CITATION:	[2008] NTMC 013
PARTIES:	SHANE YATES v USHA CASTILLON
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	20700476
DELIVERED ON:	5 March 2008
DELIVERED AT:	DARWIN
HEARING DATE(s):	11/02/08 – 13/2/08
JUDGMENT OF:	DAYNOR TRIGG SM

CATCHWORDS:

Contract: express terms, implied terms.

REPRESENTATION:

Counsel:

Plaintiff:	Mr SILVESTER
Defendant:	Mr PIPER

Solicitors:

Plaintiff:	Ward Keller Lawyers
Defendant:	Pipers

Judgment category classification:	B
Judgment ID number:	[2008] NTMC 013
Number of paragraphs:	186

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

No. 20700476

[2008] NTMC 013

BETWEEN:

SHANE YATES

Plaintiff

AND:

USHA CASTILLON

Defendant

REASONS FOR JUDGMENT

(Delivered the 5th day of March 2008)

Mr TRIGG SM:

1. This claim commenced on the 4th day of January 2007 when the plaintiff filed a Statement of Claim seeking $15,239 plus interest and costs, for monies allegedly outstanding for an agreement "to construct and deliver to the defendant a prefabricated house". This claim was particularised as follows:

Cost of basic construction	$22,229
Windows	$ 4,634
Transport costs to site	$ 2,107
Extras being sliding door and security door, "crimsafe" doors, laundry dooes (sic), awnings, kitchen, steps and concrete, mini orb, extra steel, premium on gyproc costs, decking, bracing, sander hire, fuel to site and additional wages	$15,030
Total	$44,000

2. It was pleaded that the defendant had paid (in money or kind) $28,761,

and hence $15,239 was said to be still owing.

3. The defendant filed her initial Defence on 2 February 2007. Since then there has been two Amended Particulars of Claim and two Amended Defences. The Further Amended Particulars of Claim were filed on 6 February 2008 and the Further Amended Defence was filed in court at the commencement of the hearing. The final pleadings were as follows:

Further Amended Particulars of Claim	**Further Amended Defence**
1. The plaintiff is a real person over the age of 18 years and is capable of suing and being sued	1. The defendant admits paragraph 1 of the Amended Statement of Claim
2. The plaintiff is a sole trader who carries on a business in the housing construction industry	2. The defendant admits paragraph 2 of the Amended Statement of Claim
3. The defendant is a real person over the age of 18 years and is capable of suing and being used	3. The defendant admits paragraph 3 of the Amended Statement of Claim
4. The plaintiff and the defendant entered into a verbal agreement ("the Agreement") in or about June 2005 whereby the plaintiff agreed to construct and deliver to the defendant a prefabricated house ("the house")	4. The defendant admits paragraph 4 of the Amended Statement of Claim
5. The express terms of the agreement were: (i) The defendant would provide the plaintiff with plans for the construction of the house; (ii) The plaintiff would construct the house at his workshop at Humpty Doo; (iii) The plaintiff would then deliver the house to the defendant's property at Ericson Circuit, Wagait Beach, Mandorah	5. The defendant admits paragraph 5 of the Amended Statement of Claim, in particular that the express terms of the agreement included (i), (ii) and (iii) however, the defendant alleges there were further terms of the agreement as follows: The price for construction of and delivery of the house would be in the order of - $17,000.00 and in any event no more than $20,000. This term was express and implied by reason of the following: (a) In preliminary discussions between the plaintiff and the defendant on 27 May 2005 the plaintiff indicated that the approximate cost of the house would be under $20,000.00 (b) On 10 June 2005, 20 June 2005 and 25

4. It is apparent from these pleadings that the defendant has in fact failed to plead to the allegations in paragraph 6 of the Further Amended Statement of Claim. On the face of paragraph 6 of the Further Amended Defence there is a pleading to paragraph 6, but when that is analysed it must in fact be referring to paragraph 7 otherwise it makes no sense. Thereafter, as a result of this error, the reference in the Further Amended Defence to a particular paragraph in the Further Amended Statement of Claim is one number out (for example the reference in paragraphs 8, 9, and 11 etc of the Further Amended Defence to paragraphs 8, 9 and 11 etc of the Further Amended Statement of Claim must in fact be a reference to paragraphs 9, 10 and 12 etc respectively). I have attempted to put the corresponding pleadings next to each other in the table above, otherwise they make no sense.

5. The plaintiff was given leave to file a Reply to the Further Amended Defence and Reply to Counter-claim in court at the re-commencement of the hearing on 12 February 2008. This was done without objection. This pleading stated as follows:

> 1. The plaintiff denies the allegation as to further terms of the agreement as set out in paragraph 5 of the defence.
>
> 2. The plaintiff denies the allegation as to further terms of the agreement as set out in paragraph 5A, 5B and 5C of the defence.
>
> 3. The plaintiff joins issue with the denials and non-admissions set out in the Further Amended Defence of the defendant filed on 11 February 2008.
>
> DEFENCE TO COUNTERCLAIM
>
> 4. The defendant denies the allegation in paragraph 1 of the counterclaim.

6. From these pleadings the following matters are admitted and therefore not in issue before me:

- The plaintiff and the defendant entered into a verbal agreement ("the Agreement") in or about June 2005 whereby the plaintiff agreed to construct and deliver to the defendant a prefabricated house ("the house");

1 The express terms of the agreement were:

The defendant would provide the plaintiff with plans for the construction of the house;

The plaintiff would construct the house at his workshop at Humpty Doo;

The plaintiff would then deliver the house to the defendant's property at Ericson Circuit, Wagait Beach, Mandorah;

2 By way of *further* agreement it was subsequently agreed verbally that the plaintiff would carry out extra work which was not provided in the plans

(ii) Provide and install Crimsafe doors;

(iv) Provide and install awnings;

(v) Fit out of kitchen;

(vi) Steps and concrete;

(vii) *extra* Mini Orb *in bathroom*;

(x) Decking;

3 the variations contained an implied term that the defendant would pay the plaintiff a reasonable price for the work done and materials supplied in the construction of the house;

4 a reasonable price for constructing the house *(sic included)*:

Windows - $4,634.30;

Transport costs to site - $2,107.18;

Extras *as agreed*:

Mini Corodek	$ 445.71
Bench Top	$1,124.20
Security Doors	$1,119.80
Decking	$2,310.00

7. Accordingly, the principle issue for determination is, what were the terms of the admitted agreement? Was it for a fixed price plus extras as suggested by the defendant, or was there no agreement on price such that a term needs to be implied into the agreement as suggested by the plaintiff? It is not suggested by either party that the plaintiff was to provide his time and materials for free.

8. During the hearing, Mr Piper (counsel for the defendant) sought to tender the defendant's diary for 2005, rather than selected pages that were referred to in evidence, or copies of the pages referred to. By adopting that course I pointed out to him that the whole diary would then form part of the exhibit and I could have recourse to all of it. However, that was the course he opted to take, and there was no objection to the tender of the whole diary. The defendant's diary for 2005 became ExD5. As this is the most convenient (and possibly reliable) chronology of events I will hereinafter refer to entries in this diary in order to set the likely chronology of events. Many of the entries have not been the subject of any evidence from the defendant. When referring to entries in ExD5 I will use *italics* when setting out the words in the entry. In the event that an entry appears to have been written by more that one pen I will attempt to specify. Further, as all entries relate to the year 2005, I will only refer to entries by their day and month.

9. Before turning to the evidence in more detail there are a number of general observations that I wish to make that are relevant to the evidence as a whole:

Firstly, as regards the plaintiff:

1 He first started purchasing materials for the work he was to undertake under the agreement herein on 20 July 2005 (first entry in ExP4);

2 He did not ask for or receive any deposit for the work he was to undertake under the agreement;

3 He did not ask for or receive any deposit for any materials that he needed to purchase in order to carry out his side of the agreement;

4 He kept a folder for each job that he was doing;

5 He placed into the relevant folder any invoice that he received that related to that particular job;

6 In the event that an invoice related to more than one job he would place a copy of the invoice in each relevant folder;

7 There was no evidence to suggest that he kept any running summary of the invoices that were within any such folder;

8 There was no evidence to suggest that the folders served any purpose other than to keep relevant invoices together;

9 There was no evidence to suggest that at any time prior to March 2006 he had made any calculation as to the amount of materials he had purchased for the agreement herein;

10 There was no evidence to suggest that at any time prior to March 2006 he had made any calculation as to the amount of his labour he had applied to the agreement herein;

11 He at no time requested or received any progress payment for any of the materials he had purchased or labour he had expended in

order to perform the agreement;

12 He did not keep a diary to record any meetings or events;

13 He did not appear to make any record on any day to record what work he had done that day, or to which job it may apply;

14 He finished his work under the agreement in or about February or March 2006.

Secondly, as regards the defendant:

1 She kept a diary in 2005 (which was tendered as a whole and which became ExD5) and still keeps one;

2 In her diary she would record the times of proposed meetings and who they were with in order to remind herself;

3 She would also make some notes (in the diary) in advance of any meeting (on occasions) in order to remind herself of what the meeting was to be about (but I note that this would be of no real use unless she had her diary with her at all meetings and actually referred to it during the meeting);

4 On some occasions she had her diary with her during a meeting and may make a note of something said at that meeting;

5 On other occasions she may add a note regarding a meeting sometime later the same day of the meeting or maybe the next day;

6 Some entries in her diary had a large “tick” across them, but she did not explain what this meant (hence I do not know if this signified that the meeting etc had occurred, although this is the most obvious possibility);

7 Some entries in her diary were crossed out, but she did not explain

what this signified (hence I do not know if this signified that the meeting etc had not occurred, although this is the most obvious possibility);

8 From a perusal of her diary it appears clear to me that some entries are put in after events in order to record that they have occurred (i.e. on 15 February 2005 there are 2 entries as follows:

4.30 Glenda(clinic) medivaced out to hospital!

9pm – Barba Joe medivaced to hospital!

9 It is clear that the defendant has used many different pens to record entries in ExD5 from time to time. However, it appears to me that (on a close analysis of the exhibit) that each time words have been added in the entries relating to the plaintiff (for 28 May, 10 June, 17 June, 20 June, 25 June, 17 July (but excluding "Agreed!"), 22 September and 25 September) in different pen, it is probable that it is in the same pen on each occasion. This raises the real possibility that these entries may have all been added at the same time (but this was not suggested to the defendant during her evidence) as a later reconstruction rather than as contemporaneous to the original diary entry;

10 I treat the added entries in ExD5 with some suspicion (especially those added entries that appear to have a common theme), and am not satisfied that they were necessarily made at any time contemporaneous with the original entry. I consider that there is a real possibility they were added by the defendant later, and because of this litigation.

10. Throughout the diary and the hearing there was reference to a firm of architects named NBC, and a person called Bryan in particular. It appears that the plaintiff attended at least one meeting with them (the plaintiff says

that in fact he attended two) in relation to the matter in question herein. There was conflicting evidence between the parties as to when particular plans were produced and seen by the plaintiff. Accordingly, in my view, evidence from Bryan would have been relevant and may have assisted the court (if not on the ultimate issue, at least in establishing a proper chronology of events). It was the defendant who retained and used NBC, and accordingly I would have expected her to call Bryan, if anyone was going to do so. Mr Silvester (counsel for the plaintiff) made no submissions at the end of the case in relation to this and did not seek any evidential inference to be drawn against the defendant.

11. The hearing commenced before me on the 11th day of February 2008. The first witness called was the plaintiff. The plaintiff is aged 41 and is originally from Victoria. He apparently has no particular trade qualifications and is not a registered builder. In terms of his work experience he informed the court that he had been a sub-contractor in Victoria for approximately three years, working mainly in carpentry. In addition he said that he had spent seven years renovating his own properties, and whilst doing that he performed work in all the trades except for those that required certification, such as wiring and plumbing. That is the full extent of what he told me in evidence in chief.

12. Accordingly, it would appear that whilst the plaintiff might be considered to be generally "handy", he does not have any particular trade or skill. I would be unable to accept him as an expert in any area of building work based on the scant information that he provided to me. I make these observations by way of general background, however it is apparent from the Further Amended Defence that the quality of the plaintiff's work is not a major question in this case. As noted above, the only complaint about alleged defects and incomplete work is in paragraph 11.5 of the Further Amended Defence, and the defendant quantifies this at $500.

13. In relation to these alleged defects I note that no evidence was introduced in relation to the first two at all. Accordingly I dismiss that portion of the Further Amended Defence. The defendant did give evidence about water running to the back wall of her bathroom (and a photograph that wasn't very helpful was tendered as part of ExD10), but no evidence was introduced to suggest that this was due to anything that the plaintiff did or didn't do properly. It is possible that any such problem (assuming that it existed) might be due to the height of the footings rather than the plaintiff's workmanship. It is clear from the evidence that the plaintiff had no involvement with the footings, and this was something separately arranged and paid for by the defendant. Even if this problem was in any way the fault of the plaintiff (and on the evidence I am unable to find that this was the case) there was no evidence from which I could possibly quantify the remedy to this in any event. This portion of the Further Amended Defence is also dismissed. The next complaint was about a gap between two laundry doors. The plaintiff said the hinges were fully adjustable, and he had adjusted them and it was fine. The defendant was apparently still unhappy with the size of the gap. No photo of the alleged gap was introduced into evidence. No other evidence was called to confirm that there was a problem and what was necessary to fix it. I am unable to be satisfied that this complaint has been made out on the balance of probabilities. This portion of the Further Amended Defence is also dismissed. The final complaint is in relation to damage to an external wall during transport to Mandorah. A photo of the damage was tendered and formed part of ExD10. It is clear from the photo, and I find, that there is some damage. In his evidence the plaintiff said that the chains from the crane caused this damage. He confirmed that there would be a cost involved in repairing it, which he said would be $90 for materials plus whatever it cost to repair it. In the defendant's case no evidence was introduced to quantify the cost of this repair. Given the paucity of evidence I will be conservative and allow a total of $200 for this

rectification.

