CITATION: *Colless Nominees Pty Ltd v Davidson* [2005] NTMC 066

PARTIES:	COLLESS NOMINEES PTY LTD
	v
	ALLISON GAYE DAVIDSON
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20326458
DELIVERED ON:	26th October 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	14, 15 April, 29 June, 6 July 2005
JUDGMENT OF:	Mr R.J. Wallace SM

CATCHWORDS:

Contract – formation of contract – variation of contract - consideration – lack of consideration – lack of consideration not pleaded – promissory estoppel – "detriment" – "unconscionable" – uncertainty – interpretation contra proferentem

Musumeci v Winadell Pty Ltd (1994) 34 NSWLR 723 not followed.

REPRESENTATION:

Counsel:

Plaintiff:	B.O'Loughlin
Defendant:	W. Piper

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Pipers

Judgment category classification:	A
Judgment ID number:	[2005] NTMC 066
Number of paragraphs:	115

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

No. 20326458

BETWEEN:

COLLESS NOMINEES PTY LTD
Plaintiff

AND:

ALLISON GAYE DAVIDSON
Defendant

REASONS FOR JUDGMENT

(Delivered 26th October 2005)

Mr WALLACE SM:

1. The defendant, Allison Gaye Davidson ("Ms Davidson") owns a business, Barton Houseshift, and runs it with her partner Kym William Barton ("Mr Barton"). Barton Houseshift buys second hand houses, sells them on, and transfers the houses to the new owner's site. This action arises out of Ms Davidson's sale of a house to Colless Nominees Pty Ltd, the plaintiff, and its transportation from Strangman Court, Larrakeyah to a block at Mandorah on Cox Peninsula. Brian Martin Colless ("Mr Colless"), a retired civil engineer, is a director and the guiding mind of the plaintiff. A price of $77,000.00 was agreed for the house, its transportation to and its restumping on the Mandorah site. The plaintiff paid a deposit.

2. Before moving the house, the defendant was obliged to lop part of it off in order to make it narrow enough to be transported. At one time there seems to have been uncertainty as to whether they would lop off a back verandah, or the front eave to achieve this slimming, but in the end it was the eave which was cut off, and delivered separately to Mandorah.

3. The claim is a complicated one, but in essence it relates to two things. First is the matter of the eave: there is claimed a sum as the cost of reattaching it to the house (or, perhaps more accurately, putting on a new one). Connected with the defendant's alleged failure to do that there is a claim for a series of consequential losses, there having been water damage attributable to leaks permitted by the eave's absence, (no claim is made for that damage) and leading into further losses because the plaintiff was not able to let the premises, as it intended, as a short-stay holiday house, until the eave was in place, and the water damage made good.

4. Secondly, the plaintiff claims that the defendant failed to perform a series of other works, additional to the delivery and restumping of the house, which the defendant had agreed to do. (The non-completion of these works similarly prevented the letting of the premises.)

5. The original statement of claim was filed on 1 December 2003. A handwritten notice of defence was faxed to the court by Ms Davidson on 16 February 2004. (Ms Davidson lives near Katherine). An amended statement of claim was filed on 12 July 2004, to which a notice of amended defence was filed by Ms Davidson on 13 August 2004. This notice is typewritten, and consists almost entirely of the words "agree" and "disagree" in response to the various paragraphs of the amended claim. In their different ways the original defence and the amended defence each suggest that their author, Ms Davidson, did not have the benefit of any professional legal advice.

6. The plaintiff was granted leave and filed a further amended statement of claim on 20 August 2004 to which Ms Davidson responded with a further amended notice of defence faxed to the court on 24 August 2004. Again, this document appears not to be quite what a lawyer would produce. It effectively combines the contents of the two earlier defences.

7. Around this time Ms Davidson did start to instruct Messrs Morgan Buckley, but it appears that her relations with that firm never went very far, and

Morgan Buckley never filed a Notice of Appearance. While a Ms McDonald of that firm was in receipt of earlier instructions, she did raise with Ms Gamley, of Messrs Clayton Utz, solicitors for the plaintiff, the matter of a proposed counterclaim. A counterclaim of sorts was lodged with the court (among a welter of applications) by fax on 17 November 2004. An amended counterclaim dated 1 March 2005 was eventually filed. Parts of it were abandoned at hearing. What remains is a claim by Ms Davidson for the value of certain works done by Barton Houseshift over and above those contracted to be done for the original $77,000. These additional works were in relation to the building of a balcony on the seaward side of the house after it was restumped on the Mandorah site. That the defendant did works for such a balcony is not in dispute. How much work, exactly what works, is, as is their value.

The Original Contract

8. The first discussions about the sale and purchase of the house took place between Mr Barton and Ms Caryl Warren. Ms Warren is Mr Colless's partner. Ms Warren's evidence – see p84 of the transcript – was that in the course of these very early discussions Mr Barton represented to her that the house was coded, i.e. that it complied with the building codes obtaining after Cyclone Tracy. The most persuasive evidence on this point was Mr Barton's, in cross-examination (p210):

> MR O'LOUGHLIN: Mr Barton, did you think that the – when you first became aware of this house in Larrakeyah, I think in evidence-in-chief you thought it was largely or partly up to code?---The owner of the house actually portrayed it to be up to code, but we were not sure it was up to code.
>
> MR O'LOUGHLIN: Now, is it possible that you then passed that understanding on to either Brian Colless or his partner Carol Warren?
>
> That was a 'yes'?---Sorry – that it was partially up to code, or ---?

> Well, no. You said the vendor – I think someone said it was Halkitis, or something – they told you or portrayed it to be up to code. Is it possible that you then passed that fact – portrayal – to Brian and/or Carol Warren?---No.
>
> Did you believe their statement that it was up to code?---No.
>
> Did you have any reason to doubt that it was up to code?---Yes.
>
> What was that reason?---Well, every house is up to code until you shift it.
>
> But apart from that – because – once it is removed has got to comply with a new code, is that your point?
>
> And were you told by the previous owners that where it currently sits it is complying with the current code, the full cyclone code?---No"
>
> That was a 'yes'?---Sorry – that it was partially up to code, or ---?
>
> Well, no. You said the vendor – I think someone said it was Halkitis, or something – they told you or portrayed it to be up to code. Is it possible that you then passed that fact – portrayal – to Brian and/or Carol Warren?---No.

9. I doubt whether Mr Barton ever asserted that, but he may have believed that the house might be up to code, and I accept that Ms Warren came to believe, for a short time, that it was. Mr Colless, who was away from Darwin at the time of these early discussions, made some enquiries on the subject, and himself went to the Building Board to check on the matter. There was no certificate of occupancy there to verify that the building was up to code. Mr Colless's evidence – see p12 of the transcript - was that the lack of that certificate did not extinguish all hope: often enough householders have the necessary works done then fail to file the appropriate paperwork. So Mr Colless, of his own suggestion, or perhaps Ms Davidson's or Mr Barton's had an engineer, Mr Peter Russell, inspect the structure. Mr Colless and Ms Davidson were with him at the house at Larrakeyah while he carried out that inspection. Mr Russell's report became Ex3. It seems from that report that the previous owners had done some upgrading work towards making the pre-

cylcone) house compliant with the post-cyclone code. However, some of the necessary work had not been done, or had not been properly done. Mr Russell listed 15 items in Ex3 – the "15 bullet points" – which needed to be done to bring the house up to code. Mr Russell's report, Ex3, is not dated, apart from its noting that the date of the inspection was 20 August 2001 (I presume that is a slip that should have read 2002). I assume that Mr Russell prepared and delivered the report that day or the next: such is the burden of the evidence of Mr Colless.

10. Much earlier than that, on 5 July 2002, Ms Davidson had faxed to Colless Nominees – actually to Ms Warren at her place of work – a letter dated 3 July 2002 described by Ms Davidson on her fax's cover sheet as "the offer to purchase" (although it might better have been described as an offer to sell). This fax became Ex2. The letter sets out proposed terms of sale. It reads:

> Dear Brian
>
> We are pleased to offer you the 3 bedroom house inspected by yourself at 2 Strangman Circuit, Larrakeyah. Please find following the terms and conditions of the sale of the house.
>
> Purchase price of the house delivered and restumped, is $77,000, including GST. The house will be available for us to commence work by the end of the month, and a Permit to relocate will be obtained for the following available weekend.
>
> The price includes the following;
>
> (a) Transportation of the house from the current location & delivery to you property at Number 10 Cox Drive, Mandorah NT.
>
> (b) Restumping of the house at 2.85m,
>
> (c) Footing holes, concrete & 100 ml box section piers.
>
> Barton Houseshift gives no guarantees to the quality and/or structure of the house. You must rely upon your own inspections of the building to determine the condition of the house for its intended purpose.

Barton Houseshift will not be responsible for any of the following and the price does not include any of the following:

1 Access into the proposed site at No 10 Cox Drive, Mandorah,

2 Connection of services such as power, water and septics,

3 House plans, certificates or inspections,

4 Any verandah's and stairways attached to the building,

5 Any further excavation costs, should we encounter soil irregularities such as rock etc in footing holes,

6 Transit Insurance for the building.

The payment details are $55,000.00 (including GST) on acceptance of this offer, and the balance of $22,000.00 (including GST) on the completion of the restumping at No 10 Cox Drive, Mandorah.

**Please Note: If further costs are incurred (such as clause No 5 above, or upgrading quotes), a separate invoice will be issued.

It is up to the discretion of the Motor Vehicle Registry if any verandah's/landings etc may remain attached during the transportation. Therefore, we can not give any guarantee to the condition of such if they are required to be removed from the building.

If there is anything further that you wish to discuss, please do not hesitate to contact either myself or Kym.

Yours sincerely

Alison Barton

Barton Houseshift.

11. To the extent that the contract was reduced to writing, this is that writing. So far as statements by Ms Davidson or Mr Barton (or – who knows? – perhaps one of the house's former owners) about its coding, the clear written disclaimer in the letter, "Barton Houseshift gives no guarantees…etc"

clearly, in my judgment, establishes that the purchasers ought not to rely upon them (if they were made). I might also add that Mr Colless, a civil engineer whose familiarity with building codes is abundantly clear from his evidence passim, and who refers to his experience with older houses in Darwin, seems to me the least likely of men ever to rely, even for a moment, on any assurance from any less qualified person than himself.

12. An example of the quality of Mr Colless's understanding of the building codes appears at p15 of the transcript, concerning the windows of the house:

> "It's not the type of thing that a lay person would know that a house in place could have substandard glazing and be acceptable to the building authority but the minute you move that house, you have to upgrade the glazing."

13. If Mr Barton ever essayed an opinion about the cyclone coding of the house – and I am not persuaded on the balance of probabilities that he did – I do not believe that Mr Colless relied upon it at all. He may have had his hopes, but no more than that.

14. The offer was accepted and a deposit was paid. The payment of the deposit was not in accordance with the terms set out in the letter: "The payment details are $55,000.00 (including GST) on acceptance of this offer…etc". The evidence in relation to the payment of the deposit is surprisingly (and frustratingly) vague. According to Mr Colless (transcript p11):

> "I recall just as a matter of good faith making a payment of $7,000 initially and then I recall making a payment of $20,000. that brought it up to about, I think the first payment was $7,7000 of that order, then $20,000 and about a week or two weeks before the house was transported we paid the balance of the $55, 000 which was in the letter."

15. In an answer to a question on p12, it is entirely unclear whether $7000 (or $7,700) or $27,000 had been paid over as at the time of Mr Russell's inspection.

16. Ms Davidson's evidence is no better. On p136, asked how much she had received by the time of the Cool Spot meeting – a few days after Russell's inspection – Ms Davidson said (p136)

> "I'm not sure if there was just the $7000. After the $7000 payment there was another split payment again of – I think it was 20 or might have been 23 or something like that but I'm not denying that they never paid the deposit but it wasn't paid as per the letter of offer said it had to be paid."

