CITATION: *Blackbear (NT) Pty Ltd v Elvidge* [2008] NTMC 065

PARTIES:	BLACKBEAR (NT) PTY LTD
	v
	STUART BRIAN ELVIDGE
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20802545
DELIVERED ON:	3 October 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	30 – 31 July 2008
JUDGMENT OF:	Mr Wallace SM

CATCHWORDS:

Contract – building contract – building dispute

REPRESENTATION:

Counsel:

Plaintiff:	In person
Defendant:	In person

Judgment category classification:	C
Judgment ID number:	[2008] NTMC 065
Number of paragraphs:	44

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

No. 20802545

[2008] NTMC 065

BETWEEN:

BLACKBEAR (NT) PTY LTD
Plaintiff

AND:

STUART BRIAN ELVIDGE
Defendant

REASONS FOR DECISION

(Delivered 3 October 2008)

Mr WALLACE SM:

Introduction

1. This is a contractual, and perhaps to a degree, quasi-contractual action brought by the plaintiff company against the defendant, who has counter-claimed. The plaintiff contracted with the defendant to build him a house on his block at Virginia, not far south of Palmerston.

2. The guiding mind of the plaintiff is Mr Michael Andrew Beare, Director, and Mr Beare represented the plaintiff at the hearing and was its only viva voce witness. It seems to me that the clarity of these Reasons will be improved if I refer to Mr Beare as though he were the plaintiff.

3. The defendant ("Mr Elvidge") worked at the relevant time as a prison officer. His employment impeded communication between him and Mr Beare for two reasons. First, Mr Elvidge's job involved shift work. Secondly, he was not permitted, when at work, to have the use of a mobile phone. Consequently the preferred mode of communication between Mr

Beare and Mr Elvidge was email. There were few face to face meetings and few telephone calls. As a result, and most unusually in a case of this sort, I have not been troubled by conflicting evidence as to who said what to whom when and where and what was meant. Instead, I have as evidence some dozens of emails – by no means the totality of the correspondence, I believe. The emails' format makes them not easy to read, but, even so, they provide much more reliable evidence than the usual unreliable, partial memories of oral discussions.

Background

4. The contract (Exhibit 1) was entered into on 2 March 2006. The building work ended at the end of November 2006, a good deal later than either party would have wished. Mr Beare asserted in his evidence, and Mr Elvidge impliedly agreed, that the unexpected delay annoyed Mr Elvidge quite a lot. Mr Beare suspects, and he may be right, that this annoyance on Mr Elvidge's part put Mr Elvidge into a frame of mind where he was looking for some way of getting back at Mr Beare. I don't believe Mr Elvidge agreed with that: more importantly, whatever the motive for Mr Elvidge's being moved to find fault with Mr Beare's work, the question for me is whether what he found were properly characterised as faults. The delay did not in itself give rise to any part of the claim or counter claim, being, it seems excused within the terms of clause 9 of the contract (Exhibit 1).

THE CLAIM

1. The Bore

5. Mr Elvidge's block is a rural one, served by town power, but not by water or sewerage. In order to render blocks thereabouts habitable, each has a bore for water, and a septic tank. The house was to be situated the best part of a hundred metres back from the front fence, and the septic tank about ten metres from one end of the house.

6. There is a power pole on the verge of the road (Burdens Creek Road) more or less in the middle of Mr Elvidge's block's frontage, and it was at first planned to site the bore just onto Mr Elvidge's ground as near as practicable to that pole. This plan seems to have originated from a suggestion from Mr Beare that that would be the most convenient place to have the bore. The choice of site was Mr Elvidge's to make, and he made it.

7. The year 2006 may have had a longer lasting Wet season that expected, or Mr Elvidge's block may have taken longer to dry out than expected, or both, but for whichever reason the driller was not able to take his heavy equipment onto the block to drill the bore until 20 June. Water was found in the chosen spot, but, unfortunately, it was in a sandy layer which precluded its extraction – the pump and pipes would have become speedily clogged. A second site was proposed, near to the house, at the same end as the septic tank and within about 10 metres of it. The driller could not get to this site, owing to the wetness of the ground, until 1 August 2006. When he did, and drilled there water was found in a satisfactory layer of stone and a bore was successfully established.

8. The relocation of the site of the bore had two consequences. The first was considerable delay. Mr Beare asserted, convincingly, that construction could not practicably go ahead in the absence of a supply of water. There was no large supply until 1 August. For that reason, performance of his side of the contract, dated 2 March 2006, was virtually suspended until early August, a delay for that reason alone of about 5 months. I have no doubt that both parties, and Mr Elvidge in particular, were well aware on 2 March that the works would have to await the drying-out of the block, but I also have no doubt that neither of them, and again particularly Mr Elvidge had any expectation that the wait could be as long as 5 months.

