evidence. Given that initial impression I ordered a transcript to check whether that impression was correct. Although that delayed giving these reasons a reading of his evidence has more than confirmed my initial view. Examples of his vagueness on the content of discussions with the plaintiffs and others, without much in the way of documented material to assist his memory, leads me to the view that his recollection on a number of matters was deficient. Although the evidence of Ms Innocenzi and Mr McNamara coincides on many matters, where their evidence differs, I prefer Ms Innoncenzi's evidence as being the more reliable account of their inter action and the sequence of events.

80. With some qualifications I accept Mr Petrie's evidence also. He appeared to make appropriate concessions although clearly he also was prepared to stand by his opinions. He obviously could not comment on conversations between the plaintiff and defendant that were not in the records provided to him. His opinions would be diminished if it were shown that conversations, contrary to the material he based his opinions on, had in fact taken place. Similarly, if other documents existed that he had not considered, that may also diminish the weight of his opinion. In my view there were no documents of significance before the court at hearing that could be shown to have reduced the value of Mr Petrie's opinions, however it is also true and I believe accepted by Mr Petrie, that he didn't know whether the defendant architects had in fact considered issues that were not documented. In a general sense Mr Petrie's views support the plaintiffs' case, however those views, (such as the Defendant falling below (in a number of areas) of what would be acceptable practice according to the RAIA), are not determinative of the ultimate matter.

Consideration of the Issues

81. The Amended Statement of Claim pleads breach of contract and breach of duty of care. The alleged tortious duties overlap significantly, if not totally, with the alleged contractual obligations. I see the case as primarily capable of resolution under contractual principles although granted that some findings may be relevant to both actions.

82. The written contract between the parties is that which is set out in Ex P2 and reproduced above in these reasons. That contract also incorporates the booklet "You and Your Architect" and also incorporates Ex P1 "the wish list of spaces" within the framework mentioned in the contract, namely " we have received your "wish list" of spaces which appears to be achievable within a budget which we understand to be $250,000." The acceptance of the concept of the house as expressed in the "wish list" is reaffirmed in the contract in the paragraph beginning: "We understand that you would generally like the house to be open….etc". Initially I was concerned that the "wish list" was merely aspirational however I note that as well as the inclusion of it in P2, from the time of the conclusion of that contract, both parties proceeded and conducted themselves on the basis that the concept for the house was that as initially identified in the "wish list". For example, it was those very "spaces" that were included in the initial sketch plan and later in the schematic design. Although of course the contract was capable of variation by agreement, it was that initial concept that ran through the process. In other words, although I initially had some misgivings, there is no reason why the "wish list", (which is possibly wrongly labelled as such), but effectively incorporates the plaintiff's instructions, should not be considered to be part of the contract between the parties. If, as Ms Kelly rightly points out, the clients desires and therefore instructions may change throughout the process, there would need to be a variation of the contract, possibly incorporating negotiated consequential cost variations if that is necessary. In my view the instructions incorporated in P1 and P2 are broad enough to be

capable of considerable development within the design process. I note Mr McNamara accepted in his evidence that he was required to build the house for the plaintiffs including those items on the wish list. On the balance, in this case, I find the initial instructions contained in P1 were incorporated into the contract. A contract for architectural services would hardly be efficacious without some starting point in the contract of what was actually conceived, at least in general terms, by the parties. I say that with the awareness that there is still a substantial development process that will inevitably occur.

83. The most significant issue concerning the interpretation of the contract is whether an essential term was that the house be constructed for $250,000. Exhibit P2 states "within a budget which we understand to be $250,000. This cost of course will vary depending on the overall area of the house and finishes selected. We will provide an opinion of probable cost with the initial sketch plans so as a brief can be finalised that is within your budget." In the same document concerning calculation of fees it is stated "Based on a construction value in the order of $250,000, the RAIA scheduled fee is…." Based on the face of the document and the consistent conduct of the parties and the evidence given by both Ms Innocenzi and Mr McNamara, I am led to the inevitable conclusion that the construction of the home within a budget of $250,000 was an essential term of the contract. It is evident that the Defendant's fee structure was calculated on the basis of the budget. It will be recalled that Ms Innocenzi asked for the initial documentation process to cease while she applied for finance in the sum of $250,000; she applied for that finance, was given agreement in principle and advised the defendant.

84. Initially in evidence Mr McNamara expressed there was a budget "in the order of $250,000" and he prepared the sketch design on that basis (T 105). Certainly in cross examination (as noted earlier in these reasons), he effectively expresses the view that the budget is a very important term of the contract. He was shocked himself when the tenders came in and he knew

that the project was well over budget. Ms Innocenzi gave evidence that the significance of the budget was reinforced at meetings with Mr McNamara.