17. Earlier, apropos of the payment of the $7000, Ms Davidson said (p131 – "the 3rd or the 5th" is of August 2002):

> "We were back in Darwin I think the following or the weekend after the 3rd or the 5th, we met at the house again and there was discussions about the actual relocation, getting it out of the site. There was basic discussions in relation to the letter of offer with the stairs and all that sort of stuff. There was a particular discussion about an eave having to be removed to reduce the width.
>
> Before you go on with that meeting, had they accepted the offer by this stage?---Yes, yes.
>
> How did they do that?---They offered to – a deposit was supposed to be paid on acceptance of the offer but it was our understanding that they had $7000 to offer at that time but they had to organise finances through – something I'm not quite clear on with their personal ---
>
> So I think you received that $7000?---I believe so, yes.
>
> And going back to that meeting on the weekend, who was there at the house?---I'm pretty sure there was Kym and I and Caryl and Brian.
>
> And the family was still living in the house at that time?---Not at the second time, no, they moved into the house right next door so they were still present when they weren't in the house.
>
> And going back to where you were, what occurred on that day?---We just had another look at it. Caryl was quite beside herself with excitement over the house, which I can relate to, we just had another look. We had put in a permit with the Motor Vehicle Registry to get some sort of an idea from there but it's up to the discretion of the Motor Vehicle Registry to indicate to us what we have to do to reduce the width for each and every load, all of them. We had a talk

about one of the eaves having to come off the house to reduce the overall width. There was a few options we could have went with, there was an eave on the front, on what I refer to as the dining room side of the house and there's a verandah on what was then the back of the house at Strangman Court. It was more logical and economical to the purchasers that the eave on the front of the house come off because that was cheaper than obviously taking all the verandah and everything off the back. So then Caryl Warren indicated as well that if we were to take anything off the house they would prefer it to be on what is called the front side. When it was at Strangman Court it was the front eave over the dining room side because they intended to build a verandah out there."

18. I accept this passage as truly representing Ms Davidson's belief as that time of the state of contractual relations between the parties. (On the question pertaining to who said what when about the removal of the eave the truth is less clear.)

19. It seems to me that it is quite important to work out, as far as possible, whether a contract had been formed by the parties at this point. The payment of the deposit of $7000 or $7,700 by Mr Colless strongly suggests a desire on his part to seal a bargain, a p52:

> "You wanted the house and you wanted to get it before anyone else which is why you put the money down fast? --- No, no, my partner wanted the house."

20. Indeed, Mr Colless's recollection that the money put down fast was perhaps $7,700, one tenth of the contract price, obviously echoes the most common practice in contracts for the sale and purchase of land. In those contracts there is a tried and true written contract covering nearly all foreseeable eventualities. In the case of the sale of this house to Colless Nominees, there is no such written contract, apart from the letter, the "offer to purchase" and a 10% deposit is not contemplated in that letter. I am left to do my best to discern the intentions of the parties from the evidence as to their words at the time – there is precious little of that – and their actions afterwards. I conclude that Ms Davidson's acceptance of the $7000-odd deposit betokens a waiver by her of the letter's requirement of "$55,000…an

acceptance of this offer…" and a variation of terms accordingly. Instead it appears that both parties argued that Colless Nominees would pay the $55,000 total as quickly as it could and in any event before the house was moved. It seems to me that the vagueness of both Mr Colless and Ms Davidson as to the stage when the next $20,000-odd was paid points strongly to the conclusion that neither of them thought that that payment changed or indicated anything in particular – it was just a step along the way to the necessary $55,000. Meanwhile, Ms Davidson ceased to look for any alternative purchaser – her evidence was that there had been a number of people apparently interested in this house – and proceeded to approach the Motor Vehicle Registry to prepare the way for the move to Mandorah. In my opinion the vendor and purchaser of this house each thought, correctly, that an agreement to sell and buy had been struck on the payment of the $7000 (or $7,700). The terms of the agreement were those of the letter, the "offer to purchase", varied in respect of the $55,000. The paragraph, "Barton Houseshift gives no guarantees' to the quality and/or structure of the house…" etc, was a term of the contract.

A Variation To The Contract?

21. Having received Mr Russell's report, Mr Colless sought a meeting with Ms Davidson to discuss the matters raised in it. He originally suggested that they meet at his house, believing it to be an advantage in bargaining to be "on your own territory" see p53. Ms Davidson and Mr Barton may have read the same texts on business tactics: they suggested that the meeting take place on neutral ground, and the parties settled on the Cool Spot, a coffee shop at Fannie Bay. They met within a day or two of the production of Mr Russell's report. (Russell's inspection had been on 20 August 2002 and, after the meeting Ms Davidson sent an email containing a sort of minute of the meeting, to Mr Colless on 23 August (the email became Ex4).

22. Mr Colless's reasons for meeting to discuss the matter were clear enough when he was giving his evidence in chief, but their most explicit exposition came in cross-examination:

> (p53) "I know that uncoded houses are a nightmare to upgrade and I was deliberately – I was definitely wanting a coded house…"
>
> (p54) "… you know, I have a rough idea that you can spend $100,000 upgrading a house, I've supervised upgrading houses and I know what a nightmare they"-
>
> (p54) "…but having this report and the items pinpointed I knew it wouldn't be that order of cost, but if it was going to be too much, you know, certainly I would have pulled out and asked for my money back. I sort of got the impression that they were wanting the agreement to go ahead too and definitely my partner was wanting the agreement to go ahead."

23. Mr Colless's hope was that at the meeting he might persuade Barton Houseshift to carry out some of the works that would be needed to bring the relocated house up to code. As far as I can tell, neither Ms Davidson nor Mr Barton knew much about the detail, but they were aware that this was Mr Colless's agenda, see Mr Barton's evidence at p210-211, and Ms Davidson's at p134. It also seems that both parties were contemplating that they might withdraw from the agreement. I have just quoted Mr Colless from p54, here is Ms Davidson at p134.

> "Kym and I had discussions on the way to the Cool Spot on what we were prepared to do and that was to offer Brian Colless his deposit back and resell the house to one of the other lots of people that had rung up for it."

24. Notwithstanding that, immediately before the Cool Spot meeting, both parties had reasons for dissatisfaction – Mr Colless at the now undeniable expense he faced to bring the house up to code, Ms Davidson and Mr Barton at the thought of being squeezed by Mr Colless - it is clear that, as Mr Colless noted, both did want to go ahead with the contract. On Mr Colless's side he attributes that desire entirely to Ms Warren. That would be enough.

On the Barton Houseshift side the source of the desire is less obvious. I set no store by Mr Colless's theory (p64) that they may have been motivated by shame or embarrassment at the house's having turned out to be not up to code. My suspicion is that their desire, and Mr Colless's personal preference too originated from inertia. The agreement had gone a certain distance, expectations had formed, plans had been made and it was easier to go on than not.

25. There was also evidence from Mr Barton to the effect that it was not uncommon for purchasers to request him to do little pieces of work in need of doing as about the time a shifted house was restumped, and that it was not uncommon for him to do such work, free of charge, provided he had the necessary tools and labour on hand and the job were not too large. That being so, his apprehension before the Cool Spot meeting may have been allayed, or completely dispelled, by his understanding (which may have been correct or not) that what Mr Colless was asking of him was not too large.

26. The meeting seems to have been quite amicable. There is no doubt that Barton Houseshift – Mr Barton seems to have been Mr Colless's principal interlocutor at the meeting – undertook to do some work on the house after it had been relocated as part of the works necessary to bring it up to code. The scope of the work agreed by Mr Barton is a matter of strong dispute on the evidence. There is also no doubt that Ms Davidson sent to Mr Colless the email Ex4 mentioned above, where I described it as a sort of minute of the meeting.

27. Ex4 reads as follows:

> BRIAN COLLESS
>
> From: Allison Barton [barton@nt-tech.com.au]
>
> Sent: Friday, 23 August 2002 10:36AM

To: brian.colless@octa4.net.au

Subject: Upgrade works to No 2 Strangman Court

Dear Brian & Caryl

Further to the discussions and inspections with Peter Russell late on Tuesday

Afternoon (20.8.2002) at the house at No 2 Strangman Court, Larrakeyah regarding the work required to be completed for the coding of the house, and the discussions between Brian, Kym and myself at the Cool Spot, Fanny Bay, it is agreed that we will undertake the following to assist with the coding of the house.

As explained to Kym & myself, the following work is required:

The 100mm hollow box section is to be fixed (may already be fixed but is not visible at this stage) to the 6mtr split timber bearer that is exposed in the lounge/dining area inside the house. It is agreed that if there is no such fixture in place, a welded angle or flat bar bracket out from each side of the 100mm box section (a total of 4 brackets) with 2 coach screws on either side to catch the split bearer, a total of 8 coach screws, will be sufficient.

The rafters that are supported by the 6 mtr exposed bearer (same bearer as above) are required to be trip L gripped on each side.

The Z brackets on the outer perimeter wall along the bedroom side need to be bolted through the rafters.

The floor joists need to be trip L gripped to the bearers under the house. Where there is a split/joined joist, a trip L grip will be placed on both sides.

We will undertake the above work as agreed. However, we will not accept responsibility for any further work without further discussions or negotiations. The work will commence when the house is on side at No 10 Cox Drive, Mandorah.

Regards, Allison.

28. The works which Barton Houseshift at the Cool Spot meeting undertook to do are the works the non-performance of which forms the second limb of the plaintiff's claim.

29. There is no doubt that there was no alteration of the contract price as a result of the Cool Spot meeting. In examination in chief Mr Colless, questioned by Mr O'Loughlin, at p16:

> "Those other four or five items that they agreed they would do. Was there any mention in that conversation that they would not be at their expense and part of the contract price but at your expense?"
>
> "It was definitely not at my expense. No like, I was already offering something at my expense [i.e. the glazing and other items] Much more than what they were offering."

And at p17:

> "..Was there any discussion about the contract price changing now from 77 to some other figure?"
>
> "Definitely not"

Similarly, in cross examination at p55-56:

> "What my client does not agree with is that while nothing was said it was implied and this is the question – and you would agree from the discussions there was no mention of an increase in price and it was not intended by either of the parties that there would be an increase in price by reason of their agreeing to do these further works?"
>
> "That's what I believe, yes."

Consideration

30. These answers, and all the other consistent evidence on the point, brought into my mind the question, which I raised with Mr O'Laughlin towards the end of the second day's hearing (p135): where is the consideration for the undertakings made by Barton Houseshift at the Cool Spot meeting?

31. In written submissions received on 21 July 2005. Mr O'Laughlin canvassed four possibilities. I will deal with them in turn.

> "1. ***The Verandah Contract was Consideration for the Four Items***
>
> Evidence from Kym Barton was that the agreement to have the defendant build the verandah was reached at the same meeting at the Coolspot at which the additional four items described in the defendant's email of 23 August 2002 were discussed. The plaintiff also gave evidence that the agreement to build the verandah was reached, discussed or confirmed at this meeting.
>
> This opportunity to build the verandah should be regarded as consideration (i.e. the defendant can build the verandah at a profit).
>
> Courts are not to look at the sufficiency of the consideration, simply to determine if there is *any* consideration[1].
>
> Thus, in exchange for the additional profit of building a verandah, the defendant agreed to undertake the additional four items.
>
> If this issue had been pleaded by the defendant (which it is not), the plaintiff would have specifically replied to the matter. Clearly, the plaintiff has not had this opportunity as the matter was not pleaded."

32. The difficulty with that submission lies in the factual premise in paragraph 1.1. There is no doubt that Mr Colless had it in mind to add a new verandah (or balcony) to his translocated house, and there is no doubt that this verandah, and his desire that Barton Houseshift might do some of the works towards its erection, was brought up by Mr Colless during the Cool Spot meeting. And there is no doubt that, ultimately, Mr Barton did these works – principally drilling holes for concrete footings, then fixing steel uprights and beams. (These works are the subject of the counterclaim).

33. Here is Mr Colless on what was said at the Cool Spot (p125 – 127). This was in cross-examination. The passage is long and slightly confused but I can think of no fair way to edit it:

[1] Law of Contract at 194.

"It's one I neglected to put to you in your earlier evidence and that is that at the Cool Spot there were discussions about the verandah and Mr Barton is going to be saying ---

HIS WORSHIP: The new verandah.

MR PIPER: The new verandah.

You were asking him for a price for the whole of the metal work and footings for the verandah? ---For the steelwork, yes.

You'd agreed that that was discussed?---Sorry, I never had included the beam up – the first floor beam with the cleats to pick up the verandah roof but ---

But not in your head?—Yeah, I had asked him for a price, yes.

And that was at the Cool Spot?---Mm mm.

And he said that he couldn't give you – he wasn't prepared to give you a flat price for the whole of the new verandah structural steelwork?---Mm mm.

And he said that he would just – he has a standard charge for holes for the footings and that's $400 a hole. I know I didn't ask you that in your earlier evidence and I should have but that's what his evidence is going to be and you need to have an opportunity to respond?---Yes.