14. The plaintiff has been in the Northern Territory since July 2004. He started his own business (as a sole trader) in early 2005. He operated out of business premises in Humpty Doo and resides in Stuart Park. Since starting the business he has produced seven demountables, large sheds, decking, done renovations, roofing, constructional welding and also built trailers.

15. The plaintiff said that he first met the plaintiff in early 2005 through a mutual friend, Gillian Harrison. At the time of meeting the defendant, the plaintiff was constructing a demountable (12m x 3.5m) for Harrison, which he was to deliver to Wagait Beach. He said that someone else was responsible for the footings for the demountable and the installation of it on site. He went on to say that he did the job for Harrison on a cost plus labour basis, and he charged about $7,000 for his labour (which he said was between $30 and $40 an hour). However, no documents were produced into evidence to support any of this (and I am not sure how they could have been) and I am simply in no position on the evidence to make any finding one way or the other. The labour component of Harrison's demountable may have been $7,000, but equally it may not have been. I am unable to find on the balance of probabilities that it was or wasn't. The plaintiff went on to say that the final costing for this job was $24,000, and this included windows, wiring, internal walls and transport. It further appears that although this job commenced before any agreement to build a demountable for the defendant was entered into, it was actually delayed until after the defendant's demountable was delivered to site. The plaintiff said he was asked by Harrison to stop working on her demountable and do the plaintiff's instead and also told that she wished to change the plan and hadn't finalised it yet.

16. This evidence was admitted without objection, but the relevance of this

evidence is questionable. The plans for Harrison's demountable were not placed into evidence so I cannot compare them with other plans that did make their way into evidence. I do not know what really was involved in this construction. I am unable to make any findings as to what the terms of any agreement between the plaintiff and Harrison were. I know nothing of the type or number of windows and their cost. I don't know if any (and what) internal fittings were included, and if so, the cost of the same. I don't know whether there was any deck and/or any deck roofing included. On the evidence before me I am unable to draw any conclusions as to a proper comparison between Harrison's demountable and the defendants. Further, I would be unable to draw any conclusion as to what might be a proper labour component for the defendant's demountable based upon what the labour component allegedly was for Harrison's demountable.

17. I am not sure of the basis on which this evidence was introduced into the plaintiff's case, or how it is said to be relevant to my decision making. In cross-examination it was put to the plaintiff that he was aware that Harrison and the defendant were friends, and therefore that they would talk about each others contract and therefore that the defendant would have an expectation that her price would be about the same. The logic of this proposition is not strong. In any event the plaintiff said he didn't know what she was thinking, which in my view is the correct response and disposes of the proposition.

18. I do not know what knowledge, if any, the defendant had of the Harrison arrangement at the relevant time (being the time she asked the plaintiff to build a demountable for her) as Mr Silvester objected to this evidence being led from the defendant. The plaintiff himself gave no evidence to suggest that he discussed his financial arrangements with Harrison with the defendant at any relevant time, and it was not suggested in cross-examination that they had. When the defendant was giving evidence she was asked by Mr Piper (counsel for the defendant) about her discussions

with Harrison. Mr Silvester (counsel for the plaintiff) objected to the question on the basis that it was hearsay. In my view, he was correct to do so.

19. Whilst evidence of what was said between Harrison and the defendant is clearly first hand evidence of what was said, it is hearsay in relation to the claim herein. Further, it would not be evidence of the truth of what Harrison said. It is no part of the pleadings or case herein that I am being asked to determine what was the terms of the contract between the plaintiff and Harrison. It is no part of the defendant's case that the defendant and plaintiff discussed the plaintiff's arrangements with Harrison as part of their pre-contractual negotiations, or at all. It was not asserted that the defendant said anything to the plaintiff about Harrison's contractual terms at any relevant time, or that the plaintiff said anything to the defendant about it. I fail to see how it could assist me.

20. I will disregard the evidence in relation to Harrison's demountable in my deliberations as to what the agreement was between the plaintiff and the defendant. Further, in the event that there was no fixed price agreement between the plaintiff and the defendant I will disregard the evidence in relation to Harrison's demountable in my consideration as to what might be a reasonable price for labour or otherwise.

21. In her evidence the defendant said that in 2005 she was the chief executive officer of the Millingimbi council. She suggested that she left that position sometime in about June or July of 2005 (but as will appear later that date may not be correct), as she said she resigned and started with the Anindilyakwa land council. She is currently the executive officer of the NT indigenous education council.

22. In her evidence the defendant said that the Millingimbi council had decided in 2005 to purchase a demountable for use as a women's centre. From ExD5 it is clear that NBC Consultants (and a person named Bryan,

in particular) made numerous appearances in the diary with the first one being on 7 January. NBC appears in relation to entries that refer to *fencing project, house, housing, house plans, sketch of open air theatre, community hall* etc.

23. The first reference in ExD5 to anything relating to any "women's centre" or anything similar is in an entry for 8 March, which states:

4.30 Dept of Com. Services (NT)

- Strong Women Co-ord. / demountable

- equipment

24. In about March and April of 2005 the plaintiff says that he dealt with the defendant in her capacity as chief executive officer at the Millingimbi community council. From ExD5 it appears that the first mention of any contact with the plaintiff was made on 30 March, and the entry for this day reads:

11:00 *Shane : Demountable 0402381602*

Then under this in a different pen is written:

Fax 89843907

BSB:

A/C:

Then in perhaps the same pen as the facsimile number is written, obliquely is written: *$26,000*

Then obliquely and under *$26,000* is added (in what appears to be a 3rd different pen): *Millingimbi demountable.*

Then on the right hand side of the note in a pen that may be similar to the entry of *Millingimbi demountable* is written *Written Quote Please!!*

25. The plaintiff further said that the defendant asked him to supply a

demountable (12m x 3.5m) plus a deck and veranda in piece form to the Perkins barge for transport to Millingimbi (and I note that this is consistent with the entries in ExD5 for 31 March 2005). The plans for this project made their way into evidence and became ExP1 (surprisingly, in her evidence the defendant said that she had never seen these plans before when they were shown to her in evidence, but she did not dispute that they were the plans that they purported to be on their face). These plans indicate that the demountable was largely an open space with a kitchen at one end and an enclosed toilet and sink at the other. On the face of the plans the structure was:

> a 12m x 3.4m demountable;
>
> with an internal toilet and sink;
>
> with one internal door;
>
> with an open plan kitchen and pantry;
>
> with two external doors;
>
> with six windows of varying sizes;
>
> with a 9.6m x 3m deck;
>
> with two steps up to the deck;

26. Three other documents were tendered through the plaintiff in relation to this demountable in cross-examination. Each was a facsimile from the plaintiff to the defendant. I will deal with each one in chronological order as appears from the facsimile transmission information on the face of each exhibit.

27. The first facsimile was ExD3, which was a facsimile sent to the defendant on 31 March 2005 at 10.19am. It stated as follows:

> Re Quote for Womens Resource Centre.
>
> Hello Usha, further to our meeting I have finalised both the floor

plan and window specifications as per your request including the supply and fitout of the toilet area to include disabled facilities. The price for you which includes the finalised structure, transport to Perkins depot and supply of the fans, stove and exterior light comes to AUD$26,000.00. This payment will go under my ABN which is GST exclusive.

The colour scheme will be white ceiling, dulux clotted cream on two walls as discussed and a gold colour of your choice on the remaining two walls.

If you have any questions please do not hesitate to contact me.

If you decide to go ahead please supply a deposit of 10% with the balance payable on completion.

28. I digress to note that ExD5 has a notation for 1 April of *FINAL WORK DAY!!* but this entry is then crossed out. Also on the same day appears the following entry:

- *Purchase Orders: Plants*

- Demountable 20%

with the *20%* being in a different pen to the rest of the entry.

29. The second facsimile in time is ExD2, which was sent to the defendant on 4 April 2005 at 12.25pm. It stated as follows:

Hi Usha, In response to your email I enclose copies of the new floor plan for the resource centre as well as a diagram of both the freestanding decking and if needed a roof structure enclosing this area. The materials for the decking using hardwood would come to around $3000.00. This would include everything needed to construct the deck on your site although as the engineer would have to draw up the plans this could change. However the changes in price would only be slight in my opinion as I think the plan I have done for construction should be sufficient.

To include a colourbond roof as described would also cost around a similar figure, say $2800.00 in materials. Again the design and materials used could change once an engineer looks at it and this will influence the final figure.

Please let me know how you feel about this and if you are happy I

can give the diagrams to the engineer for approval. To organise the materials for you I would charge about $200.00. The engineering costs shouldn't change as if these plans are submitted all at once then they can be included with the original structure.

I note that these figures would suggest an increase in price from ExD3 of $6,000, however, as appears later from ExD1 the price was for some reason (which is unexplained) increased by $7,000.

30. The email from the defendant to which this facsimile responded did not make it's way into evidence. However, it would appear that the defendant must have asked the plaintiff for a further price including the supply of materials for a deck and roof over it (and this is partly confirmed by ExD5 where there is a notation next to the time of 3pm on 31 March of *Shane – verandah (portable)* with a "tick" across the word *Shane*). Initially ExD2 was a single page document, although on the face of it when it was sent it was the first page of three. The remaining two pages were added to the exhibit later in the evidence. These two pages comprised some additional plans (suggesting a laundry trough inside the bathroom, and some detail for the decking).

31. The final facsimile in time is ExD1, which was sent to the defendant on 4 April 2005 at 3.25pm. It stated as follows:

> Invoice : NT 02/05
>
> Date : 04/04/05
>
> Invoice to: Milingimbi Council
>
> C/O Usha Castillan
>
> For:
>
> : Construction of coded demountable 3.5 metres x 12 metres as per instructions
>
> : Supply all materials for construction of decking 3.6 metres x 9.6

metres

: Supply all materials for construction of roof over decking and part of demountable 3.7 metres x 12.2 metres

Delivery via Perkins Barge around mid May 2005

All steel to be galvanised finish

Total cost GST exclusive AUD $33,000.00

32. ExD5 for 4 April makes no reference to any contact with the plaintiff in relation to this or any other matter on that day.

33. It is apparent from ExD1 that the plaintiff has estimated six weeks to construct and deliver this demountable. In cross-examination he said that from memory he had no other work on at the time. Clearly, if correct, this would explain the short time frame contemplated. However, this may not be totally correct as it was because he was doing a demountable for Harrison that he was introduced to the defendant at all. But the evidence does not assist as to what stage this had reached, and it certainly appears from later evidence that Harrison was in no rush to have hers finished.

34. It follows from these documents that the plaintiff was charging $7,000 (being the difference between the quote and the invoice, although why it was now an invoice rather than a quote is not explained) to "supply all materials for construction of decking…….(and) supply all materials for construction of roof over decking". Clearly, if the plaintiff was to erect the deck and roof the price would be higher as there would be a labour component.

35. It appears that the plaintiff was to have no other involvement with the demountable after he delivered it to the barge. In particular, he was not to be responsible for it's delivery and installation on site. Further he had no work to do in Millingimbi such as the footings or any plumbing or connection of electricity etc. Further he was not to be involved in the

construction of the deck and roof over it (he was just supplying the materials).

36. It follows from these documents that as at 4 April 2005 the defendant knew the contents of each of these documents and therefore must have had an idea of what the plaintiff might charge for similar work. In cross-examination the defendant agreed that she knew that for $33,000 she could get what the plaintiff had quoted for Millingimbi. She said that she knew the range. In addition she agreed that (as compared with the Millingimbi demountable) she was getting bigger windows, a laundry, a different roof, transport of the demountable to Mandorah, and labour to build a deck roof on site (which was to be a free standing "scillion" roof which was not attached to the house).

37. The defendant said it was "correct" that these extra things (for her demountable as compared with the Millingimbi demountable) cost at least $15,000. But when it was put to her that therefore $48,000 would not be an unreasonable price for her demountable she became evasive. In my view, she realised the corner that she had just painted herself into, and was seeking for a way out. Mr Silvester tried to take her back through a similar process again, but (now knowing where it was leading) I find that she was deliberately vague and evasive. For example, when he again suggested that she knew the minimum cost would be $33,000 (because she knew that was the cost of the Millingimbi demountable delivered to Perkins barge) she now said that she really couldn't say that as she didn't have a plan in mind.

38. I am unable to accept the defendant's evidence in this regard as being honest or genuine. On the one hand she is now suggesting that she didn't know her demountable would cost at least $33,000 as she didn't have a plan in mind, yet she contends (as will appear later in these reasons) that from her very first conversation with the plaintiff (without any plan

existing) he put forward a price of $20,000 which she continues to contend that he should be bound to. In my view, this is a nonsense.

39. Mr Silvester again tried to pin the defendant down to an answer on his proposition. He put to her that she went into her discussions with the plaintiff knowing what she would get for $33,000, and her response was "exactly". It was then put to her that she knew to have a 12 metre by 4 metre demountable would be an additional cost (as noted the Millingimbi demountable was 12m x 3.4m only) and she said that she thought it may be. He then put that she knew a bigger one would cost more than one that was 3.4 metres wide, and her response was that common sense says yes. I find that any reasonable person would know and expect that a 12m x 4m demountable would (not may) cost more than one that was 12m x 3.4m (all other matters being equal).