85. There was a significant discussion about whether the budget included GST. It is clear from both Mr McNamara and Ms Innocenzi that this sum was intended to be inclusive of GST. It is also clear from Ms Innocenzi that she viewed professional fees and charges as additional to the expressed budget. The budget was truly meant, as it states, to be for construction costs and that is inclusive of GST.

86. Mr Petrie's evidence is that in the early stages of design as a practice standard an acceptable margin is 10% but that as the process continues and refinements are made during the design development stage a margin more in the nature of 5% should be achievable. It was submitted on behalf on the defendant that the acceptable range was therefore $225,000 to $257,000. That is not included in the contract and was not suggested to the plaintiff. I do not think I am therefore in a position to accept that submission. Even if the 5% margin is accepted, and I note there is some indication of limited flexibility by Ms Innocenzi, by the time the tenders got close to budget there was no approval by the plaintiffs for that design.

87. There have been a number of arguments about whether the changes suggested or incorporated by Ms Innocenzi at various stages should be taken as expressly or impliedly varying this term. Ms Innocenzi was very particular about changes she made after viewing the initial sketch plan. This was early in the process (on 23 January 2001) and are set out in the summary of her evidence in these reasons. She stated there was no discussion about any cost implications. When the costing advice came in from Rawlinsons she instructed further changes, primarily to do with aesthetics. Overall, (and this is acknowledged by Mr McNamara in his evidence), this logically should have reduced costs if they varied at all. One cost was the timbers for the flooring and possibly the use of glass. A further

cost implication was an increase in floor space. From the initial costings she had understood there was some room to move. A number of changes were made on items that she had not yet been consulted on. It is not as though she was changing her mind continually. There were fittings such as motorised louvres that clearly were not anticipated by her at all. In any event she told the court there were no discussions about the adverse cost implications of this. I accept her evidence on this. I accept on balance there was not a subsequent agreement to vary the budget.

88. Once the surprisingly high tender results were received, it was Mr McNamara who made changes to the design and had them re-costed by Rawlinsons. The plaintiff was not happy with the suggested changes and she was clear in her evidence that she did not instruct Mr McNamara to tender on the basis of that plan. I accept her evidence on this. I note in support of her evidence is the opinion of Mr Petrie about the lack of documentation of this stage of the process.

89. My conclusion is that the defendant failed completely to design a house, within the broad specifications of the contract, that was capable of being constructed for $250,000 inclusive of GST. In my view that was the essence of the contract. The first tenders came in at around 60-70% over the budget. The re-tendering which was not authorised by the plaintiffs was still unacceptably high and in any event the final design was not authorised by the plaintiff. I am sure the defendant's architect was well motivated to attempt to change the design at that late stage but that took the house into a completely different direction so that it bore little resemblance to the schematic design or the original concept. I do not accept Mr McNamara's evidence that he stayed with the basic concept. I note Mr Petrie is highly critical of that part of the defendant's work. I do not agree at all that the plaintiffs had accepted the further design by the defendant after the later costings by Rawlinsons (Ex P10). Ms Innocenzi's evidence is that she was most concerned with those plans for reasons she gave in her evidence (T 35-

36). It is highly unlikely that in her frame of mind at that time she would have consented to tender. There is a significant difference in agreeing to have the design sent out to tender and simply obtaining a quote. I reject the submission made on behalf of the defendant to the effect that there is no real difference. The tender process is far more advanced and more difficult to negotiate about, particularly as in this case when the design is not agreed. I note that proposition relied on by the defendant is rejected by Mr Petrie.

90. The further breach alleged is that the defendant breached a term to design and supervise construction within 35 weeks. Of that term P2 states: "From the initial schematic design stage through to completion of construction, the process typically takes about 35 weeks plus a further 26 weeks to monitor the building for any defects that may subsequently arise." On my reading of that term, that is not worded clearly enough to treat time as an essential term. I don't see anything specific in the other evidence to indicate that it was intended to be a term of the contract. It is a genuine indication.

91. Similarly, in my view, there is simply not the evidence that there was an express term of the contract that the defendant prepare the documentation and supervise construction to ensure meeting the requirements of the Northern Territory's "First Home Owner's Grant" and the "Quick Start" grant concessions.