9. The second matter arising from the relocation of the bore was that it necessitated changes to the planned works. First, there were changes to the

provision of wiring to the pump on the bore, and the switching to that pump, it now being at the house rather than at the front fence. Secondly, the bore now being proximate to the septic tank, there was a need to change the planned arrangements for the septic tank's outlet. (Regulations require that the outlet be not less than 100 metres from any bore). It was therefore necessary to extend the outlet from the septic tank well beyond what had been originally planned. As it happens, some of Mr Elvidge's neighbours already had bores drilled on their blocks, each of which gave rise to a no-outlet zone, so there was a limited choice of sites for the outlet. None of this would have come as a surprise to Mr Elvidge, who had discussed matters early on with the relevant authorities when obtaining his bore permit (see Exhibit 5) and came by a drawing which showed an arrangement for the outlet very like the one eventually installed.

Variations

10. The contract (Exhibit 1) contains various clauses to cope with variations from the original terms. In relation to the matters arising from the problems with the bore, clauses 10 and 11 are pertinent:

> 10. (a) The Builder is hereby authorised and directed to comply with and to give all notices required by any Act of Parliament or by any regulation or by-laws of any local authority or of any public service company or authority which has any jurisdiction with regard to the Works or with whose systems the same are or will be connected, and he shall pay and indemnify the Proprietor, against any fees, or charges legally demandable under such Acts of Parliament, regulations or by-laws in respect of the Works.
>
> (b) The Builder, before making any variation from the Contract Drawings or Specification necessary for such compliance, shall give to the Proprietor written notice specifying and giving the reason for such variation and applying for instructions in reference thereto.
>
> (c) If the Builder within five (5) days of having applied for the same does not receive such instructions, he shall proceed

with the work conforming to the provisions, regulations or by-laws in questions, and any variation thereby necessitated shall be deemed to be a variation under Clause 11 of these Conditions, and valued accordingly.

11. (a) This contract may be varied by omissions from the Works or by the performance of extra work, and no variation shall vitiate the contract.

(b) Subject to the requirements of Clause 10(a) hereof, the Builder shall be under no obligation whatsoever to carry out any extra work or to vary the contract without the Builder's agreement.

(c) If the Builder agrees to undertake the variation, he may require the proprietor to issue his instructions as to his requirements for any variation in writing. The Builder may also require that, prior to the execution of any variation, the Proprietor shall produce evidence of his capacity to pay any extra amount to cover the variation.

(d) The cost of all omissions from the Works shall be deducted from the Contract Sum. In determining the cost of omissions, the Builder shall be entitled to retain a reasonable allowance for overhead and profit.

(e) The price payable by the Proprietor for all extra work shall be added to the Contract Sum, and where a price shall not have been previously agreed, the Builder may proceed with any extra work and the price to be paid therefore shall be the actual cost thereof to the Building together with a reasonable allowance for overhead and profit.

a) Part of Mr Beare's claim is $330, the price of carting two loads of water to the site. Mr Beare did this (I accept) in order to get some water on site – it could be retained in a tank already there – so that work could commence before the (second) bore came on stream. Mr Beare did this unilaterally, without going through any process of consultation with Mr Elvidge. He did so in order (I find) to lessen the delays in the project which were already evidently going to be large, on account of the ground's remaining so wet for so long. He probably did so reacting to Mr Elvidge's expressing frustrations over the delay, but Mr Beare may also have had

reasons of his own to want to get started before the bore came on stream. There is, for example, no knowing on my part what other projects Mr Beare had in hand, and how the delay in Mr Elvidge's job was impinging on them.

I must say that it ill becomes Mr Elvidge to complain about this additional expense, he being simultaneously the party complaining about the delay. On the – admittedly incomplete – evidence before me, I think it very probable that the water cartage substantially benefited Mr Elvidge by substantially bringing forward the completion date. My sympathies on this issue are with Mr Beare. However, the issue is to be decided not by sympathy but by law, and it was in my view not justified for Mr Beare to incur this expense unilaterally. There was no emergency (that I am aware of) and the proposal could practically have been put to Mr Elvidge via email. I dismiss Mr Beare's claim in respect of that $330.

b) A much more substantial part of Mr Beare's claim derives from the costs he incurred digging, installing and burying about 100m of pressure hose from the septic tank so that its outlet could be located a legal distance from the second bore. The price of the hose and the plumber ($1743.50) was more or less offset by the credit of $1320.00 Mr Beare granted Mr Elvidge to account for the length of water pipe saved when the bore was relocated. (The first bore would have necessitated about 100m of piping to the tank, the second, hardly any.)

Again Mr Elvidge complained, convincingly to me, that this variation had not been discussed with and agreed by him before Mr Beare carried it out. Mr Beare's evidence that he had discussed it was unconvincing but his claim in evidence that, with or without discussion and agreement, the change had to be made, was far more convincing. In short, Mr Elvidge's house had to have a water supply (a bore) and a waste disposal system (the septic tank). By the time the placement of the (second) bore was known, works were far enough advanced (by making use of the carted water, I presume) that the site

of the house was fixed and the septic tank installed – see Exhibit 14, receipts produced by Mr Beare for various contractors' work invoiced by them to Mr Beare in July 2006, weeks before the second bore was in place. It is clear that Mr Beare had no choice; the extra works had to be done.