40. Mr Silvester again tried to take the defendant through the same (what I consider to be a matter of logic and common sense) process but she again wouldn't make the same concession that she had made earlier (and was now clearly trying to back pedal from), namely that she knew her demountable would cost more than $33,000. I again found her evidence on this to be unimpressive, evasive and unconvincing.

41. Mr Silvester tried again with a slightly different tack. The defendant agreed that she had turned her mind to a budget. It was then put to her (again) that she knew Millingimbi cost $33,000 and she wanted to do more on top of that basic design, and she said "I can't deny I knew exactly what it was going to cost". She was then asked "you knew you were going to need $33,000 before you got to add ons, yes or no", and she replied "yes, it was in my mind". Then it was put "plus you'd need additional funds for whatever the extras cost" and she replied "yes". I find that that is the truth of the matter, and the defendant's evidence (referred to later in this decision) as to any fixed price of $20,000 is not reasonable or

believable.

42. At the end of cross-examination the defendant agreed that additional to what the plaintiff had produced for Millingimbi (for $33,000 delivered to the barge) he had supplied, at her request:

- Timber for the deck;
- His own labour to fix the timber to the steel deck;
- Supplied timber for the steps;
- Fixed the steps with his own labour;
- Concreted the steel frames for the steps into the ground;
- Supplied concrete;
- Supplied the oil for the timber and applied it;
- Supplied “crimsafe” and sliding doors;
- Supplied larger windows;
- Supplied a stainless steel bench top;
- Supplied and fitted mini orb feature walls; and
- Did bathroom tiles.

43. I find that the defendant knew (or must have known) that her demountable was larger and more expensive than the one that was done for Millingimbi. The Millingimbi demountable was for meetings and general business. Her demountable was to be a residence and home. It had more expensive windows and doors. It had a more expensive internal fit-out. Any reasonable person who turned their mind to the cost of this demountable (as compared with what was produced for Millingimbi) must have known that it would cost significantly more that $33,000 (even

allowing for the fact the plaintiff did not arrange or pay for the internal electrical work, and that the defendant bought some of the internal fittings herself).

44. The plaintiff went on to say that he had nearly completed the demountable for the Millingimbi council when he was contacted by them and advised that the council did not have the money. I am unsure as to when this actually occurred. It was not suggested that it was the defendant who contacted the plaintiff, and the plaintiff said that by this stage the defendant had gone to another job.

45. I return to the general chronology of evidence. The defendant has numerous entries in ExD5 for the following day of Tuesday 5 April. They start with **Last work day Millingimbi.* ; and end with *Mark – return keys* as the last entry. There are then no entries for 6 April, only one entry for 7 April, no entries for 8, 9, 10 or 11 April (consistent with her ceasing work) and on 12 April is recorded *Margaret : Temp CEO!!!.* It is therefore likely (absent some explanation from the defendant, which was not forthcoming) that the defendant in fact ceased work at Millingimbi on or about 5 April 2005.

46. Then there are a number of entries in ExD5 for 13 April, including one which suggests that the defendant travelled from Millingimbi to Darwin.

47. In ExD5 for 14 April is noted:

** NBC. 89484000 (Bryan)*

- my house plans

- GTE (Rick Peters) Mick Hogan contractor GEMCO

- strong women demountable

It is not clear why the defendant would still be talking to NBC about the demountable at Millingimbi if she had in fact ceased working there. The

reference to *my house plans* fits in with the defendant's evidence in cross-examination that she had plans for a house for herself drawn up, but didn't end up proceeding with that as she couldn't afford to build one. I note that at the back of ExD5 there is a half page devoted to *building quotes,* and a reference to *BJ - $260,000* and *Rob Millar - $300,000.* There are also some dates that have been added to this entry. The date *27/4* appears next to the name of Rob Millar, and two dates of *20/4* and *17/5* appear next to the name and phone number of Mick Hogan.

48. On 15 April there is a further reference to *NBC* and *Bryan.* Then on 19 April the first entry is *Personal Belongings on barge!;* which is consistent with her finally departing Millingimbi by that date. Later on the same day there are entries relating to a person named *Ross* and a 9 or 12 month lease in her name. Further on the same page there are two entries relating to *Bryan* that suggest she received her *house plans final* this day, and then she has a reference to *Beare Homes* on this day and the following day (20 April) that would suggest she may have been talking to them about building her house.

49. On 21 April in ExD5 there is reference to *Ian Bird (Builder)* being perhaps another builder that she spoke to re building her house. It appears to have been about this date that the defendant must have entered into a contract to purchase her block at Mandorah, as there are entries relating to *C/W Bank…approval TUE 26/4 "loyalty discount, no establishment fee"* and *Territory Conveyancing (Dianne).* On 22 April there is then a reference to *Fax contract to David (C/W Bank);* and later

> *1.30 – Ray White R/E (Garret)*
>
> *- Contract*
>
> *- Cheque.*

I don't know if this entry relates to the Mandorah land purchase, or maybe a

rental arrangement or something else.

50. There is no entry in ExD5 for 26 April to suggest that the Commonwealth Bank did in fact approve any loan on that day. On the following day (27 April) the entries suggest that the defendant was still in discussion with the bank about her loan and a settlement date of 26 May is mentioned. There is also reference to *Rob Millar, Builder …House plans 2 – 3 weeks* which suggests that the defendant was still looking at building a house, rather than a demountable at that stage. I find that this was the case.

51. In ExD5 for 28 April there is an entry regarding the Commonwealth Bank that *decision tomorrow a.m.* Then on 29 April there was *Loan Approval (verbal only).* There is then a pink "post it" note stuck into the entry for this day immediately after this entry which suggests the defendant needed to get a number of things to the bank (a consultancy contract; a letter for the bank on letterhead confirming her salary of $64,531 plus remote area allowance; and a one year rental agreement for 3/5 Warrego street Larrakeyah at $300 per week).

52. Then on 30 April in ExD5 there is a mention of *NBC, Bryan* but no indication as to what this may have related to. There is nothing in ExD5 to suggest that at any time during April 2005 she had moved away from the idea of possibly building a house on the land (which was yet to settle) at Mandorah. There is nothing to suggest that she had any contact with the plaintiff after the last facsimile of 4 April on any issue until 27 May (which I will come to shortly).

53. It appears from ExD5 that the defendant went to Groote Eylandt (hereinafter referred to as "G/E") from 3 May until 7 May. She appears to have held a number of discussions of an employment type, but it is unclear whether she went looking for work or she already had work and this was part of it. From the diary as a whole I find that it is most likely that she started working for the G/E land council in or about early May of

2005.

54. On 13 May in ExD5 there was an entry at the top of the day *move into Larrakeyah unit?* which has been crossed out.

55. On 16 May there is an entry in ExD5 that says *Appointment DEWR* and refers to various training and travel dates. On 17 May there is an entry from the bank saying *loan not approved!!* ; but the following day there is a further entry *Loan Approved <u>without</u> inclusion of Mandorah land.* It is not clear what the meaning or consequence of this was. Later on 18 May the defendant went to G/E, and does not appear to have returned to Darwin until 10am on 24 May. It appears from ExD5 that the defendant finally moved into 3/5 Warrego court on 25 May.

56. The first contact that the plaintiff says that he had with the defendant about this matter, was when she came to his shed at Humpty Doo, in April or May of 2005. It was put to the plaintiff in cross-examination that this first contact occurred on the 27th day of May 2005, and he agreed that could well have been correct. I note from ExD5 that the only entry that might in any way refer to the plaintiff after 31 March is the entry for 27 May which has *Shane Yates* noted next to the time of 5pm, and then after that in different pen to the name:

    - *plans (sketch)*
    - *costs*
    - *timeframe*

57. This is consistent with the note at the end of ExD5 that suggested she may still have been chasing quotes to build a house up to 17 May. I find that sometime on or shortly before 27 May 2005 the defendant decided that she could not afford to build a house on the land at Mandorah, and decided to look at a demountable as an alternative.

58. The plaintiff said that the defendant asked him about constructing a demountable for her (he thought the size was to be 12m x 4m) and shifting it to a block at Wagait. The defendant said he was constructing Harrison's demountable at the time, but agreed to also build one for the defendant. The plaintiff says that he told the defendant that all he needed was the plans, and the defendant was to attend to this and return.

59. The plaintiff says that there was no mention of any deck at that time, nor was there any mention of price or the basis on which he would charge. In cross-examination it was suggested to the plaintiff that he told the defendant in this conversation that he could knock one up in a couple of weeks and she was looking at something under $20,000. The plaintiff denied that this was said.

60. It is clear, and I find, that whatever conversation was had at this stage it must (of necessity) have been a very general one. The plaintiff had no real idea of what he was being asked to possibly build or when. If any words were said about general costs (and I am unable to decide one way or the other), then in my view, they could not have been intended (nor would they be capable) to form the basis of any agreement that was yet to be negotiated, to build a demountable that was yet to be determined as to size, content etc.

61. When the defendant gave evidence she said that she first spoke to the plaintiff about building a demountable for her when she met the plaintiff (by arrangement) at a café in Cullen Bay (which is different to the plaintiff's evidence that the first meeting was at his shed, and his version of where the first meeting took place was not challenged in cross-examination), and this would have been in April 2005 (and not 27 May as was put to the plaintiff in cross-examination). No diary entry to confirm any such meeting was relied upon, and no date of any such meeting was specifically identified.

62. I am unable to accept the defendant's evidence that there was any such meeting in April 2005 between her and the plaintiff. On the contrary, I find that there was no meeting (whether at Cullen Bay or anywhere else) between the plaintiff and defendant in April 2005 in relation to building a demountable for her. In this regard the defendant is either mistaken or untruthful. As earlier noted, the defendant was still seeking quotes to build a house (rather than a demountable) up until about 17 May. It is therefore unlikely that she turned her mind to a demountable until sometime on or after this date.

63. She said that at this meeting they discussed what "specifications" she required. She was asked whether price was discussed and she said that the plaintiff said that her building would cost under $20,000. She gave no evidence in chief to suggest the plaintiff had said anything like he could knock one up in a couple of weeks (but she suggested something along these lines in cross-examination.

64. I find that there was no meeting or discussion between the plaintiff and defendant concerning the possibility of him building and delivering a demountable for her until 27 May 2005. As earlier noted, she had only decided to consider a demountable (instead of building a house) on or shortly before this date.

65. The defendant (by reference to EXD5) went on to say that in her second meeting of 27 May (which I find was in fact the first such meeting) she had a "sketch" of basically what she wanted and she discussed this with the plaintiff. The defendant gave no evidence to identify this "sketch" further. I don't know who prepared it. I don't know how detailed it was. I don't know where it went after the meeting. It was never produced into evidence (clearly it was a relevant and material document) and no explanation was forthcoming from the defendant as to why. No "sketch" or similar document appears in the defendant's list of documents as filed

in court on 20 July 2007, and if it truly ever existed it should have been listed, even if it was no longer available. It wasn't suggested to the plaintiff in cross-examination that the defendant had ever shown him a "sketch". However, it would be unremarkable that if a person was sitting down with a "builder" to discuss a building that some form of "sketch" wouldn't be done or used during a discussion.

66. The defendant went on to say that they talked about costs, and her best recollection was the costs would remain the same as we had discussed in our previous meeting (which meeting I find did not in fact occur). She further said that time was to be on the same basis as the Millingimbi job of 8 weeks. Given that the discussion was only a very preliminary one, and the plaintiff did not know what he might end up being asked to build, or when, it would not have been possible (in my view) for the plaintiff to have given any time estimate that might be binding. In addition, there was nothing on which the plaintiff could have based any costing. I reject the defendant's evidence on this.

67. Looking at the objective surrounding evidence it would appear less likely that the defendant's version is correct. Firstly, when the plaintiff invoiced to build the demountable for the Millingimbi community council (ExD1) he was looking at a delivery time of around 6 weeks (from 4 April to around mid May). This was at a time his business was just getting going so he should have had more time available. I find it highly improbable that he could have done one in a couple of weeks (especially since he had no plans to know what he had to do, and no idea of what materials he would have to order) as suggested by the defendant. Further, for the plaintiff to have suggested a possible price without having any plans or drawings to know what he was going to be asked to build would have been reckless and most unwise. Whilst the plaintiff's record keeping appears to have been poor, and he did not appear to have any reliable diary system, and his time keeping non-existent, he did not strike me as an

idiot. Thirdly, because of the defendant's recent dealings with the plaintiff she already had an idea about his general pricing, and $20,000 (in my view) would be unrealistically low.

68. If I am wrong on this, and there was some discussion about possible prices, I would find that it was likely to have been a very informal and vague one (given the paucity of information then available), and not one which was capable of being an offer which was able to be accepted, or contractually binding. I find that the discussion of 27 May was (by necessity without any plans to specify the scope of work) a very loose and general one to ascertain the plaintiff's possible interest and availability to build a demountable for her. I find that there was no binding agreement at this stage. It was left in the hands of the defendant to obtain proper plans and then deliver those to the plaintiff so that discussions could continue, with the possibility that an agreement might be reached in the future.