Now could he have said that – did he say it firstly?---He did mention a cost per hole he said – I asked him for a quote and he said, 'Look, I can't give you that now but those holes we're doing for the main part of the house they're $300 each'.

Well , he says the figure of $400 was said to you at the Cool Spot?—No.

You say that he gave the impression that the holes would be---?—For the main house and said that he would generally charge $300 a hole?---For those ones on the main house, yes, he said that's his general charge. Now bearing in mind the ones on the house – that didn't worry me too much because the ones on the main house are much deeper than the ones on the verandah.

And he said that he would otherwise charge you for the verandah at an hourly rate?---We didn't agree on an hourly rate.

No, he admits he didn't give you – no, in fact he says he can't recall?---No, I wasn't given any rates.

He says he can't recall whether he gave you an actual figure?---No, he – well, I can't recall him giving me a figure either.

He says that he said, 'I'm not giving to you a quote' and I think you've already accepted he wasn't prepared to give you a quote for the whole verandah?---He said he couldn't give me a quote then and there.

And he said he'd do it on his – well, after the discussion about the holes he said that otherwise hourly rates?---No, because Allison Davidson's fax or e-mail to me she says that he will be providing a quote at a later date.

The question is ---

HIS WORSHIP: The question is just what you can recall of the conversation at the Cool Spot, Mr Colless?---Yes.

It's being suggested to you that Mr Barton said to you that any work he agreed to do he'd charge you at an hourly rate?---Mm mm. He---

I don't think it's being suggested to you that you said 'All right fine', I think it's just being said that that was put as a proposition by Mr Barton and left hanging in the air?---Yes.

Is that right Mr Piper?

MR PIPER: Well, there are two parts I suppose and I will deal with them individually.

I mean it does seem a natural progression in the conversation, do you recall him actually saying that he'd do it at an hourly rate?---Do the whole work at an hourly rate?

Not the holes, do steelwork at an hourly rate?---No, I don't, I don't recall that.

He will say that that was how it was left and agreed?—Mm mm.

Would you accept that?---No.

Well, he did do the formwork – the steelwork on the verandah?---No formwork, you keep mentioning formwork.

But he did do the steelwork so was there some other arrangement that was between then and – that we haven't heard about yet between then and when he did start the work on the verandah?---No, no there was none. Before he left site I asked him to sit down with me and work out the price, this was before it was finished.

Before what was finished?---Before the steelwork he did on the verandah was finished".

34. And here is Mr Barton, in chief (p186):

"Was the verandah discussed at that meeting?---Yea, well it was---

What was discussed about the verandah at that meeting?---He actually asked me whether I'd be interested in doing the footings and steel work seeing as he had all the equipment there, to save him mobilising someone else to go around and do the work. And I told him our standard rate was $400 a day, and we worked on $95 an hour for a welder and labour.

Do you recall whether you said it was an hourly rate or just – you actually gave a figure, or just used the words 'hourly rate'?---Yeah, I told him our hourly rate. You cannot – there was just no way you can quote on a job like that because you don't know what you're in for. We didn't even have a set of plans to go with at that time, and what he wanted. Because one minute he wanted a full verandah around the house and then it was changed."

35. The nearest any testimony came to establishing an agreement was Mr Barton in cross examination (p216-217):

"The construction of the new verandah was discussed at the Cool Spot, was it not? ---I believe so.

And you asked for plans and Brian said he had not got them at that stage, and that was about as far as he could take it. You said 'well, I can't do a costing or an estimate if I don't have plans'?---He asked me what I would charge.

He did?

And what did you say?---$400 a hole. And $95 an hour.

That was said at the Cool Spot?---I think so, yes.

You think so?---It was discussed.

You think it might of happened at the Cool Spot or might have happened somewhere else?---Look, I could not recall.

It might not of happened at all?---No, it did happen.

But this is pretty important, is it not? This is a – well what did he say – 'yes that is okay' or 'by golly that is a lot'?---Are you insinuating that we are too dear?

What did he say in response?---He did not say anything actually. I don't think. He was writing some things down when we were – he was trying to scribble down a bit of a plan of his verandah at the time.

Did he say anything to indicate 'Yes, I agree with those rates'?---No, but he did not disagree either.

And did you take that to mean anything? That 'I have told him my rates, if he asked me to do the work he knows the terms'?---Yes, I took it like, if he did not want us to do it he would not get us to start on it.

And in a fact, we have an agreed contracted rate as to how much your work would cost for the verandah?---Verbal agreement, yes.

You are not sure where it happened, Cool Spot or somewhere?---Well there is only a couple of place it could have been. It could have been Mauna Loa Street or the Cool Spot, where we had our discussions, or at tea. We went out to tea one night as well.

And this is a contracted term, the claim now in relation to the verandah is based on a contractually agreed rate for works that you would provide before the work was done?---That's right.

And I put it to you that you have made up that evidence, and that no conversation at all was had by you and Mr Colless where you stated a rate of $95 an hour because I told him and he then asked me to do the work'?---Exactly.

Which one? I have you an alternative, then?---The second one. I told him the price and he agreed on it, otherwise we would have never started on the job and he would have never let us start on the job."

36. In my opinion, taken as a whole the evidence of both Mr Colless and Mr Barton establishes that there was no contract formed at the Cool Spot meeting. It seems not have been certain that Mr Colless would want the work done. If he did, Mr Barton had quoted at least for the hole drilling part of the job. The matter was left there, at least until Mr Colless showed Mr Barton the plans for the verandah at some later date. Just how and when the parties agreed on contract after that is obscure – see below, concerning the counterclaim. The last answer quoted from Mr Barton evidences that obscurity: it could be a layman's statement of a sort of estoppel.

37. There remains the point raised in paragraph 1.5 of Mr O'Loughlin's submissions: the issue of consideration was not pleaded. I will return to this. Mr O'Loughlin's second line of argument was:

> "2. ***The First Contract was Rescinded by Consent***
>
> 2.1 Alternatively, no additional consideration is required if the earlier contract has been rescinded, such that the earlier obligation is regarded as discharged. A new contract is created and there is no need to look for additional consideration[2].
>
> 2.2 In this case the existing duty (to pay the purchase price) may be viewed as having been discharged by a new contract which includes a promise with the same content as the original obligation (plus the additional four items). The obligation will be regarded as binding because consideration is present in the parties' agreement that the original obligation is to be discharged.
>
> 2.3 In this case there was no express agreement for discharge of the obligation or termination of the contract, however, there was evidence upon which this should be implied or inferred.
>
> 2.4 Evidence from the defendant and her husband, was that on driving at the Coolspot they were of the view that if an agreement could not be reached, then the house could be taken elsewhere and the deposit returned. It can be inferred that the parties approached the meeting where each knew that the

[2] *Stilk v Myrick* (1809) 2 Camp 317 (170 ER 1168); *Hartley v Ponsonby* (1857) 119 ER 1471.

original contract could be discharged and a new contract may (indeed was) reached.

2.5 The decided cases suggest that this inference will be readily drawn in the earlier agreement can be lawfully, terminated, as there is a general dissatisfaction with the rigidity of the general rule[3].

2.6 Unless the circumstances are such that it is impossible to interpret the later contract as a termination of the first, a court will discern an implied agreement to terminate the original contract and consideration will be present[4]."

38. As Mr O'Louglin notes at paragraph 2.3, there certainly was no express agreement to this effect. Nor, in my opinion is there any evidence pointing towards the conclusion that the parties at the Cool Spot meeting agreed to rescind the original agreement and to start again. Indeed there is no reason to believe that either party even mentioned the possibility of one or other of them wishing to withdraw from the original agreement. (There is evidence that both parties had given thought to that course of action outside the meeting.) It likewise seems to me that the parties', and in particular Mr Colless's silence on this matter at the meeting, takes this case out of the class of cases where his forbearance from suit - based presumably on a breach of a representation that the house was up to code (however feeble the chances of such a suit succeeding might be) can be consideration moving from the promisee in exchanged for the promisor's undertaking additional obligations. As I have written already, I do not accept that there ever was any such representation, and even if there ever was, it could not have survived the communication of the terms of the "offer to purchase". But irrespective of my findings, the evidence bearing on the Cool Spot meeting is very much not in the form that Mr Colless came to that meeting to say either that he would withdraw (by reason of that misrepresentation) or to threaten Barton Houseshift with a suit for the price of the extra works

[3] *Stilk v Myrick* (1809) 2 Camp 317 (170 ER 1168); *Hartley v Ponsonby* (1857) 119 ER 1471.

[4] Ibid.

needed to bring the house up to code. There is no evidence that at the meeting Mr Colless offered anything for the additional obligations, except to go ahead and complete the contracted purchase of the house.

39. Nevertheless, Mr Colless did lay before Mr Barton and Ms Davidson his problems in bringing the house up to code, and it was in the light of this disclosure that Barton Houseshift agreed to do some of the works. This gives rise to O'Laughlin's third submission:

> "3. ***Alternatively, The Agreement to continue with the Purchase was Consideration***
>
> 3.1 It is suggested that the plaintiff already had an existing duty to pay the $77,000 for the house.
>
> 3.2 In *Ward v Byham*[5] , Denning LJ stated: "..a promise to perform an existing duty or, or the performance of it, should be regarded as good consideration, because it is a benefit to the person whom it is given".
>
> 3.3 This principle has been applied in other jurisdictions in England and in Australia:
>
> *Popiw v Popiw*[6].
>
> 3.4 Thus the plaintiff by agreeing to pay the remainder of the $77,000, even, though it has been an existing duty, should be regarded as good consideration.
>
> 3.5 Further, the defendant obtained the practical benefit[7] of not having to transport the house all the way to Katherine.
>
> 3.6 Carter on Contracts refers to authorities where the principle that consideration may not be required does not apply to situations where one party has applied duress[8]. There is no evidence to suggest that there was any extortionate behaviour on the part of the plaintiff. The evidence from the defendant was that her husband was quite keen or not fussed in doing the extra work. The defendant gave evidence that taking the house

[5] [1956] 2 All ER 318, Law of Contract 197-199
[6] [1959] VR 197 at 199.
[7] Law of Contract 199.4
[8] Law of Australia p 192

to Katherine was a viable alternative such that the defendant was not put under pressure by the plaintiff.

3.7 Santow J. in *Musumeci v Winadell Pty Ltd* [9] considered the authorities and confirmed that such a principle should apply (see page 747). Likewise, Trietel, in *The Law of Contract*[10], after considering the case law and the policy factors doubted whether consideration should be applied in this type of situation:

"In view of these developments, it may be doubted whether the doctrine of consideration continues, in this type of case, to serve any useful purpose; and in particular whether the new promise should not be enforced if it was obtained, without duress, in the course of commercially reasonable renegotiation"

40. The judgment of Santow J. in *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 does indeed support Mr O'Laughlin's contention. Santow J followed in part the judgment of the English Court of Appeal in *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 QB 1. *Musumeci v Winadell Pty Ltd* was a case in which a landlord had agreed during the currency of a lease that the tenant might pay a lesser rent than the lease prescribed. *Williams v Roffey Bros* was a case where a subcontractor who had got into difficulties performing his underpriced contract was promised by the head contractor that he would be paid more than the contract price. Santow J's conclusion was that the law in such cases could be stated as follows (at p746-747)

> "Accordingly, I am satisfied to conclude that, subject to the earlier recasting of the five elements of Glidewell LJ, *Williams v Roffey* should be followed in allowing a practical benefit or detriment to suffice as consideration. For convenience, I set out below the re-cast elements, changes indicated by italics. I recognise that they will be further refined in light of experience. One particular issue is the extent to which a benefit or detriment, said to be "practical", as distinct from explicitly bargained for, must nonetheless be

[9] (1994) 34 NSWLR 723
[10] 7th Ed., p 75

consistent with, and not extraneous to, the bargaining process, as at least its intended result if not necessary its moving force:

"The present state of the law on this subject can be expressed in the following proposition:

(i) If A has entered into a contract with B to do work for, or to supply goods or services to, B in return for the payment by B, and

(ii) At some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or be able to, complete his side of the bargain, and

(iii) B thereupon promises A an additional payment *or other concession (such as reducing A's original obligation)* in return for A's promise to perform this contractual obligation at the time, and

> (a)As a result of giving his promise to B obtains in practice a benefit, or obviates a disbenefit provided that *A's performance, having regard to what has been so obtained, is capable of being viewed by B as worth more to B than any likely remedy against A (allowing for any defences or cross-claims), taking into account the cost to B of any such payment or concession to obtain greater assurance of A's performance, or*
>
> (b)*As a result of giving his promise, A suffers a detriment (or obviates a benefit) provided that A is thereby foregoing the opportunity of not performing the original contract, in circumstances where such non-performance, taking into account B's likely remedy against A (and allowing for any defences or cross-claims) is capable of being viewed by A as worth more to A than performing that contract, in the absence of B's promised payment or concession to A.*

(iv) B's promise is not given as a result of economic duress or fraud *or undue influence or unconscionable conduct* on the part of A *nor is it induced as a result of unfair pressure on the part of A, having regard to circumstances,* then,

(v) The benefit to B *or the detriment to A* is capable of being consideration for B's promise, so that the promise will be legally binding."