92. In terms of the plaintiff's Particulars of Claim contained in the Amended Statement of Claim I find that the contract did incorporate the particulars as alleged in paragraph 2(a), namely for the defendant to design a home within the plaintiff's budget expressed to be $250,000. As I have made the finding that the broad specifications are those in P1 and P2 and documented in the first schematic design, it is the failure of the defendant to perform that obligation that constitutes the breach. I note also the response to the further and better particulars 2, paragraph 2, 19 October 2004: "The plaintiff relies upon the written communication forwarded via fax 28 December 2001,

document 1.5 in the defendant's discovery, and document 1.6 dated 9 January 2001 being the defendant's response confirming the wish list achievable within the budget of $250,000." The first of the "Particulars of Breach of Contract" pleaded in my view is made out, namely "Failing to prepare a schematic design and/or design documentation in accordance with the express budget restrictions detailed by the plaintiffs."

93. On behalf of the defendant it is argued that no action of theirs caused the breach. I note Mr Petrie's report stating: "On the assumption that the cost plan was valid, then either, 1. The building increased in size; 2. The quality of finishes and equipment was increased and/or 3. The tender market changed dramatically from the time of the cost plan. Ms Kelly suggested a fourth possibility to him, or rather suggested doing away with that first assumption, namely, she suggested that the Rawlinsons Cost Plan was "crook". Mr Petrie agreed that was a possibility. Much has been made about the Rawlinsons' plan. There is some evidence that Mr McNamara told the plaintiff that it was Rawlinsons that was at fault. Not much weight can be placed on that. There is evidence that there was scant documentation passing between the defendant and Rawlinsons. In any event, although the contractual relationship is between the plaintiff and the defendant, in my view this is a situation where the defendant assumes the risk in terms of engaging Rawlinsons. If the inability to meet contractual obligations *was* due to Rawlinsons, the defendant is still responsible for its obligation *vis a vis* the plaintiff. The way I have viewed this matter is that it is not necessary for the plaintiff to prove how the circumstances came about that led to the defendant's breach. The defendant had contractual obligations that it failed to perform.

94. I am of the view the plaintiff has substantiated in *Particulars of Claim*, paragraphs 1, 2(a), 2(b), 2(d),2(e),2(f),2(i), 2(j). In terms of paragraph 3, acceptance was not on January 9 but a little later. I accept paragraph 3. In terms of the breach of contract I have already found that the first alleged

breach is proven. I specifically reject particulars 2(c), 2(g), 2(h). As to the alleged breaches I have found point 1 to be made out, in similar terms I find point 2 to be made out; in consequence, although it is somewhat subsumed, I find point 3 made out; although it is also somewhat subsumed, I find point 4 made out. I reject point 5. The duties alleged in tort overlap significantly, if not totally with the matters raised in contract. In my view it is unproductive and unnecessary to analyse the matter further under duty of care.

95. This is an unusual situation as the plaintiffs have paid certain fees and expenses to the defendant for plans and services that are of no value and no use to them. They could not build the house that they were told could be designed for them. In my view the plaintiffs are entitled to recover the moneys expended by them in these circumstances. They have spent the money pursuant to a contract that they have received nothing for. It is not to the point that some plans and designs have been generated and given to the plaintiffs. Those plans and designs were not developed pursuant to the contract. The plaintiffs should be able to recover the fees they paid to the architects as a matter of compensatory damages for the loss they have incurred. They should also be able to claim the various fees paid to consultants as such loss would have been a readily forseeable consequence of the breach.

96. As noted already, I have rejected the proposition that the contract included a term concerning completion of certain stages in time to make the plaintiffs eligible for various government home buyer grants. I do not think the plaintiffs should be compensated for missing the deadline for applying for those grants. The evidence is somewhat scant as to whether the earlier grant (in March) would have been available at all. There is also some evidence of delays (although not necessarily significant ones) on the part of the plaintiff. Even if the plaintiffs missed the December grant because of the breach of contract, I am not persuaded that the loss was in the contemplation of the parties, in other words, was too remote to be compensated.

Orders and listing

97. I am making these reasons available to the parties solicitors today. I will list the matter to formally make the orders on Tuesday 26 July at 9.30, although there will be liberty to apply on the date.

98. The plaintiff is to be compensated for the following loss:

13/06/01	TCM Engineers	$572.00
15/08/01	The Architects Studio Pty Ltd	$2,109.75
29/08/01	The Architects Studio Pty Ltd	$7,500.00
31/08/01	TCM Engineers	$4,004.00
19/09/01	Hydrotech Pipeline Design	$275.00
19/09/01	The Architects Studio Pty Ltd	$1,875.00
30/09/01	TCM Engineers	$1,114.00
		$17,479.75

Additional interest calculated from the Statement of Claim through to Tuesday 26 July 2005 is $4,078.17

99. Consequently, I will make an order on 26 July at 9.30 entering judgement for the plaintiff in the sum of $21,557.62 and will hear the parties on any cost issues.

Dated this 21 day of July 2005.

_____

Jenny Blokland
STIPENDIARY MAGISTRATE