69. ExD5 suggests that on 29 May the defendant spoke to *Gillian,* who may be the Gillian Harrison referred to earlier herein and obtained some possible prices for *plumbing, windows/louvres, stumping.*

70. According to ExD5 it appears that the defendant was probably busy with work and was away in G/E from 31 May until 6.30 pm on 9 June. In her evidence the defendant said that the block settled at the end of May but from my perusal of ExD5 it appears that settlement on the Mandorah property may have taken place on or about 6 June.

71. In June 2005 the defendant said he met with the plaintiff again. In cross-examination it was suggested that this was on the 10th of June and the plaintiff did not dispute the date. This is consistent with ExD5. On this occasion the defendant produced what the plaintiff called a drawing. This "drawing" became ExP2. ExP2 was a "floor plan" for "demountable for Usha Castillon at Mandorah" and was drawn by NBC Consultants and dated "June'05". I note that there is no reference at all to NBC or Bryan in

ExD5 between the time of the first and second meeting between the plaintiff and defendant. It is therefore difficult to see how ExP2 could have been prepared before the meeting of 10 June. The plaintiff denied that the defendant asked for a price or written quote at this meeting.

72. The plaintiff said that he could not remember the discussion that day but by looking at ExP2 it appeared that they discussed window sizes and some changes to the internals of the building. He went on to say that the defendant would have taken ExP2 with his writing on it back to get plans drawn up. This appears logical.

73. It is generally the evidence of the plaintiff that the defendant at no time asked for a quote or written quote. I find it difficult to accept this evidence. Clearly the defendant had abandoned her plans to build a house on her block due to the cost of the same. Money was an issue for her. It is, in my opinion, more probable than not that she did ask the plaintiff for one or both of these at least once, but I find he never complied with the request. Despite that the defendant permitted the plaintiff to continue with his work on the demountable.

74. For 10 June in ExD5 there are two entries relevant to this matter. The first is next to the time of 9am and says *Shane.* This is followed by a "tick" and then appears *cost of demountable? Written quote!* These latter words have been written in a different pen to the name of Shane, and were therefore added sometime after the initial entry.

After this and adjacent to the 3pm time is written *NBC – Bryan* and this is also then followed by a tick.

75. In relation to the meeting of 10 June the defendant said that she was able to get onto NBC to get a design, and I had these preliminary plans with me and I asked the plaintiff if he could give me a costing. ExD5 does not suggest that the defendant was able to (or did) get onto NBC at all until

the 10th of June itself, however both the plaintiff and defendant are ad idem that on 10 June some plans were provided by the defendant. As noted earlier, the plaintiff says that what he saw was ExP2. In cross-examination of the plaintiff it was suggested to him that ExP2 was one of a bundle of plans discussed on that day, and the plaintiff said that this was the only one he had a copy of. However, when the defendant was shown ExP2 in her evidence she suggested that wasn't one of the documents that she had at the meeting. She suggested that they looked at a complete set of A3 plans (but no such plans were produced into evidence). It wasn't suggested to the plaintiff in his evidence that he was mistaken in his evidence about ExP2 and he in fact only saw A3 plans.

76. As regards these non produced A3 plans the defendant went on to say that they were emailed to her, but she couldn't print them off. However she added that it was quite possible that she emailed them to the plaintiff but she was not sure of that. I find that ExP2 was a document that was looked at and discussed between the parties on 10 June. It is clear from a perusal of ExP3 (the plans that were finally the subject of a building permit) that some plans (pages DAR-024/A1 to A4 in unamended form, which did not make their way into evidence) were partly drawn by NBC sometime in June 2005. I note that these drawings done in June do not have any of the floor joist details that appear to have been done for the first time sometime in July. It is possible that the plaintiff was shown some unamended plans sometime in June, but I do not know if they were prepared before this meeting or not.

77. On the face of ExP2 the demountable was to be:

> 12m x 3.5m in size;
>
> plus an outdoor laundry attached to the main structure;
>
> with an enclosed bedroom with robes;

with an enclosed shower, toilet and basin;

with a linen cupboard;

with a kitchen;

with a pantry cupboard;

with two air conditioners;

with six windows of varying sizes;

with two internal doors;

with three external doors;

with a 3.2m x 8.78m deck;

with a set of steps up to the deck.

78. Clearly, in my view, this was a significantly more complicated building than the one the plaintiff had done for the Millingimbi community council (ExP1) and I would immediately expect the cost of materials and labour to be higher. The floor plan is a basic drawing and gives no detail that (in my view) a person constructing it would need in order to base any possible quote. It has no engineering information (such as floor joists etc) for the structure. It has no detail as to the size and type of roof to be built. It has no detail as to height. Assuming the defendant did ask the plaintiff for a price at this meeting, he would, in my view, have been unable to give a meaningful one based upon ExP2. In any event, even if a price was given (and I am unable to find that it was) it would have shortly become irrelevant as ExP2 was substantially altered, as will later become apparent.

79. The defendant later said in her evidence (after she had dealt with a meeting on 17 July, to which I will turn later, and was then asked if there had been any discussion regarding time frames that she had not told the court about) that on 10 June she told the plaintiff she needed to move into

the demountable, as it would be the only place she had to live, before the end of the year and within the eight weeks they had discussed. I find this conversation and recollection to be all a bit too convenient. At this stage no final plans had been approved. No agreement had yet been reached between the plaintiff and defendant that he would build anything for her. They were still in preliminary discussions only.

80. The next relevant entries in ExD5 are as follows:

14 June – *Bryan; NBC : re plans*

15 June – *Bryan ; NBC*

17 June – *Bryan, NBC 89484000 (left message with Larry)*

- Shane – plans, quote

There was a tick to the left of both entries on 17 June. The words *plans, quote* again appear to have been added later in a different pen.

As noted earlier, the original pages DAR-024/A1 to A4 (before they were first amended) of ExP3 were drawn by NBC sometime in June 2005. Sometime between when these plans were first drawn in June and 24 June the defendant must have asked for the floor plan to be revised (and this is consistent with the plaintiff's evidence of the discussion he probably had with the defendant about ExP2), as sheet DAR-024/A2 notes that a "revised floor plan and specification notes" was drawn on 24/6/05. This floor plan (DAR-024/A2 of ExP3) is a considerable change from ExP2 in the following ways (that I can see):

1 The size of the demountable has been increased from 12m x 3.5m to 12m x 4m;

2 The bedroom cupboard has moved to another wall;

3 The bedroom cupboard now is sliding rather than hinged doors;

4 The hinged door coming from outside straight into the bedroom has been removed and replaced with a sliding door in a different spot;

5 The outside laundry has been moved inside to where the linen cupboard originally was;

6 The location of the internal bedroom door has been moved;

7 The passage windows have been increased to a row of three instead of two;

8 Two rows of windows in the bathroom in lieu of one;

9 Bathroom now to be fully tiled in lieu of sheet vinyl;

10 The location of the sink and the hotplates in the kitchen have been swapped with each other;

11 Kitchen window is now two rows of windows in lieu of one;

12 The pantry cupboard in the kitchen has been moved;

13 The verandah decking is now to be “durability grade 1”;

14 The verandah posts have been moved 20mm in from the outside edge;

15 The positioning of the steps up to the verandah has been moved;

16 A carport has been added;

17 A roof line (and some guttering) has now been added to the detail;

18 Extra posts have been added to support the roofline over the carport and front steps;

19 A water tank has been added;

20 Main living/dining wall is now to be a "zincalume mini orb fixed vertically feature wall"; and

21 It appears the two air conditioners are now to be split systems.

81. ExD5 would suggest that the defendant was away from Darwin (on G/E) from 0830 on 14 June until noon on 17 June. Accordingly, the contact on this day may well have been phone contact, given that the entries above referred to appear in ExD5 before the flight information. However, despite the fact that the defendant went through her diary to refresh her memory on dates and events (and despite the fact the entries relating to the plaintiff were all tagged with big yellow post it stickers, presumably to help her find them) the defendant gave no evidence of anything occurring on 17 June involving the plaintiff.

82. It was suggested to the plaintiff in cross-examination that on 17 June the defendant asked how it was going with the quote in writing (although the defendant did not confirm this in her evidence), but the plaintiff denied it. It was further suggested that the defendant was keen to get started as soon as possible. The plaintiff responded that the times he met with the plaintiff she was always very keen to get started (which would indicate an unreasonable expectation on her part). It was finally put that he told the plaintiff that she should wait until the plans were approved, and he said this was correct. In my view, this clearly was very sensible advice to the defendant.

83. On 20 June ExD5 records *Shane – plans quote.* There is a "tick" immediately after the "-" and the last two words (*plans quote*) appear to have been added later in a different pen.

84. In relation to this entry the defendant said that she spoke to the plaintiff on the phone and they discussed the plans and the structure. She said that the

plaintiff had a copy of the preliminary plans and said it was rather heavy in steel, which may be able to be reduced. She went on to say she said to the plaintiff that she had not had a quote yet. The plaintiff denied in cross-examination that the defendant sought a quote. It was further put in cross-examination that the defendant re-iterated that she had no more than $20,000 to spend (although this is not the defendant's evidence of this conversation) and the plaintiff denied this. In re-examination the plaintiff was asked whether he would have proceeded to take this contract if the defendant had said this, and he said "not at all". I am unable to accept the defendant's evidence in respect to this conversation. As will appear later, the drawings that show the steel floor joists (DAR-024/A6 of ExP3) were not drawn until July, and therefore the plaintiff could not have had such plans or discussed them on 20 June. On the evidence I find that no such plans (or detail) existed as at 20 June.

85. The next entry in ExD5 is for 25 June and commences next to the 10am time slot. It reads: *NBC, Bryan + Shane Yates.*

There is a large "tick" at the end of this entry. Then under this entry is added (in different pen): *(Plans)* *Written quote!*

86. The defendant gave no evidence (even though she had her diary in front of her, and appeared to go through it) in relation to anything happening on this date at all. The plaintiff was not asked about this date in cross-examination either (even though he was taken through other dates in the diary). I did not hear any evidence from Bryan or anyone else from NBC. Clearly, in my view, the added words "*written quote"* would suggest (and are intended to suggest) that the defendant requested a written quote from the plaintiff at this meeting. In that event, Bryan should have been able to confirm this if it occurred. However, he was not called to give evidence. I would have expected the defendant to call him. This meeting may be consistent with the plaintiff's evidence that he attended two meetings with

NBC (but ExD5 doesn't assist to confirm that this did occur, and if so, when). If this meeting did take place, there is no evidence to enable me to find what was discussed.

87. The next relevant entry in ExD5 is for 27 June. On this day the first entry suggests that the defendant flew to G/E with Air Vincent this day. The last entry on the page (next to the 7pm slot) reads: *Shane : 0402381602.*

There was a "tick" appearing below this entry.

By reference to this note the defendant said in her evidence that she spoke to the plaintiff but she could not precisely recall what they talked about. In the end she did not suggest that they talked about anything. Despite this evidence from the defendant it was specifically put to the plaintiff that the defendant said the same things to him that she had on 20 June (namely a request for a quote, and that she had no more than $20,000 to spend), and the plaintiff denied this. It was further put that the plaintiff told the defendant there could be a saving by downgrading the steel given her concerns at the cost. The plaintiff denied this (as a reason) and said he does that to try and keep the cost of all his buildings down. I accept the plaintiff's denials. It was finally put to the plaintiff that the defendant would say (although in the end she didn't say this at all) that there was a discussion about the steel on 27 June, and the plaintiff agreed that this could be correct. However, for the reasons noted earlier (namely that the drawings relating to the steel floor joists was not created until July) I find that this is in fact not correct.

88. The defendant went on to suggest in her evidence that it was about this time that she resigned from Millingimbi and started with the Anindilyakwa Land Council and was flying in and out. I am unable to accept this evidence as accurate. As appears above it is likely that this occurred well before this date. I find that the defendant ceased working for Millingimbi in April 2005 (and most likely on 5 April) and not around

the end of June. I further find that the defendant started flying to G/E on a regular basis from about 3 May 2005.

89. It appears from ExD5 that the defendant may have flown back to Darwin from G/E on 1 July. Then returned to G/E again from 12 July until 16 July. There is no mention of the plaintiff in ExD5 during any of this period, although there is reference to *NBC* on 7 July.

90. Sometime in July NBC drew additional plans for the demountable. These were sheets DAR-024/A5 to A12 of ExP3. These plans included the "footing and floor framing layout" and "roof framing layout" and the roofing detail along with other drawings. It could only have been after the plaintiff saw these plans that he could have made any observations about the amount of steel in the floor joist, as no such detail appears to have existed (on the evidence before me) before these plans were created.

91. On 17 July in ExD5 next to the 9am slot is recorded in thick black pen:

Shane 0402381602

There is a "tick" at the start of the entry. Then under this entry in a different pen has been added:

Cost of demountable? In writing please

- *Under $20,000 (be more specific)!*
- *$15,000 - $17,000 - ? <u>Agreed!</u>*
- *- Cost of windows??*

There is a circle drawn around - *$17,000,* and the entry *<u>Agreed</u>!* appears to be in a darker pen than the rest of the added entry. Accordingly, it appears that this entry was made at three different times using three different pens. Clearly, on the face of this entry, it suggests (and is intended to suggest) that certain discussions took place concerning price and an agreement was

reached concerning a price of $17,000. If so, this meeting and entry is very important to the defendant's assertions.