41. On the way to coming to that conclusion Santow J was able to cite some judgments where *Williams v Roffey Bros* had been applied, for example (at p746)

> "It remains to note two recent examples, one in Australia and one in the United Kingdom, where *Williams v Roffey* has been applied. In each the practical benefit was to B as an employer, in avoiding potential workplace disruption, in return for B increasing severance payments of posting a redundancy package. The first, *Lee v GEC Plessey Telecommunications* [1993] IRLR 383 was the English case, in which Connel J stated (at 389):
>
> > "The situation is similar with an increase in severance due to redundancy, for a redundancy payment is part of the remuneration package. The employee continues to work for the employer, thereby abandoning any argument that the increase should have been greater and removing a potential area of dispute between employer and employee. The employer has both secured a benefit and avoided a detriment."
>
> The second, *Ajax Cooke Pty Ltd t/a Ajax Spurway Fastners v Nugent* (Supreme Court of Victoria, Phillips J, 29 November 1993 unreported), though obiter, concuded in a Victorian case of a redundancy package (at 12):
>
> > "…The benefit to the plaintiff [the employee] is obvious. As for the defendant [the employer], was it not open to infer that, in posting notice of the redundancy package, and thereby announcing the benefits to be paid during the relevant period, the defendant acted to secure some benefit or advantage to itself, whether by inducing its employees to refrain from further industrial disputation or by encouraging them to continue in their present employment? After all, as was said by Lord Hailsham, LC, in *Woodhouse AC Israel Cocoa Ltd v Produce Marketing Co Ltd* [1972] AC 741 at 758 (quoted by Purchas LJ in *Williams* at 21):
> >
> > > 'Businessmen know their own business best even when they appear to grant an indulgence'."

> An example of avoidance of a very substantial practical disbenefit held as sufficient consideration arose in *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No 2).* There the disbenefit avoided arose through the fact that at the time of delivery of a ship, the market was very bad and the plaintiffs were the core customers of the defendants. If they took delivery of a ship (induced by a concession) then other customers were likely to follow suit. As well the plaintiffs would cease their efforts to postpone delivery of the boat."

42. The statement of law by Santow J is on the face of it more demanding than that of Phillips J, which could be unkindly paraphrased to the effect that the compromising party must have thought there was something in it for him, to have accepted the lesser payment. I am not certain whether, the requirements of Santow J's alternative propositions (iv)(a) and (iv)(b) would be, in practice, all that much more demanding.

43. As the learned authors of the eighth Australian edition of Cheshire & Fifoot's Law of Contract write (p200):

> "The attempt to elaborate on the principles of Glidewell LJ in relation to questioning of practical benefit runs into difficulties because the court appears to be assessing the commercial costs and benefits of the contract modification, something that the common law has traditionally eschewed. If we accept that practical benefit is to be regarded as consideration, it would be preferable to make the necessary modifications to the existing duty rule in terms of saying that, prima facie, if two commercial people have chosen to modify their business relationship, then it is presumed that they know what they are doing and it is not the court's business to second guess their judgment of their own interests. Only if proof of duress is shown would this presumption be overturned and the contract modification be set aside."

44. As to whether *Musumeci v Winadell Pty Ltd* represents the law of New South Wales, I find it difficult to say. It is curious that a judgment so radical and so well researched and, if I may say so with respect, ably constructed, should be so little cited, except in the textbooks, but the only case listed in the Australian Case Citator as citing Santow J's judgment is *Re AK Freund Pty Ltd and Kameel Pty Ltd* (2004) 55 ATR 705 – and

althought *Musumeci v Winadell Pty Ltd* may have been cited therein, the citation does not in fact appear in the ATR report of the case (the reasons of the Tribunal being reported only in part).

45. I think I must conclude that the law of the Northern Territory is still as it was established in the great case of *Foakes v Beer* (1884) 9 App Cas 605. Such, it seems, is the view, somewhat regretfully, of *Cheshire and Fifoot* (op.cit.) At p203:

> "The present rule does protect creditors from extortionate demands by debtors[11]. But, as argued earlier in relation to existing duties, it would be desirable if this problem was taken care of by the rules of duress[12] rather than the doctrine of consideration, which takes no account of whether the settlement is amicable or extortionate. Santow J in *Musumeci v Winadell Pty Ltd*[13] has certainly thrown out a challenge in the rule in *Pinnel's* case by holding that a landlord was bound by a promise to accept reduced rent payments on the basis of consideration rather than promissory estoppel: see [4.35]. In terms of fulfilling the expectations of commercial people, a rule that forgiving part of a debt is binding rather than not binding is preferable. It is (along with the existing duty rule) an area of the law of contract that provides an out for people who want to break their word on a purely technical ground. Indeed, one suspects that most business people would not know that they have an out until they consult a lawyer."

46. (In this case, the earlier defences pleaded by Ms Davidson personally bear out the expectation of the authors. It appears that she did not suspect that she might have an out – and in her case, even after consulting lawyers.)

47. If I am right about the law then I must reject the O'Louglin's third line of argument and conclude that there was no consideration moving from the promise in return for the new promises made by Ms Davidson (or Mr Barton on her behalf) at the Cool Spot meeting.

48. Mr O'Loughlin has a fourth line of argument.

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[11] *D & C Builders v Rees* [1966] 2 QB 617; [1965] 3 All Er 837.
[12] See Chapter 13.
[13] (1994) 34 NSWLR 723.

"***Defendant is Estopped***

4.1 The defendant made a clear commitment to undertake the four tasks (or on the defendant's case: a clear statement that it would provide 2 men for 2 or 3 days to complete the tasks).

4.2 The plaintiff relied on this statement.

4.3 The defendant indicated, as did Kym Barton, that the contract could have been rescinded and the deposit returned to the plaintiff if this offer by the defendant had not been made.

4.4 It would appear then that the plaintiff remained in the contract because of the offer by the defendant and it would be unconscionable to now allow the defendant to walk away from that agreement.

4.5 Denning J. in *Central London Property Trust Ltd v High Trees House Ltd*[14] after noting that there was no consideration and referring to past cases and the development of estoppel, stated at 135:

"The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration; and if the fusion of law and equity leads to this result, so much the better".

4.6 The plaintiff clearly acted on the statement, in either affirming the contract or entering into a new contract. The plaintiff would presumably not have taken on modifying the house if the defendant had not made the statement."

49. The plaintiff seeks by this argument to enforce the performance of the promise made by the defendant at the Cool Spot meeting, so Mr O'Loughlin might have cited *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 rather than, or in addition to the *High Trees House* case, estoppel here being brought forward as a sword, not a shield.

50. In *Walton Stores (Interstate) Ltd v Maher,* Mason CJ and Wilson J wrote (at p404):

[14] [1947] 1 KB130.

> "One may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it": per Dixon J. in *Grundt*; see also *Thompson*. Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption."

51. And at p406, their Honours wrote:

> "The foregoing review of the doctrine of promissory estoppel indicates that the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. *Humphreys Estate* suggests that this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party."

52. Similarly, Brennan J at p423-424:

> "Parties who are negotiating a contract may proceed in the expectation that the terms will be agreed and a contract made but, so long as both parties recognize that either party is at liberty to withdraw from the negotiations at any time before the contract is made, it cannot be unconscionable for one party to do so. Of course, the freedom to withdraw may be fettered or extinguished by agreement but, in the absence of agreement, either party ordinarily retains his freedom to withdraw. It is only if a party induces the other party to believe that he, the former party, is already bound and his freedom to withdraw has gone that it could be unconscionable for him subsequently to assert that he is legally free to withdraw.
>
> It is essential to the existence of an equity created by estoppel that the party who induces the adoption of the assumption or expectation knows or intends that the party who adopts it will act or abstain from acting in reliance on the assumption or expectation: see per Lord Denning M.R. in *Crabb v. Arun District Council* (28). When the

adoption of an assumption or expectation is induced by the making of a promise, the knowledge or intention that the assumption or expectation will be acted upon may be easily inferred. But if a party encourages another to adhere to an assumption or expectation already formed or acquiesces in the making of an assumption or the entertainment of an expectation when he ought to object to the assumption or expectation – steps which are tantamount to inducing the other to adopt the assumption or expectation – the inference of knowledge or intention that the assumption or expectation will be acted on may be more difficult to draw.

The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion. The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting therein.

If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed. A non-contractual promise can give rise to an equitable estoppel only when the promiser induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil his promise. When these elements are present, equitable estoppel almost wears the appearance of contract, for the action or inaction of the promisee looks like consideration for the promise on which, as the promisor knew or intended, the promisee would act or abstain from acting."

53. As to the meaning of the "detriment" there spoken of, in *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR298, Handley JA wrote (at p307-308):

'In my opinion the decisions of the High Court in *Foran v Wight* (1989) 168 CLR 385 and *The Commonwealth v Verwayen* (1990 64 ALJR 540; 95 ALR 321, establish that estoppel now embraces not only representations of existing fact but all promissory representations as well. The excuses and promises made by Mr

Barnao to Mr Bartlett during the weeks after 5 March 1987 conveyed representations of fact to Mr Bartlett that the respondent company had a present intention of performing the contract by paying the agreed debt. Mr Barnao also made promissory representations that the respondent company would perform the contract in the future. As a result of these representations the respondent "bought" time, in the form of a forbearance by the appellant from suing to enforce the contract. The appellant was also put to trouble and some expense in having staff attend at the respondent company's premises in fruitless attempts to collect the cheque. This forbearance and inconvenience constituted detriments suffered by the appellant. "Some degree of forbearance" not necessarily for any definite or particular time can constitute sufficient consideration to support a contract: See *Glegg v Bromley* [1912] 3 KB 474 at 480-481. In these circumstances I have considered carefully whether these detriments were sufficient to support an estoppel binding the respondent to the contract of 5 March.

Given the necessary reliance and the later attempt by the representor to abandon the assumption adopted by the representee the question whether the representee's change of position entitles him to hold the representor to the original assumption depends on whether the representee, in the words of Dixon J in *Thompson v Palmer* (1933) 49 CLR 507 at 547:... "will have placed himself in a position of *material disadvantage* if departure from the assumption be permitted." (My emphasis.)

Subsequently in *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 at 734, Rich, Dixon and Evatt JJ said:

"...what makes it unjust to permit the departure from an assumption so induced is that, were it permitted, the party so induced would through making the assumption find himself in a position occasioning *material detriment* to himself". (My emphasis.)

In the *Commonwealth v Verwayen* (560; 356), Deane J refers to the requirement that the party relying upon an estoppel must establish that it has adopted the relevant assumption as the basis of action or inaction and "thereby placed himself in a position of *significant disadvantage* if departure from the assumption be permitted". (My emphasis.)

While a single peppercorn may constitute valuable consideration which can support a simple contract it seems to me that the loss of such an item would not constitute a "material detriment", "material disadvantage" or a "significant disadvantage" for the purposes of the

> law of estoppel. It may seem strange that there should be such a distinction. However in the first case the consideration has been accepted as the price of a bargain which the law strives to uphold. Promissory estoppels and estoppels by representation lack this element of mutuality, and the relevant detriment has not been accepted by the party estopped as the price for binding himself to the representation or promise."

54. It is not immediately obvious what detriment the plaintiff in the present case suffered from the reliance on the defendant's promise. This is not a case where Mr Colless has probably changed his position in reliance on the promise (as Mr Maher, for example, began to demolish his building). Rather it is a case in which, fortified by the promise, he has gone ahead with the original contract as he was contractually bound to do. His alternative, at the time of the Cool Spot meeting was, as Mr O'Loughlin points out in paragraph 4.3 above, to withdraw from the contract. The evidence from Mr Colless falls a long way short of persuading me that the options – to continue or to withdraw – were more or less balanced in his mind before the meeting, and that it was the weight of the promise that moved the scales. In order to be persuaded of that I would need to conclude that the enthusiasm of Ms Warren to buy the house was something that Mr Colless was prepared to frustrate, absent a douceur on the scale of the promise made. I am not persuaded of that. Secondly, I would need to be persuaded that Mr Colless had weighed up what he stood to lose (apart from the contentment of Ms Warren) if he were to withdraw. There is no evidence of his doing that, which again suggests he wasn't really thinking of withdrawing.

55. [It is probably the case that, had Mr Colless wished to withdraw, the defendant would have allowed him to do so scot free. That seems to be what Ms Davidson and Mr Barton had decided upon on their way to the meeting. But Mr Colless did not know that. If, on the contrary, the defendant in those circumstances had stood upon her legal rights under the original contract, it seems to me she must have had some recourse against the plaintiff for its breach of contract. There does not seem to have been any explicit terms

attached to the payment of the deposit, but I would guess that a term would be implied entitling the defendant to retain at least any expenditures thrown away – for example, obtaining permits etc from the MVR – and also for any damages probably arising from loss of bargain. I would guess that the deposit, even if it the suggestive figure of $7,700 – 10% of the contract price – was not agreed to be forfeited if the plaintiff withdrew. The point overall is that, at least as a matter of law, Mr Colless probably had something to lose if he withdrew.]

56. It seems clear that detriment to the promisee is to be measured at the time the promisee discovers the promisor intends not to deliver on the promise, and the question whether the promisor's decision is unconscionable is to be assessed at the same time. As will be seen below, my conclusion on all the evidence is that, whatever Mr Barton promised to do exactly, it was understood at the time he made the promise that the work was to be done at the time the house was delivered to and restumped at Mandorah, a time when Mr Barton would be on site, with various tools and machinery and a labourer at his disposal, when he might conveniently and efficiently attend to the work. As things turned out, the promised works were not then done, with at least a degree of acquiescence by Mr Colless. According to Mr Barton he did not definitively refuse to do the works until much later, in May 2003, and that his reasons for doing so then relate to the receipt of a letter from Mr Colless's solicitors, (dated 24 April 2003 but not received till early May). The letter became Ex10 and included the following:

> "The agreement between you and our client was largely informal and would appear not to have any specific default clauses. We are therefore instructed to give you notice to make time of the essence for the completion of your obligations under the Contract. While the house cannot be used our client is losing potential rental income.
>
> Our client has sent you a copy of the Engineer's Report setting out what works must be carried out both to complete the removal works and to bring the house up to Code. In that regard we refer you to Peter Russell's inspection report dated the 20 August 2002 and in

particular to the 15 points listed on that report under the heading "Findings".

If those works are not completed by you to the satisfaction of our client's building certifier (Shane Cooper of Building Surveyors Australia Pty Ltd) within 3 weeks of the date of this letter, our client will terminate the agreement for the sale and transportation of the house and will engage private contractors to complete the outstanding work, and will expect you to reimburse it for the cost incurred."

57. As can be seen, that is a demand that Mr Barton perform all the works on Mr Russell's report, not the much smaller number promised at the Cool Spot meeting. Mr Barton's evidence was that he was repulsed by this unjustified demand and, after desultory further communications (which gave rise to another letter from Clayton Utz effectively repeating that demand - Ex11), he washed his hands of the matter.

58. Mr Colless gave evidence that on numerous occasions late in 2002 and early 2003 he spoke on the telephone to either Ms Davidson or Mr Barton, urging the completion of the work. It was only when such means failed that he went to his lawyers. His evidence in relation to those telephone calls – their number and their content – is disputed. No evidence (by way of telephone bills etc) was led to confirm their occurrence. I am not persuaded on the balance of probabilities that Mr Colless made enough calls requesting the completion of the works for it be inferred from the works' non-completion that Mr Barton or Ms Davidson had refused to complete. If any obligation, by way of promissory estoppel obliged Mr Barton to do the works in the first place, (which, I doubt) and if that obligation survived his departure from the site (which I very much doubt) then I am not persuaded that he finally sought to abandon that obligation until he received an unjustified demand – what he may understandably have believed to be a deliberately inflated demand. His refusal after that cannot in my view be categorised as unconscionable.

59. There is another matter which perhaps should be mentioned in the context of promissory estoppel. As I have mentioned in passing and will be further discussing below, it is not crystal clear what works Barton Houseshift undertook to do at the Cool Spot meeting. The email Ex4, is certainly not a written contract; more a minute attempting to embody what had been orally agreed. It is likewise not crystal clear how well Ms Davidson succeeded in that attempt. In cross examination of Mr Colless (p57-58):

> "This e-mail I think you'd agree is a consequence of the meeting at the Cool Spot?
>
> ---Yes, yes definitely.
>
> And the reference to 'as explained to Kym and myself from an experienced engineer to non-builders, the following work is required', it is clearly – and I will only ask you this one more time, it may be something you can't answer?---Mm mmm.
>
> It's clearly trying to clarify what you had said needed to be done?---I will disagree with that you're almost sort of saying as if I've told them what to put in this e-mail to send to me because if I'd have told them what needed to be done it would have come through worded differently to this.
>
> And you've given evidence that the way that its come out – well it's just actually not that clear as to what the further works would be?— The first – a couple of them are, if you look at item – the last item the floor joist underneath, that is quite clear the Z brackets, (3) quite clear, but (1) and (2) are sort of very nebulous they are sort of mixed and they are not clear at all.
>
> I will suggest to you that you've used the fact that its nebulous to try and operate in your favour in that you've made a claim for them for all sorts of things that they never really undertook to do?---No definitely not. Definitely not.
>
> If you didn't want to use it against them but you really wanted it to try and nail down exactly what they were going to do then you would have emailed back or you would have clarified in writing or somehow this is actually what these jobs require?---Yes. I would have preferred it to be clear but you know I wasn't going to put my words in their mouth, that's exactly what I wasn't going to do and I could live with this, I could live with this and manage to accomplish

that all right. I could get by with this you know, you often have to deal with documents that aren't clear or don't spell it out entirely but you think 'well I can live with this."

60. I accept Mr Colless's denial of the suggestion put to him by Mr Piper, that Mr Colless used the fact that the email was nebulous to claim all sorts of things that Barton Houseshift never really undertook to do. Mr Piper's next question, and the answer to it, however, persuaded me that, on receiving the email Mr Colless was aware that its wording was, in part, certainly not clear, and perhaps almost meaningless, and that he positively decided to take no step to clarify the language which was, to an engineer, at best sloppy and at worst plain wrong. My conclusion as to his reason for refraining was that he didn't want to rock the boat; that he had a feeling that any more pressure from him would cause Barton Houseshift to rescind – either to rescind what they had offered at the Cool Spot, or to rescind altogether. Quite apart from the authorities which insist that there should be certainty about the promise from which an estoppel may arise, it seems to me that Mr Colless's state of mind in refraining from clearing up unclear parts of the email (which evidence that its author may not really understand what she was talking about) is not quite consistent with the blameless conduct expected from a plaintiff relying on equity.

61. For numerous reasons, then, I am of the opinion that the promise made at the Cool Spot do not give rise to an estoppel of the kind discovered by the High Court in *Walton Stores (Interstate) Ltd v Maher.* I can see no basis to assert that the promise is binding either as a contract or on the conscience of the defendant.

62. As I mentioned above, the defendant never pleaded that there was no consideration for the promise: nor, of course, was there any estoppel pleading or its traverse. In respect of the Defences drafted by Ms Donaldson herself, that is perhaps no great surprise. A lot of business goes on in blithe disregard of the technicalities of the law of contract. To add to

the reasons why Ms Davidson might have been distracted from cool thinking about technicalities was the fact that the original statement of claim said, among other things:

> "At a meeting in or about August 2002 ("the Meeting"), Colless told the defendant and Barton that the only terms in the Letter of Offer which the plaintiff would accept were those which are now outlined at paragraph 4(a), (b) and (c) above.
>
> (b) the plaintiff would pay the defendant $77,000 (inclusive of gst)
>
> (c) the defendant would at her cost transport and relocate the House from 2 Strangman Court, Larrakeay in the Northern Territory to 10 Cox Drive, Wagait Beach in the Northern Territory by September 2002; and
>
> (d) the defendant would at her cost perform the Works.
>
> The plaintiff rejected the remaining terms and conditions contained in the letter of offer.
>
> Colless told the defendant and Barton that he required the defendant to perform the Works at her cost.
>
> The works required to be performed by the defendant were:
>
> (a) The items listed at 1 to 6 and 8 of an Inspection Report prepared by the IMC Group Pty Ltd and dated 20 August 2002 ("the IMC Report"). The IMC Group Pty Ltd prepared the IMC Report at the defendant's request and the defendant gave Colless a copy of the IMC Report at the meeting and
>
> (b) Any works required to be performed to the eaves, gutters and staircases of the House in order that it could be certified for occupancy."
>
> The defendant and Barton told Colless that the Works would be performed.

63. As later versions of the Statement of Claim effectively concede, these particulars are a long way from being true. I have underlined those sections which have been disproved in the evidence. Reading them was calculated to have Ms Davidson concentrate on refuting the untrue parts.

64. As it happened the last and only professionally drafted defence did not plead the matter either. To decide a large portion of a case on a ground never pleaded and consequently never squarely addressed in the evidence obviously creates a risk of injustice. However, in this case it is my opinion that the risk is small. The issue of consideration was raised by me during the hearing. Mr Colless was in fact recalled for further evidence after that, and if he had anything pertinent to say on the issue could have said it. In fact, it is difficult to imagine what he could have said. It was his testimony I quoted in paragraph 29 above which raised in my mind the consideration question. It is very clear to me that this is not a case where a promissory estoppel has any chance of being successfully argued. For these reasons I am of the view that the plaintiff's claim, so far as it relates to the non-performance of the promises made at the Cool Spot meeting, must fail. The promises were not enforceable at law.

65. That conclusion depends upon a chain of reasoning any part of which might be mistaken, and, in case I am mistaken, I propose to indicate how I would have decided that part of the claim in the event that the promises were binding. Before doing that, I propose to deal with the other part of the plaintiff's claim, relating to the eave.

The Eave

66. One of the three photographs which comprise Ex1 depicts the house, still on Barton Houseshift's low loader having arrived at the Mandorah site, showing the side of the house with its eave lopped off. It will be remembered that the "offer to purchase" (Ex2), the written part of the original contract, contained a term:

> "Barton Houseshift will not be responsible for…and the price does not include...Any verandah's [sic] and stairways attached to the building."

And:

> "It is to the discretion of the Motor Vehicle Registry if any verandah's landings etc may remain attached during the transportation. Therefore we cannot give any guarantee to the condition of such if they are required to be removed from the building."

67. Both parties accept that, in respect of this house, although it was at one time thought that a verandah might have to be detached, in the event the eave was. Mr Colless's evidence as to what was said prior to the detachment was (in chief at p14):

> "Were there any conversations about what might be required to be done to the house to allow it to be moved according to Motor Vehicle Registry? ---On the first visit with Kym Barton, he mentioned that he may have to cut off one of the eaves to meet with requirements for transport.
>
> At that stage was there any conversation as to who would bear the cost of that?
>
> ---No, no, not at all. We automatically assumed it was part of, part the contract because the eave being an essential part of the roof structure, yes.
>
> And you've seen the photo, being exhibit 1. Is that the eave that he pointed to?
>
> ---It was, yes.
>
> Then earlier you said you, 'Thought it was part of the contract price', you thought putting it back on?---Definitely, there was no talk of a variation for that. Like an eave is not a verandah or anything like that. It's essentially part of the roof structure. It's just an extention of the roof rafters.
>
> When you say, 'There was no talk of that', was there any talk of that cost of putting the eave back on, being your cost?---Definitely not."

68. I accept all of that evidence. I am less sure about some of the things Mr Colless said in cross-examination (at p66):

> "MR PIPER: Part of your claim, Mr Colless, is for the (inaudible) re-attach the eaves to the house?---Mm mm.

Mr Barton is very clear that in his original discussion with you which he had when you first looked at the house together that it was noted that some eaves would probably have to come off and that you said 'Well if any are going to come off I want them to be on this side, the back of the house because that's where I'm going to put the verandah'?---No, no.

It sounds reasonable because you did leave them off and put them around the roof there so why is it funny?---No just the fact that he would say that. He pointed out to us the eave that he thought would have to come out; he wasn't sure but he said 'I may have to take' – that was very close to his words – 'I may have to take the eave off' and I asked him 'Would you have to take the verandah off the back of the house?' and he said 'I don't think so'.