In relation to this entry the defendant said that she had spoken to the plaintiff by phone and told him she was coming to Darwin on Saturday (which was 16 July). She then said that she wrote the plaintiff's name and phone number in her diary to remind herself. She then said that she wrote later entries: *Cost of demountable? In writing please*

- Under $20,000 (be more specific)!

as a note to herself to "nail him down". She said that they had had a discussion that windows were always extra, so she was happy with that.

The defendant went on to say that she had a meeting with the plaintiff at Humpty Doo and:

11 she talked about needing a firm price; and

12 needing it in writing;

13 we talked about aboriginal artefacts, and the plaintiff had a sister in Hong Kong who would be interested;

14 the defendant suggested that if the price was way above her budget maybe he'd accept art for anything above $20,000;

15 the defendant came up with a figure of $15,000 and she got a funny grin from the plaintiff;

16 the defendant said how about $17,000 (as 17 was her birth date) and the plaintiff was vague and didn't say anything.

92. That was the high point of her evidence. This evidence (even if true) does not suggest that there was any agreement on any set price at this meeting, and the entry "*Agreed!"* is therefore clearly untrue and very misleading.

Rather than any agreement the defendant went on to say that she came away from this meeting quite frustrated. She said she was impressing upon the plaintiff that her finances wouldn't allow her to go much beyond $20,000, but he was neither agreeing nor disagreeing with her in response to the prices she put.

93. The plaintiff denied that the defendant had tried to nail him down to a price at this meeting, and denied any discussion concerning $17,000 occurred. The plaintiff however did agree that he had a sister in Hong Kong, but not that he was prepared to set off money for art.

94. In my view, this meeting is significant in terms of the chronology. The defendant said in later evidence that she understood the plaintiff started working on her demountable in July 2005 (although the plaintiff said in his evidence that he started constructing it in September). This is consistent with ExP4 which was invoices relating to the "basic construction" costs of the demountable herein. The first invoice in time indicates that the plaintiff ordered two universal beams (which he says were for the defendant) on 20 July 2005. The second invoice in time indicates that the plaintiff ordered twelve 8.1 metre "plates" (which he says were for the defendant) on 21 July 2005.

95. Accordingly, it follows that on or before 20 July 2005 there had been a significant change in the situation. The plaintiff was now commencing to perform his obligations under the agreement which was now in existence.

96. On the pleadings as admitted (and set out in more detail in the first two dot points of paragraph 5 of these reasons) the agreement herein was entered into between the plaintiff and defendant in or about June of 2005. However, on the evidence it is difficult to identify any particular meeting or telephone discussion that progressed the matter to the point that there was now an agreement in place. I am unable to identify a date prior to 17 July in this regard, and accordingly I find that it was in fact entered into

on or about 17 July 2005. On the evidence I find that there was no agreement between the parties on a price. Further, there was no agreement that the plaintiff's price would be under any particular amount. I find this for a number of reasons on the evidence as a whole:

- I find that there was never any real certainty as to who was going to do exactly what in relation to the agreement from the start;
- Who bought what, and who did what was a fluid situation that changed as the work on the demountable progressed (although it was agreed that the defendant would purchase and supply kitchen sink, taps, stove, tiles, laundry tub, hot water service, shower head, whirly bird and skylight);
- The defendant purchased specific items to be incorporated into the demountable from time to time, and these were stored at the plaintiff's premises;
- Initially it was contemplated that the plaintiff would build the footings for the demountable, but this was later changed so that it was done by a local contractor;
- Initially it was contemplated that the plaintiff would do the sewerage and drainage works at Mandorah, but this was later changed so that it was done by a local contractor;
- Initially (according to the defendant) it was contemplated that the plaintiff would do the internal electrical work for the demountable, but this was later changed so that it was done by the defendant's husband (although the plaintiff said this was always the case); etc

97. I find that the express agreement between the parties was that:

- The defendant would provide approved plans to the plaintiff;

- The plaintiff would purchase items (excluding items that the defendant was to purchase and supply) to enable him to construct a demountable and decking in accordance with the approved plans;

- The plaintiff would construct a demountable in accordance with the approved plans incorporating items purchased by himself and the defendant;

- Upon completion of the demountable the plaintiff would arrange for and pay to transport the demountable to Mandorah to be installed on the defendant's land;

- After delivery to Mandorah the plaintiff would do all reasonable and necessary work to complete the demountable and decking.

98. I find that there was no express agreement between the plaintiff and defendant about price, or commencement date or completion date. However, in order to give the agreement business efficacy I find that the following terms were implied into the agreement, namely that:

- The plaintiff would commence working on the plaintiff's demountable within a reasonable time;

- The demountable would be completed within a reasonable time;

- The defendant would pay the plaintiff for all items purchased by him or money reasonably expended by him on the construction, relocation and finishing off of the demountable;

- The defendant would pay a reasonable amount to the plaintiff for the plaintiff's labour and time spent to prepare, organise, construct, relocate and finish off the demountable.

99. If there had been an agreement about price (which I find there wasn't) then I would have expected the defendant to have at least sought to

confirm this once in writing with the plaintiff during this agreement. The defendant confirmed in cross-examination that she did not do so. Further, at no time did she write to the plaintiff asking him to confirm any price or put any price in writing. Further, at no time did she write to the plaintiff asking him for a written update in respect to the current costing of the demountable. This is to be contrasted with the facsimile transmissions that the plaintiff was requested to supply and did supply (ExD1, ExD2 and ExD3) in respect to the Millingimbi demountable. Accordingly, it was within the defendant's knowledge and power to have requested the same from the plaintiff in this case. The defendant knew the plaintiff's facsimile number (it was recorded in ExD5 in the entry for 30 March). The defendant had the plaintiff's email details (she had apparently sent him an email from Millingimbi previously, and thought she may have sent him some plans by email as well). I find it inconceivable that, if the defendant truly was repeatedly trying to get a written quote off the plaintiff with no success, that she would not have put such a request into writing.

100. On 18 July NBC did a revised plan (part of ExP3) where a number of changes were done to the roof fixing, wall cladding, footing centres, shear walls, floor joists, footing sizes etc.

101. I find that the plaintiff complied with an implied term of the agreement by commencing to purchase items (on 20 July) for the demountable before he even had final approved plans (ExP3 discloses that a building permit for the proposed demountable was not issued until 22 August 2005).

102. The next entry in ExD5 is for 25 July next to the 2pm slot is written: *NBC, Bryan* however, in a different pen there is then a line drawn through this entry and then added after the entry – *demountable (.Usha's).* I find this reference to *Usha's* to be unusual. Who else's demountable would she be seeing NBC about? On this same day NBC again amended the plans

(ExP3) and this is where they specifically revised the deck floor joist sizes.

103. In ExD5 for 26 July there was an entry on the line above the 10am slot which read: *1030 Meeting with GEMCO* in a handwriting which may not be the defendant's. This entry is crossed out, and above the 1030 is written in *2.30.* I note in passing that for the following day (27 July) there is then an entry: *2.30 Meeting with GEMCO.*

This would suggest to me that the meeting with GEMCO that was listed for 1030 on 26 July was shifted to 2.30 on 27 July.

On the page for 26 July is then written (between the 10am and 12 noon slots):

NBC, Bryan 89484000

Andy. – Demountable + house

- *downgrade steel.*

There is a "tick" to the left of the word *Andy* and then two further "ticks" to the right of each of the words *house* and *steel.*

In relation to this entry the defendant said that she had arranged an appointment at 2.30 this day with NBC to reduce the steel. Whilst she suggests that the meeting was at 2.30, for the reasons aforementioned she may be mistaken about this. She went on to say that she met with the plaintiff and Bryan at NBC's premises at Coconut Grove, yet the note makes no reference to the plaintiff at all. If there was truly a meeting at which the plaintiff was to attend I would expect the plaintiff's name to have appeared in the diary. I was not told who "Andy" was. It may be that the defendant was confusing this meeting with the diary entry of 25 June. She said they had the non-approved plans which were spread out and discussed. As a result of this meeting NBC allegedly agreed to reduce the size of the steel on the plans, and revise the plan. This is strange, as on the face of ExP3 these details

were supposedly amended on 25 July, which is the day before the meeting to request it supposedly took place. This confusion is not explained on the evidence.

After this meeting the defendant said that she went over to Woolworths with the plaintiff and had a coffee. It was not suggested to the plaintiff that he ever had a discussion with the defendant over a coffee at the Woolworths shopping centre in Nightcliff. She allegedly said to the plaintiff that considering she should save money from steel, how much was she going to save here. She did not give any evidence to suggest that the plaintiff responded in any way. She went on to suggest that she also advised the plaintiff that she needed to move out of Larrakeyah to Mandorah, but she did not give any evidence to suggest that she was specific as to when.

I treat the defendant's evidence in relation to this with some scepticism and am unable to accept it.

The plaintiff confirmed that he did go to the architects, and said this was on two occasions. He agreed that on one of these occasions the downgrading of the steel was discussed. I find that this was most likely sometime in July, and that by that time he had seen sufficient drawings to know that the steel joists might be able to be reduced in size.

104. It then appears from ExD5 that the defendant was in Brisbane from 30 July until 8 August inclusive, and there is no entry relating to the plaintiff during this period. Then the defendant went to G/E again from 11 August until 20 August inclusive. The diary would suggest that during this period the defendant was obtaining quotes to have a shed purchased, transported from Brisbane, erected and concreted. I heard no evidence in relation to any shed.

105. In ExD5 for 22 August an entry next to the 10am slot states *NBC – 89484000. (Bryan).* A "tick" appears before the word *NBC* and after the

entry is added *Approved!!* In a different pen. This is consistent with ExP3 which has a stamp on each page indication that building approval was issued on this date.

106. It appears that the defendant then returned to G/E at about 3pm on 23 August and returned to Darwin on 26 August. Again there are entries concerning a shed and transporting it. It appears that the shed was to leave Brisbane on 23 August with Shaw's transport. Hence, it appears that the defendant's focus shifted to this shed for a period of time.

107. From ExD5 it appears that the defendant was obtaining various kitchen quotes on 27 August. The defendant returned to G/E on 29 August, and whilst there chased up on kitchen quotes on 30 August. The defendant returned to Darwin on 2 September. Whilst there continued to be references to *NBC* and *Bryan* in ExD5 it is unclear as to how (or if) any of these relate to the plaintiff or this action. There is no reference to the plaintiff at all in ExD5 from 26 July until 14 September.

108. On the plaintiff's evidence he commenced to construct the defendant's demountable in September. Given that a building permit for the demountable was only issued on 22 August, I find that the plaintiff complied with an implied term of the agreement namely to commence to construct the demountable within a reasonable time.

109. What would be a reasonable time within which the demountable should have been completed ready for transport to Mandorah? As noted in ExD1, in early April 2005 (when the plaintiff's business was in the early stages, and from his memory he had no other work on, but the status of Harrison's demountable is not clear) he was estimating about 6 weeks to have a demountable (which was more basic than this one) ready for delivery to a barge. By the time that the plans herein were given a building permit the plaintiff had a number of projects on the go (namely Harrison's demountable, plus two demountables for Adelaide River, plus

a small ablutions block plus a trailer, all in various stages of construction). It was no part of the agreement that the plaintiff was to stop all other work and concentrate on this matter, and the defendant agreed with this in cross-examination. The defendant was not paying a premium for a speedy job. Further, the plaintiff would be relying upon the defendant to deliver items that she was purchasing before he could look at installing them. Further, the plaintiff would need to rely upon the availability of other persons to do their parts (such as electrician, gyprocker etc). I also note the opinion of Crick on time in ExP9 (referred to later in these reasons). In all the circumstances of this case I find that a reasonable time to have the demountable ready for transport to Mandorah would have been within 3 to 4 months of the building permit for the plans, therefore by 21 December 2005.

110. The defendant returned to G/E on 6 September until 10 September. She again returned to G/E on 13 September (but it is not clear when she returned to Darwin after this date), and on this date in ExD5 there is a note that reads *NBC – Amended plan. Email.* This may refer to sheet SD/F3 of EXP3 which shows that the "revised floor joists and added stiffner" details were added on 8 September.

111. On 14 September in ExD5 after the 6pm slot is recorded *Shane 0402210620 :* and there is a "tick" immediately before the entry.

112. On 20 September there is an entry in ExD5 relating to a shed at Mandorah and awaiting a land survey. On 21 September there is an entry relating to paying *Jason cash $400 for laminating kitchen.*

113. On 22 September in ExD5 there is an entry

Shane Costings!!

List of purchases for

Demountable.

There is a "tick" after *Shane* and before *Costings*. The words after "Shane" again may be in a different pen, but this is not as certain as earlier entries. In my view, this entry is inconsistent with the defendant's pleadings which suggests that there was an agreed limit to what the plaintiff was to charge. If this were truly the case there would be no need for the defendant to be worried about the costs, unless she was concerned about extras, but she did not clarify this in her evidence.

114. From ExD5 it appears that the defendant purchased a basin and mixer from Reece plumbing on 23 September.

115. On 24 September in ExD5 there is recorded *Shane : Tiling* and there is a tick after the entry. On 25 September there is the same entry also with a "tick" after it, but under this entry has been added (in a different pen)

- *need to know cost of demountable?*

(How much & what in writing).

116. Again, in my view this is inconsistent with the supposed agreement or understanding that the defendant alleges. In re-examination the plaintiff was asked what he would have done if he had been told in September or October of 2005 that the defendant was in financial difficulty. He said that he would have panicked, but he probably would have continued to finish the demountable with the idea of then selling it on the open market.

117. In ExD5 for 28 September there is a line drawn diagonally across the page. At the top of the page is written *Mandorah* and under that *land survey.* Then next to the 9am slot is written *Mick* and a "tick" appears next to this. Then next to the 2pm slot is again written *Mick* and a tick above it. Then after this word is written *–done tomorrow: will ring when completed.* There is no reference to the plaintiff at all. The relevance of this is that when the defendant gave evidence she produced a photograph

(which became ExD6) that was of the demountable during construction. She stated that she took it at the plaintiff's premises on 28 September. She went on to say that she also helped the plaintiff with lifting the windows into place on the same day. There is nothing in ExD5 to suggest or confirm any of this. I am therefore not sure when ExD6 was taken. I am not satisfied on the balance of probabilities that it was on 28 September. It would appear to have been taken sometime in late September or perhaps early October.

118. ExD6 shows clearly that in addition to this demountable the plaintiff had a number of other works on the go. ExD6 also indicates, in my view, that the plaintiff had done a considerable amount of work on the defendant's demountable at the time ExD6 was taken.

119. On 6 October in ExD5 is a note to suggest that the slab for the shed was laid this day, and that the defendant may have been at Mandorah on 8 and 9 October.

120. On 12 October the defendant travelled to G/E and returned to Darwin on 14 October (according to ExD5). She then returned to G/E on 17 October and may not have returned to Darwin until 7 November, although this is not totally clear from the diary.

121. On 7 November in ExD5 is the entry

Gary Shane: Electrician

** Bob – p/points Fit-off??*

There is a "tick" after *Gary* and another "tick" across the entry *Shane: Electrician.* I know from the evidence that "Bob" was identified as the defendant's husband (and the person who did the electrical work for the demountable). This entry may relate to the defendant's evidence that in October or November she discussed the electrical work with the plaintiff. She said she was told that the plaintiff's usual electrician wasn't available

to do the work until after Christmas, and she said she'd go away and think about it. She later told the plaintiff that her husband would be coming up to do the work. The plaintiff said that the defendant was going to arrange the electrician from the beginning.

122. On 9 November in ExD5 is recorded <u>*Shane:*</u> *0402381602* and then under this in different pen –*internal wiring: demountable.*

123. On 10 November in ExD5 is noted *Shane : update on demountable* and then added under that in different pen is *:wiring/gyproc?*

124. On 11 November there is an entry to suggest that Bob arrived in Darwin this day, then on 14 November in ExD5 next to the 2pm slot is recorded *Humpty Doo – wiring demountable* and there is a "tick" under the entry. The defendant said she was present on this day when her husband ran the internal wires into the demountable. The plaintiff was asked in his evidence whether the defendant had told him that Bob was coming, and he said not to his knowledge.

125. Once the internal wiring had been put in place the gyprocking then had to be done on the walls. The defendant said that the plaintiff assured her that it would be done in a couple of days. The plaintiff did not agree with this. He said that he used two gyprockers (as he wouldn't do as good a job), and one of these was in Gove and the other had injured his back.

126. Then on 16 November the entries suggest that the defendant may have been at Mandorah in the morning and then next to the 2pm slot is (with a "tick" over it):

Humpty Doo – wiring demountable

(BOB).

The "(Bob)" has been added in different pen. In relation to this entry the defendant said that she re-attended with her husband and the gyprocking

had in fact not been done. She said that the plaintiff and her husband had a heated argument over this. The plaintiff agreed that he had an argument with Bob about the gyprocking and other matters (which were not clarified).

In the course of this the defendant said that she told the plaintiff that she needed the demountable to go before they closed the road to Mandorah, and she insisted that the demountable be moved (whether finished or not) to Mandorah before the wet season started. In this regard the plaintiff allegedly yelled at her that the price of the demountable was going to sky-rocket. The defendant said that she told the plaintiff she didn't care as that would be his problem as his promise to her was that he'd have the demountable at Mandorah within eight weeks of it being started (I am unable to find on the evidence that any such promise was at any time made by the plaintiff).

Accordingly, the defendant's husband was a relevant and material witness to this conversation. I would have expected the defendant to call him. She did not and no explanation for this was given in evidence. I infer that Bob's evidence would not have assisted the defendant (Jones v Dunkel (1959) 101 CLR 298).

In relation to such a conversation the plaintiff said that it occurred about 10 days earlier than 12 December 2005 when the defendant approached him and demanded that the demountable be taken over to Mandorah before the wet season due to access problems with the road. The plaintiff said that he warned her against it as he knew it would create a lot of hassle for him as regards travel. He told the defendant that her costs would sky-rocket if it was moved before he finished. The defendant allegedly said that she didn't care, she wanted it out there, and he agreed.

As found earlier, a reasonable time for the plaintiff to have the demountable ready for transport to Mandorah was by 21 December. Further, the

plaintiff was to transport the demountable to Mandorah when it was finished and ready for transport. By insisting (as she clearly did) that the demountable be transported to Mandorah before this date whether it was ready or not, the defendant was seeking to vary a term of the original agreement and, in my view, was not being reasonable. She was well aware that additional inconvenience would be caused to the plaintiff (in having to work away from his business premises, having to attend Mandorah to do work that he otherwise could have done from his premises, and his access to any necessary parts or supplies would be hampered by the extra distance to travel) and that there would be extra costs involved. In insisting on the demountable being moved despite the extra costs she must, in view, be taken to have accepted liability for any such reasonable extra costs. I find that it is fair and reasonable that the defendant should bear any such extra costs.

Time was never of the essence in this agreement. It was never expressly agreed that the demountable would be transported to Mandorah on or before any specific date or time. It was only as the construction progressed that the defendant sought to add a time pressure to the construction.

127. Despite this evidence, in cross-examination it was suggested to the defendant that she knew (taking the demountable to Mandorah before it was completed) was likely to involve increased costs, but she said “no, I didn’t know that”. Immediately after this response it was put to her that she knew it would cost the plaintiff more to complete the job (if the demountable was at Mandorah) and she now replied “quite likely”. I find this evidence to be generally evasive and not genuine.

128. On 17 November in ExD5 there is a note regarding *Roads* and some phone numbers and other notes to suggest that the defendant obtained some information regarding Cox Peninsula road having a weight limit of 10 tonne.

129. On 21 November in ExD5 is recorded *Mandorah – trenching & wiring.*

130. ExD5 would suggest that the defendant went to G/E again on 29 November. Then on 1 December there is a note relating to a *Shane* in relation to a *stove* but the numbers are for two landlines, and so I do not know if this refers to the plaintiff (who throughout ExD5 is referred to be a mobile number only) or not.

131. Then on 2 December in ExD5 is recorded *Shane : Demountable?? When!!* It is clear that by this time the defendant was beginning to panic about the wet season and was insisting on the plaintiff getting the demountable to Mandorah, as she was concerned that the road might be closed to heavy traffic.

132. On 5 December in ExD5 there is a reference to *$2,260* for *sewerage; tank & equipment;* then next to the 6pm slot is *Shane ?* then under this after a "tick" and next to the 7pm slot (and in different pen) is *Humpty Doo: Ben only!*

133. On 6 December in ExD5 in blue ink is written (below the 6pm slot) *Humpty Doo:* then there is a "tick" in black ink and also in black *Shane not there!*

134. On 9 December in ExD5 is recorded

<u>Shane</u>: demountable (on block yesterday)!!

There is a "tick" above and to the left of the entry. Then above the entry there is a line drawn towards the word *Shane* and then written in

Fridge?? Electician's?

Ph. No.

Immediately after this there are notes relating to a *Gary* and it appears that the defendant did not want this person to proceed with sewerage work due to

Cost Blowout?? $1500 + Drums @60 + driveway!!

In his evidence the plaintiff said that the demountable was taken to Mandorah on the 12th of December. In ExP5 (to which I will turn later in these reasons) the plaintiff claims $700 to NT Housemovers for the date 08/12/05 (which I note coincides with the diary entry and not the plaintiff's evidence) and there is a note at the end to say "*these items not invoiced – paid in cash". In addition, there is invoice 51958, dated 8/12/05, from Shorelands, for crane hire relating to moving the demountable. I find that the demountable was taken to Mandorah on 8 December.

135. A very interesting note appears later in ExD5 on 9 December. This note was as follows:

T.I.O. – Insurance + flood cyclone

$40,000 buildings + shed

1300301833 *$15,000 furniture/contents*

136. This indicates that the defendant was seeking a quote from TIO presumably to insure the demountable and the shed that was presumably at Mandorah. However, the defendant gave no evidence in relation to this and was not cross-examined on the entries either. Then on the following date (10 December) is recorded an apparent response:

T.I.O. – 1300301833 (Jim)

(Lot 130 Erickson Cres, Wagait Beach.

$40,000 *-$375.95/a*

$50,000 *-$464.65*

$15,000 *-$284.95/a*

$20,000 *-$369.05*

There is no evidence before me as to how much the shed on the property was worth (but the entries in ExD5 suggest that it was purchased in kit form and on 18 August *Gary* was quoting *$1500* to *erect shed & transport*), but it is clear that the defendant was of the belief that the demountable and shed together (not including furniture or contents) were worth between $40,000 and $50,000.

At the end of ExD5 there are some entries in relation to the shed as follows:

SHED & PAD + Installation

$3,800

2,600

$6,400

300 Concrete

2,280 Erect shed

$9,980 – TOTAL

This is difficult to reconcile with the defendant's assertion that she thought she was to pay no more than $20,000 for the demountable. I find that by this date the defendant believed that the demountable was worth at least somewhere between $30,000 and $40,000.

137. After the demountable was moved to Mandorah the plaintiff said that he was out there fairly regularly until early in the new year. He also said that he was driving to Mandorah on a daily basis (which is different to "fairly regularly"). He said in re-examination that the following items remained to be done after the demountable was taken to Mandorah:

- complete internal fit-out (only the gyprock had been done);
- the bathroom area;

- kitchen had to be constructed and fitted;
- tiling;
- mini orb to be screwed to walls and flashed;
- installing whirly bird;
- installing skylight; and;
- some smaller (unspecified) items outside.

138. In relation to the skylight (which he said was supplied by the defendant) the plaintiff said he fitted it and tested it on site. However, after a severe rain storm it started leaking. He said he went over to Mandorah but couldn't find the leak, so he covered it and returned the next day. On this occasion he said he found a hairline crack in the aluminium flashing that was part of the skylight (therefore a product problem rather than any fault with his installation). He removed the skylight, shortened the flashing and replaced it. He said there was no further problem with it.

139. In relation to the whirly bird the plaintiff said that the defendant wanted one. He told her that it was useless as there was no ceiling cavity for it to draw heat out of, but she insisted that he order one and fit it. If the defendant was financially stretched then this would be the sort of extra (given the advice from the plaintiff as to it's uselessness) that I would have expected her not to proceed with.

140. Further on 10 December in ExD5 is recorded:

> *<u>Shane</u>: (1) Ian Izod?*
>
> *(2) Roofing – leave to Gary*
>
> *(3) Air-con wiring*
>
> *(4)*

141. Then on 11 December in ExD5

Shane – Aircon wiring

(cut-off)

Later on this day it appears that the defendant has contacted a number of electricians presumably about doing this work.

It appears from ExD5 that the defendant went to G/E from 12 December until 16 December, and then went to Brisbane on 20 December. There are no further references to the plaintiff in ExD5 for any particular diary dates.

142. I find that the defendant in her own mind may have hoped that the basic demountable would cost under $20,000, but there was never any agreement or fixed price to this effect. Her demountable was never "basic" although she disputed that any demountable could be considered "grand". Further, I am satisfied on the evidence that the plaintiff never tricked or induced the defendant to believe that he would charge her any fixed amount, or any particular amount at all, or any amount in the vicinity of $15,000 or $17,000 or even $20,000.

143. As noted earlier, the plaintiff ceased all work on the demountable in or about February or March of 2006. Thereafter there appears to have been no contact between the parties for some time. The plaintiff said that he sent an invoice by email to the defendant, but no such document was produced. He said that it was less formal than ExP6 (to which I will turn shortly), and the defendant started paying it off. The defendant denied that she ever received any such email, and she said that she started making payments of her own volition.

144. It was put to the plaintiff that he didn't send an invoice as he knew it would be tricky as it cost more than he had given the impression of to the defendant. The plaintiff disagreed with this and said he didn't send a bill as he knew the defendant had personal problems and was travelling back

and forward to America. It is not totally clear what this referred to, but there was some evidence from the defendant about a son having some health problems that required her to go to America.

145. The plaintiff produced into evidence ExP7, which was a document he created. Although the document is undated he said that he would put the date as maybe June 2006. He said that he sat down with the defendant, had a coffee, and explained what he meant by these costs. He said that the defendant had been travelling back and forward to America around this time. However, in cross-examination it was put to the plaintiff that the defendant says she received ExP7 at the same time as ExP6 (the invoice that I will turn to shortly) and the plaintiff now said "I think that's correct, yes".

146. It is admitted between the parties that the defendant paid $9,900 to the plaintiff on 11 July 2006 and a further $9,900 on 13 July 2006.