And that's what happened in fact isn't it?---It turned out he said that he was able to leave the eave on – sorry take the eave off and leave the verandah on.

That was the verandah on the other side of the house to the eaves?---There was an existing verandah on the house.

On the other side – the question was going to be the side that the eave that was removed was on, isn't it? The verandah that was left was on the other side of the house to the eave that was removed?---Yes, as you looked at the house as it is in Strangman there was an existing verandah at the rear of the house which he said would stay and the – it was the eave on the front of the house in Strangman Court that had to come off, which surprised me. I remember because it surprised me actually, I thought if anything he would have had to have taken the verandah off.

Take the verandah off?---Taken the verandah off, yes.

In fact the eaves that were removed were on the side of the house opposite to the verandah that was there at Strangman Court?—Yeah, that's why the extra width.

And it was the eaves side of the house that you have subsequently put the verandah on?---Put a new verandah on.

Put a new verandah on?---Yes."

And again (at p67-68)

"MR PIPER: Just to be clear for the court, you didn't put the – you arranged for another eave to be put on that same area of your house from which the eave was removed, is that your evidence?---That's what we're claiming, the eave that was removed – we put the eave back as it was, the eave is – the rafter comes down, hits the wall and it extends about 900mm to a metre, that's what we're calling the eave and that was cut off, we put that back.

For the purposes of transport?---It was cut off for the purposes of transport yes.

And you put back the same eave or you just put new materials?---Well Kym Barton actually brought this up on site, his method that he intended to re-attach the old eve and I said 'No you can't re-attach' – he went to the trouble when he cut it off to carry it over and I said 'You can't just put that back'. He had an idea of putting what he called a couple of fish plates and bolts to attach and I said 'No you can't do it that way that's not acceptable you've got to have at least a 900ml map between the piece of timber you put back and what's there'.

If he had of done that or if he had of put the new eave on then that would have been extra works under your agreement in any event wouldn't it?---No this is – no this is putting back – this is part of the stumping, if he cuts that eave off its part of his work to put it back. The eave is not a verandah or a handrail or anything like that it's part of the roof structure.

Well it is part of the verandahs landings etcetera that may need to come off during transportation that is obviously referred to in the terms of engagement, it's not a verandah or a landing but it is clearly intended in the terms of engagement to be covered by the clause that says 'It is to the discretion of the Motor Vehicle Registry if any verandahs, landings, etcetera may remain attached during the transportation therefore we cannot give a guarantee the condition of such if they are required to be removed from the building'. The question is : the terms of engagement are sufficiently clear are they not to cover no guarantees for detached eaves?---It's not a stairway, it's not a verandah it's an eave. It's an overhang of the roof and it's definitely part of the roof structure. There was never any mention that he wasn't going to put it back or that was to be extra work. He spoke to me on site how he was going to put it back."

Here is Mr Barton on the subject in chief (p187):

"Did you need to remove any eaves or other parts of the structure in the course of the moving?---Yeah, we did.

What happened there?---We had to take the roadside eave off, which is – when it's loaded on the truck is the passenger side. Basically it just couldn't fit down the street, which is a common thing. And even then we still had to get a power pole removed and cut and shifted to get it out. We could have took the veranda off, but Brian didn't take the veranda off, he wanted us to take that eave off because he was going to build a veranda out that side. So it didn't, sort of, matter.

When were you advised of that?---That was earlier, when we were around there, we were looking at the house. He said, 'well if you're going to take an eave off I'd rather take the one off on the road or the front of the house, because we're going to put a full veranda down that side that's going to be facing the edge.'

Was there ever a discussion with either Brian or Caryl Warren about refixing the eave onto the house?---No."

69. I cannot recall him, or Ms Davidson (whose evidence in chief has already been reproduced in paragraph 18 of these reasons) being cross-examined on the subject.

70. On all of the evidence, I conclude on the balance of probabilities that:

a) Something, eave or verandah, had to come off the house so that it could be legally shifted.

b) Both parties preferred, for different reasons that it be the eave if there was a choice. Mr Barton and Ms Davidson were aware that Mr Colless had a reason to prefer it to be the eave. (I don't accept Mr Colless's evidence to the contrary on p232.) Namely, that this would dovetail with his plan to add a new full length balcony to the relocated house. I don't know if Mr Colless was aware that Mr Barton had a reason to prefer it to be the eave, indeed, I don't know myself what that reason was, but Mr Barton's evidence suggested there was one.

c) There was no discussion as to who would bear the cost of repairing or replacing the eave, nor of who would do that job, nor of what the job would entail, before the eave was removed and the house shifted.

d) Once the house had been shifted, Mr Barton offered to do that job, but to do it in a manner that would not be up to code. For that reason Mr Colless refused that offer.

e) Mr Barton was probably offering to do that job free of charge, and probably because that was the sort of job he was accustomed to do free of charge.

f) Mr Barton was not prepared to do a job up to code and therefore satisfactory to Mr Colless at that time. Probably there was not on site either a plan, or materials to do the satisfactory job.

71. I accept that Mr Barton, and I expect also Ms Davidson then assumed and still see the eave as being in the class of objects comprehended by the terms "verandah's and stairways" and "verandah's/landings etc" in the "offer to purchase". Ms Davidson's evidence at p131-132 simply takes this for granted and Mr Barton was explicit, and I believe, sincere, on the point in his evidence. They having that belief, there would have been no reason in their minds ever to raise with Mr Colless the question of who was to repair, and who was to bear the cost of repair to the eave.

72. I equally accept that to Mr Colless eaves, on the one hand, and verandahs, landings and stairways, on the other, are as different as chalk and cheese. It may be that his individual belief owes something to the habits of thought of a civil engineer, but one does not need to share these habits of thought to see an eave as part of the essential structure of a house – as much as the floor, roof or walls – while seeing a verandah etc as an "add on". I have no reason to believe that it ever crossed Mr Colless's mind that Barton Houseshift would not, as a matter of course, reconstruct the eave. If he ever did think about the eave's reconstruction (and he may not have) I don't believe he thought he would have to do it at his own expense.

73. In my judgment the exclusion clauses in the terms quoted from the offer to purchase are ambiguous so far as eaves are concerned. It appears to me to be a case where there is no better and fairer means of deciding the issue than

to interpret the document contra proferentem, that is, to conclude that the exclusions do not extend to eaves. Therefore the house as delivered to the Mandorah site was deficient in a way not covered by the exclusion clause and the plaintiff was entitled to have the deficiency put right. The claim therefore succeeds so far as the cost of those repairs is concerned.

74. In relation to any claim for damage consequential upon the defendant's failure to provide a house with an eave, it is my opinion that Mr Barton's offer to botch the job is sufficient to defeat that claim. Had Mr Colless accepted that offer, his relocated house would have been waterproof, if not up to code, and Mr Colless could later have had the work satisfactorily done at his leisure in an appropriate season. I have no reason to believe that the doing of Mr Barton's proposed mode of repair would have compromised anything in the structure or rendered more expensive the later bringing of the eave up to code. By rejecting Mr Barton's offer Mr Colless has, for understandable reasons, failed to mitigate his losses and must be left to bear them.

75. In the end Mr Colless had a Mr John Mihailou do the work to replace the eave, among many other works, including those which Mr Colless contended Mr Barton had agreed at the Cool Spot meeting to do for him, and others that Mr Colless accepted were to be done at his own expense.

76. It would have been unnatural for Mr Mihailhou to bill his work in accordance with the items that happened to be part of the claim, as opposed to these items of work that happened not to be. Long after the event he was called upon to attempt to reconstruct his bill so that particular prices could be put on particular items of work. His attempt is summarised in his statement, Ex20, Mr Piper's cross-examination of him exposed a number of the inevitable problems that must arise in such a reconstructive exercise. I thought Mr Mihailou was an honest witness doing his best, and having heard his evidence I am satisfied that his estimates for individual jobs are as

reliable as they could be. Mr Mihailou was an old acquaintance of Mr Colless's, and I accept that Mr Mihailou's evidence that he charged for the work as a whole at a friendly rate. As far as the eave is concerned, I see no reason to reject the price he put forward to fix it, and its gutter, $1320 (including GST of $120). As far as I can tell this price does not include any component for "mobilisation" (the cost of getting men and materials from Darwin to Mandorah), nor any fraction of the cost in labour and materials required to take off at least a bit of the roof, which would have been necessary if Mr Mihailou had been repairing the eave and nothing else. (In fact Mr Mihailou was doing other works under the roof and has put his mobilisation and roof lifting/replacing costs against other items.) Together with the friendly rate, I can conclude that this results in there being very little risk that the figure of $1320 is excessive and there will be judgment for the plaintiff in that sum on the claim.

What Was agreed At The Cool Spot?

77. In the event that I am in error in deciding that the promises made by Mr Barton at the Cool Spot meeting were unenforceable, I turn to consider what the money value of those promises was; but before doing that, it is necessary to decide what was promised.

78. Mr Colless took to the meeting a copy of Mr Russell's report with its 15 bullet points. Mr Russell is the he referred to in the first answer of the section of Mr Colless's evidence in chief that follows, quoted from p15-16 of the transcript. The italics are mine:

> "MR O'LOUGHLIN: Yes?---And, and there, *there were other items there that were not clear. Like he wasn't, like he, he wasn't – he in the report if you read it, he didn't actually identify some items as needing work. He just suggested they needed more investigation or he wasn't sure about them at that stage, so – on site he had discussed with us what he saw as a major structural thing is the structure inside the roof above the lounge/dining area and ---*

Was that discussed at the Cool Spot meeting? --- Yes, yes, it was.

And what conclusion was reached about the beam in the lounge room?--- *That, you know it wasn't totally clear what needed to be done but the roof would be lifted and that the understanding was that Barton Houseshift(?) would carry that out that up-grading work.*

And fix that stand span issue in the lounge room?---Fix the span and the associated items with it, yes. It is difficult when you approach a problem like that because it's, it's not just one thing your fixing you know. There are associate – associated items to it. Like how the rafters are fixed to it. Whether there was some doubt on whether the beam was even there, here you know and in part it wasn't. It had, you know, work had to be done on it.

Is this a beam that was to support that long timber stand?---Yes, yes. There was steel work and timber work up there.

Would that mean you've indicated that well, so Barton Houseshift that, the Barton's, Kym and Allison indicated that they would do, attend to that item. Did they say at whose expense?---It was to be as their, at their expense as part of the contract.

Can you recall whether or not they used those words or did they say no words and you assumed that because they used no words?---They would have said as part of our work this is what we're prepared to do.

Did they agree to do other items?---yes, yes.

Can you recall what those other items were?---There was the-Kym mentioned how he thought that the triple gripping underneath was a job he could just put a couple of guys on and do fairly quickly. So he offered that one and ---

Triple L grips on floor joints?---On all the floor joints underneath the residence without the, *I can't recall specifically the other items but we agreed on about four or five items that they would do*. Dot points out of there and then the rest would be up to me to sort out with Peter Russell if I wanted to go ahead and I knew I'd have to be doing the glazing.

These other four or five items that they agreed they would do. Was there any mention in that conversation that they would not be at their expense and part of the contract price but at your expense?---It was

definitely not at my expense. No, like I was, I was already offering something at my expense. Much more than what they were offering.

So that as you described here you identified whose doing what items. Was there any discussion about the contract price changing, now from 77 to some other figure?---Definitely not."

79. The quality of Mr Colless's recall, of the details of what Mr Barton undertook at the meeting, did not improve in the rest of his evidence. As the italicised portions of the evidence quoted above shows, there were two different sorts of uncertainty involved. The first was that, was that, in some respects, it was not exactly known what repairs would be needed to bring the house up to code, and would not be exactly known until the roof was removed. Secondly, Mr Colless is not quite sure how many items Mr Barton undertook to do. In the first case, Mr Colless was no doubt pleased to think that he had persuaded Mr Barton to do whatever needed to be done in respect of those unknown defects in the roof structure, however complicated and expensive those works turned out to be.

80. Mr Colless's evidence then went on to discuss Ms Davidson's email, Ex4. I have already quoted from his evidence in cross examination as to the infelicities of Ms Davidson's description of the works, see paragraph 60 above. Here he is on the same topic in chief (p17):

"Did that, when you read that, did that remind you of what was agreed?---It was close. It didn't line up entirely with the dot points. Like when you get a, when you get a report from somebody. You say, I'll do this, this, this and this and so you line your items up with that. That didn't line up entirely with the Peter Russell report. The IMC report. But to my way of thinking – sorry.

No, I'll let you finish – 'to my way of thinking'?---To my way of thinking it was close enough but it didn't line up and it wasn't specific but I thought you know this wasn't coming from an engineer and I thought she was doing her best to put it down. The first, the first item I thought of hers enclosed about two or three items and it didn't spell it out too clearly but to my way o thinking I, I considered that I could live with that."

81. I conclude from these answers, and from those on the same point in cross examination, that Mr Colless, at the time he was giving his evidence, believed that he then remembered receiving the email, reading it, and recognising straight away that its contents were near to, but not quite, what had been agreed at the meeting. I think I can accept that. I further conclude that Mr Colless, when giving his evidence, has no better memory than that of what had actually been agreed. I am persuaded of this not only by the uncertainties patent on Mr Colless's evidence, but also the fact that statements made at earlier times on Mr Colless's behalf and instruction have manifestly overstated what Mr Barton agreed to. In this respect I have in mind the solicitor's letter from Clayton Utz, Ex10, of April 2003, and the original statement of claim, of December 2003. The evolution of the pleadings suggests that at the time the original statement of claim was drafted – and I assume also at the time the letter Ex10 was written – Mr Colless had forgotten the existence of the email, and that in the absence of that constraint on the self-serving processes of memory led him to make these quite unjustified demands. This is not to say that Mr Colless deliberately and knowingly enlarged the promises made by Mr Barton, but for my purposes the result is not very different. I have no confidence in Mr Colless's having any reliable recollection of what happened at the meeting.

82. There are difficulties too with Mr Barton's account. The first, and in some ways the best, version of it occurred in chief, at p186 – 187:

> "Now was there reference to how much time you would commit to doing these items on the IMC report or assisting him with it?---Well, like, I wasn't familiar with what he wanted done in the roof. He indicated to me it could take a day or two days at the most. And to me, I thought, well if it's just a couple of days wages to get the job done, just do it.
>
> So you thought a couple of days – did you talk to him about any timeframe that you would commit yourself to?---As in---?
>
> Did you mention ---?---Did I tell him a time, or ---?

Yes, you mentioned that you thought a couple of days and that he mentioned to you a day or two. Did you – just, the question is, did you use the word 'days' or mention any time periods in you discussion back to him?---Or how long it would take?

Yes, or how long you would offer your services for?---I don't think it was actually a given time period put on it, but I was only going on his experience, because he's sort f qualified in those areas. You know, it all – it all started out that there just had to be a few bolts put in the roof, and he had other work he wanted to carry out in the roof itself. So you know, I just understood that he was going to be there with a nail bag and a pair of gloves and be up on the roof, and we would be there helping him. That's the way I imagined it.

And what about the number of people that you would supply to assist or to do these things that you discussed with him – did you talk to him about making just yourself, or other people available?---It was just me and Brett.

Was that mentioned?---Yeah.

And was there any talk about equipment that you would supply for assistance?

----Yeah, I had a welder and I had full camp, plant material---

Who talked about equipment?---Hey?

At the meeting, do you recall – this is a conversation many years ago now, but do you recall who talked about equipment and what the terms were that were discussed about the use of equipment?---Well, basically Brian wanted to obviously use us because we were going to be on site and have welders and virtually every tool that you'd need to use. So that's why it became easy for him if we gave him a hand.

Did you see an e-mail with reference to generators, by Allison, after the meeting?

---Yeah.

Did you read it before it went – or let's start from the beginning. Did you assist with preparation of this e-mail?---No, I never sort of wrote it. I did read it.

Do you know if you read it before it was sent, or do you not know if you read it before it was sent?---I don't know. I can't be sure about

it. It was so long ago now, it's just – trying to – but I'd say I would have, probably, yeah.

And is that e-mail consistent with your understanding of what was agreed at the meeting?---Well, to me it just sort of outlines what has to be done, but basically it's for me to give him a hand to carry out those jobs."

83. Further on in his evidence Mr Barton becomes more definite that his undertaking was to supply a couple of men – himself and Brett – for a couple of days, together with the use of any equipment and machinery that Barton Houseshift had on site, to assist Mr Colless to get done the jobs detailed in the email. The more his evidence tended towards it being an explicit agreement to that effect, the less convincing the evidence became. I do think that it is more likely than not that Mr Barton did ask Mr Colless at the meeting to describe the works, and to estimate how long they would take, and that the "couple of blokes for a couple of days" estimate was floating around at the meeting and there became fixed in Mr Barton's mind. But that is not what the email seems to be speaking of. Ms Davidson pointed with some persuasive effect to her use of the word "assist" in the email….. "we will undertake the following to assist with the coding of the house", before listing the four items. She was saying that that choice of words by her indicated that Barton Houseshift did not expect to be doing all the works, just helping with the labour and equipment handily on site. Perhaps so, but that is not the obvious reading even of that sentence of the email; and Mr Colless can point, with some persuasive effect, to the last paragraph, "We will undertake the above work as agreed". Again, "as agreed" could conceivably fit within the "couple of blokes for a couple of days" parameter, but not obviously so.

84. I stress again that the email is, in my view, not a written contract, but more a minute of an oral agreement, written in this instance by Ms Davidson, who is not a builder or engineer and who in some respects did not perfectly understand what she was writing about. I am using it as evidence of what

the oral agreement may have been. It is in many ways the best evidence, but that does not mean that it is very good.

85. In relation to the first two items on the email, I am not satisfied on the evidence that there ever was a meeting of minds as to the subject of whatever promise Mr Barton gave. I am not satisfied on the balance of probabilities that what Mr Colless was asking for (and there must have been some vagueness about that because a part at least of the scope of these works would not be known till the roof was taken off) was understood and accepted as an obligation by Mr Barton (and Mrs Davidson). To the extent that the conversation at the Cool Spot resulted in apparent agreement about works to be done on the roof the agreement ought to be void for uncertainty. If it is not, then the likelihood is that this is a case of mutual mistake, in which Mr Colless believed he had a promise that certain works would be done, and Mr Barton believed Mr Colless expected no more of him than a certain amount of labour time and the use of his equipment. If that be the case, then the court must determine the sense of the promise. In this instance, because I am of the view that Mr Colless probably estimated, or acquiesced in Mr Barton's estimate of the scale of the works – a couple of blokes for a couple of days – I am unable to find any promise going beyond that. As for the materials to be used, I am not persuaded that anything was agreed, but that both parties assumed that Barton Houseshift would provide very little – welding rods, perhaps – and Mr Colless any substantial item of timber and other building items – coach screws, triple grips, bolts, nails etc.

86. In relation to items 3 and 4 on the email there is much less uncertainty. Each item seems to relate directly to an item on Mr Russell's report, which Mr Colless had with him at the meeting and used as the basis for discussion. These items' subsequent appearance on the email renders it tolerably certain that the parties agreed on them and that both were talking about the same things. Again, in the absence of any, or any persuasive evidence as to who

was to provide the materials, the only sensible conclusion is that Mr Colless was to.

The Value of the Works Promised

87. Mr Piper, conceded that as far as the question of quantum was concerned, there was no better evidence than that of Mr Mihailou. Mr Mihailou, as I have remarked above, appeared to be an honest witness doing his best to reconstruct the price of a few works among the many he charged for. His statement, Ex20, and his viva voce evidence showed that he had thought and rethought the matter. I accept his evidence as to the costs of labour associated with the various jobs of work listed in the email. Item 1 comes in at about $750, item 2 at about $70, item 3 has a labour cost of $350, and item 4 a labour cost of probably $560. (Mr Piper concedes that 5 hours' labour once attributed to the job by Mr Mihailou – mistakenly, he now thinks - should be a day i.e 8 hours.) A total of $1730.

88. Since I am of the view that items 1 and 2 cannot be claimed as items, there having been no agreement on them, the only appropriate measure of recovery if a claim can be made in respect of them at all would be to assess the value of "a couple of blokes for a couple of days". Mr Barton was unwillingly to put a price on his own services as a general building labourer. That may have been because he genuinely could not, because when he hires himself out his hirer pays not only for his labour-power but also for his use of various equipment. It also seemed to be because Mr Barton did not want to try to put a price on himself for such work, in order to enjoy himself by frustrating Mr O'Loughlin. However, in relation to the counterclaim the burden of his evidence was that he would have charged $95 per hour for himself and his welding maching, and thrown in the services of Brett for nothing. The welding machine was not much in the picture for the jobs listed in the email, so say $85 per hour. Two ten hour days at $85 comes to $1700.

89. There is also the question of mobilisation expenses. If Mr Barton didn't do the work while he was there, any replacement found by Mr Colless would have to get to and from the site, and either find accommodation overnight, or do the trip again on the second day. Either way the replacement workers would charge for some hours on the road, and, it they stayed over, fewer of these hours but accommodation costs. On Mr Mihailou's evidence it is hard to see the overall cost as less than $400.

90. If all four items are claimable the measure of damages would be $2100 i.e $1700 + $400. If only items 3 and 4 are claimable the measure of damages would be $1310 i.e $350 + $560 + $400.

Were The Promises Breached?

91. The evidence is scant as to the circumstances leading to Mr Barton's finishing work at the Mandorah site. Barton Houseshift had restumped the house, and gone to do some work towards the erection of the new, seaward side verandah/balcony. At one stage Mr Colless was assisting with the work. Mr Barton was suddenly taken ill, and left the site. It turned out that his alarming symptoms were of kidney stones; he passed the stone fairly soon and went back to the site after an absence of a day and a half or so. During his absence Mr Colless had worked with Brett, Barton Houseshift's labourer, on the verandah steelwork. Then Mr Colless left the site. Mr Barton came back, did some more work with Brett, then left again without seeing Mr Colless. Brett may have done a little more work on his own, then he too left.

92. Mr Colless's recollection of what was discussed between him and Mr Barton on the last day they were together on the site was (p30):

> "Did you have any conversation with Kym on the last day you saw him?—Mm mm.
>
> What was that conversation about?---He asks me for the remainder of the money for the stumping. The letter From Barton Houseshift said

> $55,000 to transport the house – to purchase the house and transport it there and then the remainder of $22,000 – this is including GST – to be paid when the stumping is complete. They had already asked us before stumping started if we could pay half the money for the starting despite – yeah ---
>
> Half of the 22 outstanding?---Despite what they asked for in the original contract. Under a bit of pressure from Caryl we paid it, the original half, and on the last day Kym was on site he said 'We've got some money problems can you pay us the last half of the money' you know, the outstanding amount of money. I said 'I would rather pay you for the work on the verandah because that's work you've done, it's additional work, I want to pay it'. He said 'It won't be enough to get me by I'd rather you pay me the $11,000 that's outstanding'. It was the most stupid thing I ever did.
>
> What did you do then?---I rang Caryl – I said 'Well okay I can write you out a cheque', he didn't want a cheque from me on site, because I had my cheque book, he wanted direct deposit into his bank as he was always insisting upon previously. So I rang Caryl in town to see if she would do it".

93. And she did (see also Ms Warren's evidence on p85). Mr Colless eventually came to the view that Mr Barton took the money and ran, which is an understandable view.

94. The aspect of this evidence what I most doubt is whether the conversation happened on the same day as Mr Barton was going down with his alarming symptoms. Perhaps the discussion about payment happened a day or two earlier. But whenever it happened there is no reason for me to believe that either Mr Colless or Mr Barton discussed when and how the works agreed at the Cool Spot were to be done. There is no evidence of Mr Colless having purchased any of the materials that would be necessary for the work, or of his discussing their purchase with Mr Barton. Mr Barton's illness, which was unforeseen, and Mr Colless's absence after that, which may have been unavoidable, perhaps got in the way of discussions that might have happened had both men been on site for the last few days of the erection of the new verandah's steelwork.

95. At p226 of the transcript, in cross examination, Mr Barton said:

> "Well I'll put your proposition to you then. That you were providing labour and assistance, and you're willing to do that because it kept the deal alive and you were going to be there, and it wasn't any huge skin off your nose, so to speak to do that?
>
> ---That's right. Just a bit of sweat and that.
>
> But with the turn of events you packed up and left the site on or about 12 October 2002, you agree?---Yes.
>
> I'm just trying to break it up so we can decide whether we agree – you agree with that, that you left around 12 October 2002?---Well, Brian didn't want to do the roof.
>
> You left 12 October 2002?---Well I wouldn't know the exact date when I left there.
>
> And thereafter what you had agreed to do earlier suddenly becomes much harder, like having to go back and repair the roof and ---?--- Well obviously it becomes an inconvenience because we agreed at the Cool Spot to do it while I was there with the equipment, not come back. I didn't want to do it then.
>
> And after that you didn't want to go back did you?---Oh no, I was waiting to go back, waiting on the phone call."