147. On 10 October 2006 the plaintiff sent an invoice to the defendant in relation to this matter. This invoice became ExP6 and stated as follows:

> Date: 10th October 10, 2006
>
> Invoice to:
>
> Usha Castillon
>
> Erricsson Cct
>
> Wagait Beach NT
>
> Invoice No : Sy0614
>
> Invoice for the construction and delivery of demountable from Humpty Doo to Erricsson Cct Wagait Beach plus other works as per attachment.
>
> Invoice total : $44000.00

Less total already paid $9900.0

Total owing $34100.00

Please make payment to :

Shane Yates

The invoice then goes on to give contact and bank details for the plaintiff. I note that the assertion as to how much had been paid was in error and understated by $9,900. Whilst this invoice refers to an "attachment" no such attachment was tendered into evidence as part of the exhibit, but from later evidence it appears that ExP7 may be this document. ExP7 stated as follows:

> Hi Usha, here is a list of what I would call extras for the demountable based on the usual price of what I charge which is about $20,000 plus windows and transport. I remember saying that making us travel to Mandorah before the unit was finished was going to substantially add to the price. These prices aren't exact just rounded to the nearest dollar. Also I haven't deducted the $1000.00 for the furniture you gave me so please take this off the invoice.
>
> Extras:
>
> Sliding door and security door. $1120
> Crimsafe doors $1119
> Laundry doors $430
> Awnings $480
> Kitchen $1366
> Steps and concrete $520
> Mini Orb $600
> Extra Steel (by engineer) $1600
> Gyproc extra $2000
> Decking $2655
> Windows $4634
> Transport $2107
> Bracing $45
> Sander Hire $95
> Fuel to site and bens wages $3000

Total $21381

Plus extra labour for the following: Prefab and install awnings, oil and screw down decking, prepare and fit step treads, weld bracing, shift furniture and fit curtain rails. I haven't charged to come out and fix the skylight in spite of the unit leaking due to a fault with it. If you don't agree with this please let me know as I need to resolve this soon to finish my houses in Humpty Doo.

Many Thanks

Shane Yates

148. The plaintiff was cross-examined as to the contents of ExP7 and why he worded it as he did (as it was suggested that it confirmed that there was to be a basic cost of $20,000 plus extras – which the plaintiff again denied). The plaintiff said that after he gave her the email the defendant was going on about $20,000. He therefore prepared ExP7 to get the defendant to understand the costs using the $20,000 she was talking about. He said he was trying to placate her. He went on to say that he found the defendant difficult to discuss things with and he felt this was the only way he could get her to pay the account. She had asked for a breakdown of all the extras on the job and this was what he tried to do (in ExP7).

149. I agree that the wording in ExP7 is curious and may lend some weight to the defendant's evidence, but the plaintiff's explanation is not implausible.

150. I do not know how it came about that the defendant gave some furniture to the plaintiff, or how an off-set for this was discussed or agreed. It was something that was not in issue before me.

151. In the course of the evidence the plaintiff produced two bundles of invoices and receipts. The first bundle was said to relate to the "basic construction receipts" for materials that the plaintiff said were used to perform this agreement. As part of that bundle there was a typed list with

the right hand column stating the amount of each invoice that was billed to (or related to) the defendant's demountable. This bundle and list became ExP4. This typed list that accompanied ExP4 states as follows:

LIST OF BASIC CONSTRUCTION RECEIPTS

Invoice Date	Supplier	Invoice No	Amount of Invoice	Amount billed to Defendant
20/07/2005	OneSteel	11309539	$2,346.15	$925.00
21/07/2005	Metroll Building Products	12228	$442.60	$442.60
29/08/2005	Metroll Building Products	12823	$1,860.28	$1,860.28
09/09/2005	Humpty Doo Hardware	801142	$8.75	$8.75
13/09/2005	Humpty Doo Hardware	80610	$5.40	$5.40
14/09/2005	Humpty Doo Hardware	810691	$8.40	$8.40
14/09/2005	Metroll Building Products	12951	$1,512.83	$1,512.83
15/09/2005	Metroll Building Products	12940	$61.60	$61.60
20/09/2005	Coolalinga Car Parts	35190	$12.50	$12.50
20/09/2005	Bunnings Darwin		$147.66	$48.66
21/09/2005	Humpty Doo Hardware	802421	$18.55	$18.55
23/09/2005	Humpty Doo Hardware	802586	$35.85	$35.85
24/09/2005	Cerbis Ceramics	163152	$15.65	$15.65
26/09/2005	Stramit Industries		$61.39	$61.39
27/09/2005	Stratco (NT) Pty Ltd	09/115450	$15.18	$15.18
30/09/2005	Coolalinga Car Parts	35607	$25.00	$25.00
03/10/2005	OneSteel Metaland Darwin	11500655	$124.00	$88.00
04/10/2005	Trade Building Supplies	01012389	$73.30	$73.30
06/10/2005	Trade Building Supplies	01012514	$49.60	$49.60
18/10/2005	Metroll Building Products	13437	$1,634.84	$1,634.84
18/10/2005	Fielders Australia	64821666	$158.50	$158.50
18/10/2005	Fielders Australia	64821665	$18.04	$18.04
18/10/2005	Insulation Solutions		$33.81	$33.81
19/10/2005	Insulation Solutions		$16.90	$16.90
20/10/2005	Coventry Fasteners (WA) Pty Ltd	609342	$361.17	$361.17
01/11/2005	Metroll Building Products	13733	$1,503.78	$1,026.00
01/11/2005	Trade Building Supplies	01013328	$110.20	$110.20
04/11/2005	Coolalinga Car Parts	36822	$28.80	$28.80
07/11/2005	OneSteel Metaland Darwin	11594238	$176.00	$176.00
09/11/2005	Coventry Fasteners	609733	$44.69	$21.26
24/11/2005	Fletcher Insulation		$460.34	$460.34
28/11/2005	Humpty Doo Hardware	809672	$80.00	$80.00
29/11/2005	Bunnings Darwin		$100.50	$100.50
29/11/2005	Metroll Building Products	13855	$14.32	$14.32
29/11/2005	Trade Building Supplies	01014331	$201.85	$201.85
01/12/2005	Bunnings Darwin		$154.28	$146.78
02/12/2005	Humpty Doo Hardware	809949	$58.30	$58.30
04/12/2005	Bunnings Darwin		$88.88	$88.00
05/12/2005	Bunnings Darwin		$187.36	$187.36
06/12/2005	Bunnings Darwin		$169.55	$73.88
06/12/2005	Bunnings Darwin		$15.19	$15.19

10/12/2005	Bunnings Darwin		$27.35	$27.35
12/12/2005	Coolalinga Car Parts	38136	$35.20	$35.20
13/12/2005	Bunnings Darwin		$70.48	$70.48
15/12/2005	Humpty Doo Hardware	811213	$12.90	$12.90
16/12/2005	Bunnings Darwin		$171.71	$171.71
18/12/2005	Bunnings Darwin		$142.08	$142.08
20/12/2005	Cerbis Ceramics	167827	$60.85	$60.85
20/12/2005	Bunnings Darwin		$85.14	$85.14
21/12/2005	Bunnings Darwin		$15.60	$15.60
24/01/2006	Berry Springs Hardware	140796	$4.20	$4.20
24/01/2006	Bunnings Darwin		$19.95	$19.95
24/01/2006	Coventry Fasteners	107324	$166.80	$166.80
30/01/2006	Bunnings Darwin		$45.66	$45.66
30/01/2006	Bunnings Darwin		$24.25	$24.25
01/02/2006	Metroll Building Products	14527	$57.56	$57.56
01/02/2006	Bunnings Darwin		$38.35	$38.35
02/02/2006	Bunnings Darwin		$10.30	$10.30
03/02/2006	Bunnings Darwin		$112.08	$112.08
03/02/2006	Metroll Building Products	14418	$1,944.83	$57.59
06/02/2006	Bunnings Darwin		$11.92	$11.92
06/02/2006	Humpty Doo Hardware	816377	$14.60	$14.60
07/02/2006	Bunnings Darwin		$78.60	$78.60
07/02/2006	Cerbis Ceramics	169843	$22.00	$22.00
07/02/2006	Cash & Carry Tile Shop	169833	$28.40	$28.40
08/02/2006	Bunnings Darwin		$37.94	$37.94
08/02/2006	Palmerston Hardware & Building Supplies	129686	$27.95	$27.95
10/02/2006	Bunnings Darwin		$8.95	$8.95
11/02/2006	Bunnings Darwin		$29.80	$29.80
11/02/2006	Reece Pty Ltd	45049472	$4.85	$4.85
14/02/2006	Bunnings Darwin		$30.15	$8.94
16/02/2006	Berry Springs Hardware	141607	$8.90	$8.90
16/02/2006	Bunnings Darwin		$5.30	$5.30
16/02/2006	Palmerston Hardware & Building Supplies	131540	$67.65	$67.65
TOTAL			**$13,358.30**	**$11,088.44**

152. I note in relation to the Bunnings amount for 4/12/05 ExP4 alleges that the amount of the invoice is $88.88. This appears to be a typographical error, as the actual invoice is for $88.00, but the correct amount does appear in the right hand column.

153. Accordingly, on the plaintiff's evidence he has purchased (and paid for) $11,088.44 worth of materials and/or services from others that he has used in the "basic" construction cost of the defendant's demountable. I have checked the mathematical addition and this figure appears to be wrong. I came to a figure of $12,288.44, and because of the large discrepancy (of $1,200) I had a member of staff double check the

calculations (which she told me she did twice) and she apparently came to the same figure as myself. I therefore find that the correct amount for ExP4 items is $12,288.44.

154. The plaintiff has not charged or sought to recover any extra amount above and beyond the actual cost to him. I find this to be most unusual and exceedingly generous. I agree with what Mr Crick says in paragraph 11 of ExP9, namely that:

> If the builder was asked to provide the materials for the job, it would be normal for the builder to ask for and obtain a percentage markup of actual costs of materials to cover administration costs. A reasonable ask would be 10-15%.

By not seeking to do so, the plaintiff is effectively acting as an unsecured lender to the defendant for no interest. It would, in my view, have been a term to usually imply into an agreement of this sort, but it has not been pleaded or sought herein.

155. The second bundle was said to relate to the "list of extras receipts" for materials that the plaintiff said were used to perform this agreement. As part of that bundle there was a typed list with the right hand column stating the amount of each invoice that was billed to (or related to) the defendant's demountable. This bundle and list became ExP5. This typed list that accompanied ExP5 states as follows:

LIST OF EXTRAS RECEIPTS

Invoice Date	Supplier	Invoice No	Amount of Invoice	Amount billed to Defendant
07/09/2005	Darwin Steel Supplies	1786	$1,300.00	$1,300.00
20/09/2005	Garrett Building Services P/L	39	$4,634.30	$4,634.30
20/09/2005	Darwin Steel & Pipe Supplies Pty Ltd	608497	$198.55	$198.55
16/11/2005	Metroll Building Products	13887	$922.71	$445.71
05/12/2005	Peter Burai	11	$4,785.00	$4,125.00
05/12/2005	The Laminex Group	2580739	$242.35	$242.35
08/12/2005	Shorelands	51958	$1,407.18	$1,407.18
*08/12/2005	NT Housemovers			$700.00
09/12/2005	Darwin Steel Supplies Pty Ltd	3695	$165.00	$165.00
12/12/2005	True Blue Hire	042428	$83.90	$83.90
13/12/2005	Top End Hire Service	137598	$71.15	$71.15
16/12/2005	Garrett Building Services P/L	79	$297.00	$297.00

17/12/2005	Glen Pollard Cabinet Making & General Services	0001	$430.00	$430.00
25/01/2006	Coventry Fasteners	107563	$166.80	$166.80
27/01/2006	Bunnings Darwin		$25.45	$25.45
28/01/2006	Palmerston Hardware & Building Supplies	126975	$179.88	$179.88
30/01/2006	Nortruss Builders	07	$432.00	$432.00
30/01/2006	Fielders Australia	64890324	$1,124.00	$1,124.20
03/02/2006	Darwin Steel Supplies	4606	$78.06	$78.06
03/03/2006	Garrett Building Services P/L	11	$1,119.80	$1,119.80
15/12/2005	Big River Timbers Pty Ltd	B91604	$3,130.38	0.00
14/12/2005	Westrans Freighters Pty Ltd	389788	$731.39	0.00
07/03/2006	Big River Timbers Pty Ltd	72557	$1,804.49	0.00
10/03/2006	Westrans Freighters Pty Ltd	389792	$428.82	0.00
	Decking costs to Castellon			$2,310.00
	*Fuel		$1,500.00	$1,500.00
	*Casual employee costs		$1,500.00	$1,500.00
TOTAL			**$26,758.21**	**$22,536.33**

*These items not invoiced – paid in cash

156. I note in relation to the True Blue Hire invoice for 12/12/05 that the amount is actually $83.99, rather than the $83.90 that appears in ExP59 (accordingly, the plaintiff's calculations are 9 cents out). Further, the Fielders Australia invoice for 30/1/06 is for the $1,124.20 that appears in the right hand column, rather than the $1,124.00 that appears in the column marked "amount of invoice".

157. As noted previously, the decking costs of $2310 are admitted on the pleadings, and accordingly no evidence on this was necessary.

158. Accordingly, on the plaintiff's evidence he has purchased (and paid for) $19,536.33 (excluding the last two claimed items, that I will deal with later in these reasons) worth of materials and/or services from others that he has used in the "basic" construction cost of the defendant's demountable. I have checked the mathematical additions, and this figure should in fact be $19,536.42. Again he has not charged or sought to recover any extra amount above and beyond the actual cost to him. I again find this to be most unusual and exceedingly generous.

159. The plaintiff's evidence in relation to ExP4 and ExP5 was effectively

unchallenged. I note paragraph 11.5 of the Further Amended Defence as it relates to "objectionable items". It appears that the plaintiff has taken these objections on board and a number of items (such as NT News advertisement, drill hammer etc) are no longer pressed as part of the claim. In cross-examination it was suggested to the defendant that she didn't dispute that the plaintiff expended all the money in EXP4 and ExP5, and the defendant responded that "I have concerns about everything listed here". When Mr Silvester queried the word "everything", the defendant responded that "there are some items here I don't believe relate to my house". However, the defendant did not specify which items or why she held this belief. In the defendant's case no evidence was called to cast any doubt on any of the items or amounts within either of these exhibits. No evidence was introduced to suggest that any of the remaining items in paragraph 11.5 (as referred to above, and set out in full earlier in these reasons) were in fact not used in relation to this demountable. Be that as it may, the plaintiff still bears the onus of proving his claim and the quantum of his claim on the balance of probabilities.

160. It is clear, and I find (from ExP4 and ExP5), that the plaintiff is out of pocket for at least $31,824.86 for materials and costs that he has incurred directly related to the defendant's demountable. I am satisfied that each of the items do relate to the defendant's demountable (as that was his clear evidence, and no evidence has been introduced to cast any doubt on the truth of that assertion). I find that it is fair and reasonable that the defendant reimburse the plaintiff for this amount.

161. I now turn to consider the remaining aspects of the plaintiff's claim.

162. In relation to the claim for labour (other than his own) in the original Statement of Claim the plaintiff claimed this as part of the extras (along with fuel) at a total of $15,030. In the Amended Statement of Claim this has been changed so that it is now included as part of the total labour

costs of $7,894. In cross-examination he was asked how he came to this amount as it was not a round figure, and his answer was that he thought that was reasonable for the job that he did. Then in the Further Amended Statement of Claim this figure is changed so that the plaintiff is now claiming total labour costs of $9,000. Again in cross-examination he was asked to explain this change, and he said counsel changed those figures and he couldn't explain it. However, he went on to add that he thought the figure should have been $9,000 from the start. Given his evidence immediately before this, that he thought that $7,894 was reasonable for the job that he did, it is difficult to reconcile these two amounts.

163. The defendant said that he used labourers (and he named Ben Izod) who he said invoiced him for their labour. However this is different to what the list that forms part of ExP5 alleges. There it is alleged that the casual employee costs were one of the items that was "not invoiced – paid in cash". No invoices were produced initially, yet in re-examination the plaintiff then produced six invoices which became ExP8. These invoices covered the period from 1 November 2005 until 20 January 2006. I note that the invoices do not identify what hours Ben allegedly worked on what day, where or on what job. In each one the hourly rate is stated as $25. These invoices are as follows:

1/11-8/11	34 hours	$850
5/12-9/12	29 hours	$725
12/12-16/12	35 hours	$875
19/12-22/12	33 hours	$825
9/1-13/1	40 hours	$1000
16/1-20/1	38.5 hours	$962.50

164. How the plaintiff can derive a figure of $1800 (as initially claimed) or $1500 as now claimed from these documents remains a mystery on the

evidence before me. A claim for $1500 equates to some 60 hours that the plaintiff is alleging that Ben spent on the defendant's demountable. However, the plaintiff said in his evidence that he took Ben with him to Mandorah on 20 days. He also said that these days at Mandorah were at least full 8 hour days including travelling time. 20 days of at least 8 hours would equate to 160 hours. This evidence does not sit well together. Also, the plaintiff suggested that most of his trips to Mandorah were before the new year. From Ben's supposed invoices he allegedly worked 68 hours from 10 December until 31 December, which would only equate to about eight full days. For the whole period (of these invoices and after the demountable was taken to Mandorah) from 10 December until the last invoice they total 146.5 hours, which would equate to about 18 full days (assuming that he did no work on any other job during this period).

165. The plaintiff said that Ben prepared these invoices and he typed them onto his computer. Apparently the existence of these documents was never discovered to the defendant (and I note they do not appear in the plaintiff's List of Documents dated 30 May 2007). I note that at the end of day one of the evidence (in general discussion with counsel and in the presence of the plaintiff) I pointed out that if the evidence was that the plaintiff was paying cash to employees without declaring it and without withholding income tax then the plaintiff may need to be cautioned as to his rights against self incrimination. The next day, for the very first time, these invoices appeared off his computer. I have concerns about the origin of ExP8. I am not satisfied on the balance of probabilities that these invoices are what the plaintiff says they are. They may be, but they equally may not be. I give them little weight.

166. I accept that Ben assisted the plaintiff on the defendant's demountable, but the difficulty is assessing how much he did. The plaintiff did not call Ben and no explanation for this was offered in evidence. Given the very non specific nature of the plaintiff's evidence any evidence from Ben may

have helped to clarify the matter, and in my view, if Ben was available then the plaintiff should have called him. I infer that Ben's evidence may not have assisted the plaintiff (Jones v Dunkel (1959) 101 CLR 298).

167. I am left with very vague and general evidence. The plaintiff was the person who (with even basic time recording) was in a position to say what was done, who by and when. Any criticism therefore must be directed at the plaintiff, and his lack of any proper records. The defendant was in no position to know what any worker did, or when, on her demountable, as opposed to other work that the plaintiff had going at the same time. Accordingly, in my view, when making any estimates I should err on the lower side rather than the higher side.

168. The plaintiff claims to have paid Ben $25 per hour. I have not heard from Ben to confirm this, other than through ExP8 (being Ben's alleged invoices). There is no evidence from Crick (in ExP9) as to whether this is, or is not, a reasonable rate to pay a labourer. There was no evidence to suggest that Ben had any particular trade skills or experience (other than a suggestion from the plaintiff that he thought he was a boilermaker) that would justify him being paid more than a labourer's wage. I do not know what the going rate was for a labourer at this time, or at all. I do not even know how old Ben was at the relevant time, so I don't know whether he would attract an adult wage or not. As noted earlier, the plaintiff said that Ben went to Mandorah with him 20 days. He went on to say that when they went they were full 8 hour days including travelling time. He also said that Ben had to be back by 6pm as he had some commitment (unspecified) in town. The plaintiff did not put this 20 days forward as an approximate or an estimate.

169. As noted earlier the plaintiff claims $1800 for fuel in his Further Amended Statement of Claim, yet he is claiming $1500 for fuel in ExP5. The reason for this difference was never explained. In his evidence the

plaintiff said that the round trip to Mandorah and back was approximately 214 kilometres (this was not challenged), and he calculated his claim based on 30 days at $50 per day. No evidence was led as to the price of fuel at the time or the fuel economy of the vehicle that he was using.

170. The plaintiff said in cross-examination that he had fuel records which he went back on to work out that he attended at Mandorah on 30 days. Accordingly, in my view, if the plaintiff was relying upon these records in order to arrive at the evidence that he gave, it was incumbent upon him to produce these records. As Cross on Evidence (4th edition) states at page 519, "a party relying on the words used in a document for any purpose other than that of identifying it must, as a general rule, adduce primary evidence of it's content". These fuel records did not make their way into evidence (and I note that they do not appear in the plaintiff's List of Documents dated 30 May 2007), so I have no way of knowing if the plaintiff is correct in his assertion. Mr Piper did not ask for these "fuel records" to be produced for his inspection. As the defendant was not permanently at Mandorah it was impossible for her to know when the plaintiff was there and when he wasn't. The casual employee (Ben Izod) did not give evidence and he may well have been able to assist in this regard.

171. Absent the fuel records that the plaintiff has relied upon to give his evidence that he attended Mandorah 30 times (and absent any evidence as to why they were not discovered or produced) I am not satisfied on the balance of probabilities that the figure of 30 days is correct. However, on all the evidence it is clear that the plaintiff did attend Mandorah to complete this agreement, the question is how many times.

172. Assuming that fuel may have been say $1.20 per litre at the time, the $50 would equate to 41.6 litres of fuel. Taking the daily distance of 214 km and dividing this by 41.6 litres of fuel gives a fuel economy of 5.1 km per

litre. On the face of it this does not appear to be unreasonable.

173. There was no evidence before me as to how long this trip actually took, which is relevant to any claim for travelling time for the plaintiff and/or Ben. I would estimate (allowing for the fact that part of the road was unsealed on the evidence) at least two and a half hours for the round trip.

174. The remaining issue, on the fuel claim, is whether the plaintiff did in fact travel to Mandorah in relation to this agreement at least 30 times. As noted earlier, the plaintiff said that this 30 days was not a guess, but a figure he worked out after going back over his fuel records (and I have earlier stated why I am unable to accept this evidence on the balance of probabilities). I also have his evidence as to what work was left to be done when the demountable was moved to Mandorah, but there is some dispute on some aspects (such as whether tiles had been laid etc) of this evidence. I also know from the plaintiff's cross-examination that he did need to attend in Mandorah to correct some defects, and he referred to having to re-fix flashing around the roof.

175. The plaintiff said that he went to Mandorah regularly up to New year, and less regularly after that. At one point in his evidence he said that he was driving to Mandorah on a daily basis.

176. In relation to the plaintiff's personal labour the pleadings do not assist in identifying how much he is actually claiming for this. In the original statement of claim no specific amount for this was specified. In the Amended Statement of Claim this has been changed so that there is now a separate item of total labour costs of $7894. Then in the Further Amended Statement of Claim this figure is changed so that the plaintiff is now claiming total labour costs of $9000, which are alleged to be 300 hours at $30 per hour. There is no separate claim for any labourers, so it appears that this figure of $9,000 is a rolled up figure for both his personal labour and any labourer's time. Yet he has claimed all this time at $30 per hour,

when on his evidence he paid his labourer $25 per hour. Accordingly, because of the different pay rates claimed between the plaintiff and other labour it is necessary to try and work out how much time each spent. If the pay rates had been the same this would not have been necessary.

177. As noted earlier the plaintiff kept no records which would enable him (or the court) to find what hours he, or any labourer, worked on this demountable on any particular day. I have a guesstimate of 300 hours in total. In addition I have the statement of David Crick (ExP9) where in paragraph 8 he says:

> I have been asked to estimate the labour which a qualified builder of the type referred to below would allow for the construction in Darwin and location and commissioning of the building to Mandorah. I say that such a builder would allow three to four weeks at 60 hours per weeks, plus travel time to undertake this task.

178. Accordingly. Crick has estimated 180 to 240 hours plus travel time.

179. The plaintiff is claiming $30 per hour for himself. He is not a licensed builder. He did not suggest in his evidence that he was qualified in any trade (such as carpentry etc). He did not suggest that he had any certificates or training in any specific skills (such as welding, sheet metal work etc). On the evidence I am unable to find that the plaintiff was a "qualified builder" (which I accept may be different to a licensed builder), and accordingly the evidence as to hourly rates by Crick is not of much assistance.

180. Given the non-specific nature of the evidence I must take a broad brush approach to it. Again, in my view, it was always in the plaintiff's hands to have remedied this by basic time keeping records, and by producing his fuel record. I don't believe that the plaintiff has been deliberately vague (except by failing without any explanation to produce his fuel records), but rather that he simply was not very record conscious. Prior to starting

this business most of his "building" work was for himself, and therefore the need for proper time or other records was probably not necessary. However, when doing work for others it is not unreasonable for an itemised account to be expected and provided. If the plaintiff had been in a position to do this from early 2006, these proceedings may not have been necessary, but given the defendant's assertions (regarding a supposed $20,000 limit) it may still have.

181. I find that $30 an hour for the plaintiff is a reasonable amount, and if anything, on the low side.

182. I find that $25 an hour for Ben may be a bit high, but I'm satisfied that is what the plaintiff actually paid. Accordingly, the plaintiff should be re-imbursed for this.

183. Doing the best that I can with the evidence I will allow 200 hours of the plaintiff's time at $30 per hour ($6,000); plus 20 trips of 2 and a half hours (at $30 per hour) of travelling time for the plaintiff (for the return trip to Mandorah) which makes $1,500; plus 40 hours of Ben's time at $25 per hour (which makes $1,000); plus 10 trips of 2 and a half hours (at $25 per hour) of travelling time for Ben (for the return trip to Mandorah) which makes $625; plus fuel based on 20 round trips to Mandorah (at $50 per round trip).

184. Accordingly, I find that the plaintiff is entitled to a judgment against the plaintiff in the sum of:

- For the items in ExP4 $12,288.44
- For the items in ExP5 $19,536.42
- For the plaintiff's labour $ 6,000
- Plaintiff's travelling time $ 1,500

- For Ben's labour $ 1,000
- Ben's travelling time $ 625
- Fuel $ 1,000

TOTAL	$41,949.86
Less Paid	$28,761.00
Less wall damage	$ 200
AMOUNT OWING	$ 12,988.86

185. In addition the plaintiff claims interest in his Further Amended Statement of Claim. I find that there was no agreement between the parties that the defendant would pay any interest on any unpaid monies. Nor do I find that there was any implied term. However, Rule 39.03(1) of the Local Court Rules states that:

> In a proceeding, the Court may order that interest is to be included in the sum for which judgment is given at the rate it considers appropriate on the whole or part of the sum for the whole or a part of the period between the date when the cause of action arose and the date of judgment.

186. I do not know if any offers of compromise or payments into court have been made in accordance with the Rules. If they have, then this may affect the exercise of my discretion in relation to interest, as well as on costs. Accordingly, I will hear the parties on the questions of interest and costs (including the amounts thereof, if any) before entering the final judgment herein.

Dated this 5th day of March 2008.

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DA

YNOR TRIGG

STIPENDIARY MAGISTRATE