96. The last answer might be true: the answer before that certainly had the ring of truth. As I mentioned above in paragraph 59 of these reasons I am not persuaded that Mr Colless telephoned either Mr Barton or Ms Davidson to request or demand that the works be completed before the Wet season began. If he telephoned at all with such a request or demand, it may have been at a time when Mr Barton was far away doing other work – he had a job at Timber Creek for what sounds to have been at least a few weeks towards the end of 2002. I am quite sure that Mr Barton did not initiate contact with Mr Colless to seek a mutually convenient time to do the work. As his evidence above shows, Mr Barton, having left the site, no longer viewed the works as

a trivial add on to the main contract. From his point of view, once the works stood alone, they became irksome.

97. It seems to me on all the evidence that it was the essence of Mr Barton's agreeing at the Cool Spot meeting to do the works that they would be done in connection with the relocation of the house. Of course, if Mr Barton then chose to postpone the works – to chase other lucrative work – his obligation would remain. But if Mr Colless chose, for example, to postpone the works, or was not in a position to furnish the materials necessary for the works, and Mr Barton took himself, his equipment and his labourer off site in these circumstances, then it is my opinion that an essential underpinning of the obligation would have been taken away, and Mr Barton would be no longer obliged to put himself to the trouble and expense of returning at Mr Colless's convenience. In my opinion the parties to the Cool Spot agreement would have included a termination clause in their agreement to that effect, if they had turned their minds to such events. It is only reasonable to imply such a term, given the reasons why the works were asked for, and agreed to.

98. That being so, on the question whether the agreement was breached, the burden of proof being on the plaintiff, there is simply insufficient evidence for me to decide whether Mr Barton's departure from the site was a default on his part, or whether it was occasioned by some failure on Mr Colless's part, such as the examples above. Nor is there evidence which could persuade me that Mr Barton's departure was negotiated on condition that he would return later to complete the works. It may have been Mr Colless's hope and understanding that Mr Barton would, and Mr Barton may have felt that, if called upon, he should, but there is not evidence of a revised agreement to that effect. In my opinion, his departure from the site terminated any obligation, arising from the Cool Spot meeting. There is not sufficient evidence of a breach of that agreement.

The Counterclaim

99. There was an amount of evidence on the question whether Mr Barton, when drilling the holes for the foundations of the piers of the resited house, had struck rock so as to activate some sort of a claim pursuant to the item numbered 5 in the "offer to purchase", Ex 2: -

> "…the price does not include any of the following,… 5 Any further excavation costs, should we encounter soil irregularities such as rock etc in footing holes."

100. The amended counter claim does not make any claim under such a head, and I shall not consider such a claim. As far as I can see the evidence is relevant to the counterclaim only in so far as that claim concerns the holes dug for the footings of the new verandah. Mr Colless had no reason to suspect that significant amounts of rock had been discovered during the drilling. He claims to have seen none during his time on site, and to have noticed none in the spoil from the holes. Mr Barton says there was lots of rock and he had swept the spoil off the site with his bobcat, so there was not much chance for Mr Colless to have seen it. It is a fact that Mr Barton did nothing to inform Mr Colless that he had struck rock, which is what he would normally have done in such a case – see p212 in Mr Barton's cross examination. It is also a fact that no account was ever rendered to Mr Colless by Ms Davidson for the extra cost of the rock breaking, until this litigation was up and running and both parties appear to have been availing themselves of every piece of ammunition they could use against the other. It is also the fact that Mr Barton entirely failed to produce any record of the number of holes where rock had been struck, and that his evidence on the question was never better than extremely vague. Further to account for Mr Colless's impression that there had been no rock was the fact that a pad of loose earth had been formed up on the natural block (previously in part, the car park of the Golden Sands Motel), and that this pad was thick enough to account for most of the depth of the footings holes. For example, in respect of the holes dug for the verandah's footings (with which I am most

concerned) Mr Colless's evidence at p24 is that the thickness of the pad was about 700mm, the holes there being 900 mm deep. I found Mr Colless's evidence on this point more credible than the rambling generalities of Mr Barton. Again, Mr Colless had at a later time dug a deep hole for a septic tank. In that place his recollection is that he struck rock (and had to bring in a rock pick machine to get it out) at about a metre and a half below the natural ground level. I accept that evidence too.

101. The evidence of Michael Robert Kiem persuades me that, notwithstanding that Mr Colless had good reasons to believe otherwise, there was a substantial amount of rock found in at least some of the holes dug by Mr Barton. Mr Kiem, called as a witness by the defendant, gave every impression of being an impartial witness. Mr Kiem had brought in the earth that had become the pad spoken of above, and it was he who actually dug the hole for the septic tank. His overall impression of the block was that rock was to be found on it near the surface all over the place. If I understood his evidence correctly, Mr Colless's block, like others in the area, has loose lumps of "coffee rock" at or very near the surface. These can be scraped out with, say, a backhoe. Deeper again one runs into a solid layer, or large solid aggregations of porcellanite. This rock is impervious to a backhoes's excavator, and has to be broken up with a rock pick, a jackhammer-like attachment to the backhoe.

102. Mr Kiem not only gave evidence about the surface geology of Mr Colless's block, but he also (p195) said that he drove past it a few times when Barton Houseshift were restumping the house, and more than once:

> "…felt sorry for one young fella he had there. He was down the hole with a jackhammer. Jackhammering the rock down in the hold up to his shoulders and all that."

103. That evidence was convincing, and its force was not reduced by my finding out in his cross examination that Mr Kiem was an old friend of Mr Barton's from years back in Katherine. After all, he had more recently done work for

Mr Colless and knew him too, and there is no reason for me to think that he favoured one man over the other.

104. There is however, nothing to indicate that Mr Kiem's sightings of the pitiable Brett related to the verandah holes (900mm deep) rather than the holes for the footings of the house proper, some of which were 1200 or 1350mm deep. Indeed, Mr Kiem's description seems to make it more likely that the holes he saw Brett down were for the restumping of the house proper. In short, notwithstanding Mr Kiem's evidence, I am satisfied on the evidence that there was nothing notably arduous involved in excavating the holes for the verandah's footings. No doubt there was some rock in some of them, but it is not proved that there was enough to make the job anything out of the ordinary.

105. That being so, I can return to what the evidence is as to the terms of the agreement between plaintiff and defendant for the defendant's work on the new verandah. As was clear from the discussion at paragraphs 32-37 of these Reasons, I have no reason to believe on the evidence that an express agreement was struck at the Cool Spot meeting for the defendant to do the work. Mr Colless enquired if Mr Barton might be interested, Mr Barton said yes and quoted some rough prices and the matter was left there. Evidently at some later date, after plans (see Ex6) were produced, Mr Colless must have handed these over to Mr Barton. The plans included the new verandah and Mr Barton went on to do the works. There is no evidence of any further discussion between plaintiff and defendant as to price.

106. That would be a fairly rough base from which to work out the price of the works. As it happens, I cannot even be sure what figures were quoted by Mr Barton at the Cool Spot. He says $400 per pole drilled, Mr Colless claims to remember $300. Neither was particularly persuasive, but the defendant bears the onus of proof on the issue and I am not persuaded that any more than $300 was quoted. Again Mr Barton claims that he quoted $95 per hour

for labour, a figure Mr Colless says that he did not hear and does not remember and would never have accepted. Again, neither man's evidence is persuasive, and I do not know what figure was quoted. Whatever the figure was, I am satisfied that Mr Barton was putting it forward as the price of his labour, and Brett's, and for the use of his machinery – especially his welding machine, in this context. I don't know whether Mr Colless understood that, assuming that a figure was mentioned. I do not know what materials Mr Barton had it in mind to charge for over and above his hourly rate, and I have no reason to think Mr Colless knew either. It is clear that both men accepted – anyone would - that any big items say, lengths of structural steel, provided by Mr Barton would have to be paid for by Mr Colless in the end. But it is much less clear whether smaller items – especially welding rods, in this context – would be a cost borne by Mr Barton, or passed on to Mr Colless. I suspect the former. The latter is at least not proved.

107. Out of this miasma I can conclude only that Mr Colless agreed to pay a reasonable price for the work Mr Barton did to construct the verandah, or that he is estopped from denying such an agreement. As to what work was done – how far the welding was finished – there is a dispute on the evidence between Mr Barton and Mr Colless. In this instance I was persuaded that Mr Barton had done what he said he had done. The one area of uncertainty arises from the fact that on the last day that work was done on site, Mr Barton was not there, and had no way of knowing whether Brett finished the work, or competently finished the work.

108. As to how long the work took, I am less impressed with Mr Barton's evidence. As on other topics, my reasons for caution about it derive not from my apprehending that Mr Barton is consciously exaggerating, but rather that he was recklessly expanding on hazy memories. It emerged in the evidence that it was many months before an invoice was prepared for these works (just how many months is not altogether clear) and I am not

persuaded that Mr Barton had any greater resources in terms of contemporaneous records, timesheets etc at the time the invoice was made out, than he had at the time he gave his evidence, when he had none. Apart from the usual haze created by the effluxion of time, his recollection may have been imperfect because his falling ill and missing a day or two's work on the site.

109. It seems to me that better evidence, both of what might be reasonable rates of pay per hour, and of the time the work should have taken, is to be found in the evidence of Clive Towell, quantity surveyor, called in the plaintiff's case. Mr Towell was a witness apparently very certain of his evidence. He prices the boring of the holes at $90 each, assuming the ground to be sand. As I have said above, whatever else may be uncertain about the agreement between Mr Barton and Mr Colless, a price of at least $300 each was agreed. I would for that reason allow 7 x $300 for the holes drilled, but I would adopt Mr Towell's figures for supplying and placing concrete, for erecting the steel columns and floor beam attachments, $480 and $560 respectively, a total of $3,140 (see Ex22, report by Mr Towell supplementary to his main report Ex21.)

110. The plaintiff agrees that he owes the defendant a further $381. The original contract, the "offer to purchase", specified that the house was to be restumped on steel stilts of 100mm square section. Mr Colless later asked that that be varied to stronger sections, 125mm square, and that was agreed. Ex5 is an invoice from OneSteel, setting out the price Mr Colless paid for various bits of steel. Mr Colless's evidence is that he could, from that invoice, work out the difference in price and had calculated the figure of $381. It appears that the defendant accepts that calculation, which is just as well, because I'm not sure I understand it.

111. Mr Barton made the point in his evidence that the change from 100mm sections to 125mm meant that every weld, on all four sides of each pier, was

25% longer than it would originally have been, and would take 25% longer to do. This is in relation not only to the 7 verandah piers, but to all these of the house, a total of about 30. Of course the job as a whole would not be 25% longer – it would take the same amount of time to set up a 125mm pier as a 100m one, and the same time to shift from pier to pier. But in terms of time actually welding, and the consumption of welding rods, it would add up.

112. There is, as usual, no evidence of any discussion as to who would carry the cost of this extra. Perhaps Mr Barton may have been willing to toss it in as all part of the service, but more probably not. As usual, his evidence is wretchedly lacking in specifics as to how much time and material the extra 25% would have taken, but even at an extra 5 minutes per pier, one would be looking at about 2.5 hours work. At a rate to include the cost of materials, say $80 per hour – another $200.

113. There is one other item which appears to me to be made out, just, on the counterclaim. This is in relation to the cleats which Mr Barton says he welded onto the beams of the new verandah. Mr Colless was reluctant to accept that Mr Barton had done this task. He believed that one Marcello had done it as part of later works. He might be right, but Mr Barton's evidence seemed more persuasive. I would allow the claim to the extent Mr Towell valued that job, $640.

114. In my judgment therefore, the counterclaim succeeds to the extent of $3140+$381+$200+$640, total $4,361. I think GST should be added to that: + 10% is $4797.10. Deducting from that the judgment on the claim, $1320, order that the plaintiff pay the defendant $3,477.10. I think there should be no order for costs, but I will hear the parties should they wish to apply.

115. It seems likely that the work on the verandah involved mobilisation costs, but, if it did, there is nothing in the evidence that permits me to put a figure on them.

Dated this 26th day of October 2005

_____

R.J. Wallace
STIPENDIARY MAGISTRATE