Given that I am not persuaded on the evidence that Mr Beare ever did propose a variation to this effect, he cannot, in my view, claim for this extra work pursuant to the contract. But I am also of the view that this does not matter. The work was done, it was necessary and unavoidable and entirely in Mr Elvidge's interest and Mr Elvidge has had the entire benefit of the work. Mr Beare is entitled in quasi-contract to the worth of his work. There is no reason for me to suspect that the cost submitted by Mr Beare was anything but reasonable. That part of the claim succeeds.

c) Mr Beare's claim includes a composite of "Extras" (in his favour) and "Credits", items varied to cost less or not done at all, so that Mr Beare's overall bill was reduced. One item on the Credit side was created by the relocation of the bore. Mr Beare made an allowance of $88.00 in respect of 100 metres of electrical cable at $0.88 per metre. (He had, as mentioned above, also made an allowance – a much more substantial one – for 100m of water pipe not needed when the bore was shifted to a site adjacent to the house).

Mr Elvidge was and is unable to believe that the change (from one bore site to the other) should result in so small a credit to him. Whether he looks at the cost per metre originally allowed for the works – power and water lines, and switching between the first bore site and the house, or whether he looks at the (extra) cost per metre of the line to the septic outlet, he comes to a figure of some thousands of dollars saved, which should be credited to him.

Mr Beare says, not so. Had the first bore worked, he would have had to bury an electrical conduit (from the power pole) to the house, and a water pipe (from the bore). The switching wire back from the house to the bore

would have been contained in the same electrical conduit. That conduit and the water pipe would have been buried in the same trench.

Thus, as a result of the second bore being so close to the house, the only saving is in the material cost of the water pipe, which is no longer necessary, and for which allowance has already been made in the accounting; and the material cost for the switching wire. In the result, the credit to Mr Elvidge is therefore not thousands, but tens of dollars.

I can understand Mr Elvidge's sense of disbelief at all this, as well as his sense of grievance at not being consulted about the necessary extra work but I find Mr Beare's account on this point persuasive.

2. Miscellaneous

11. The other items of the claim are minor and not troublesome. First, Mr Beare claims, and Mr Elvidge concedes an extra for $385.00 in respect of some kitchen cabinet making. Secondly, Mr Beare claims, and Mr Elvidge disputes the claim for $220.00, as an additional cost arising from Mr Elvidge's choice of a more powerful than expected air conditioning unit. In respect of this part of the claim a certain amount of background explanation is necessary.

12. The contract and specifications envisaged that Mr Beare would be supplying and charging for the air conditioners for the house. At some point after the contract was signed the parties agreed that Mr Elvidge could supply them, Mr Beare would install them and Mr Elvidge would be given a credit for the specified price of the air conditioning machines. It seems that this variation was agreed on an ad hoc basis, without being formally the subject of any written, signed agreement – no doubt there were many small variations agreed and carried out on the same informal basis. The only reason this one, concerning the air conditioners comes to my attention is that it gave rise, according to Mr Beare, to a cost of installation greater than would have been

the case had the Beare-supplied air conditioners been installed, because Mr Elvidge chose to supply for installation a more powerful machine.

13. Mr Beare's evidence as to why it cost more to install this machine that the less powerful one was fairly vague. Mr Elvidge's evidence as to why it would cost no more was even vaguer, being essentially to the effect that: the hole in the wall is presumably the same size and the electrics are presumably pretty much the same. I was left to decide whether the evidence of a man who knew what he was talking about (Mr Beare), even though he was not talking very clearly, was to be preferred to the evidence of a man who didn't (Mr Elvidge) even though his evidence has a certain intuitive appeal. Being persuaded that I am that both men were, in essence, honest in their evidence, on this issue I am (just) persuaded that Mr Beare is to be relied upon.

14. So much, then, for the claim. All items are made out, except the $330 for water cartage.

THE COUNTERCLAIM

15. Mr Elvidge's counterclaim consists of five elements. The first is a list of items headed, in his pleading, "Credits":

Credits	
100 LM 'Blue Line'	$1,320.00
10 LM Pool under ground power	$445.00
100 LM Bore under ground power	$4,450.00
Switch in house for bore	$88.00
Air Conditioners	$3,575.00
Panasonic A/c check – installer fault	$196.90
Uneven veranda slab – front is 10mm lower than rear	$6,985.00
Electricity	$179.11
Original Bore Drilling Charge	$7,800.00

16. Of these, several items are admitted by Mr Beare, but have already been taken into account by both sides. Thus the "100 LM [linear metres] 'Blue Line'" is the water pipe not needed from the first bore. The "10 LM Pool underground power" is agreed and allowed for. The "air conditioners" (i.e.

the machines) at $3,575.00 is agreed and allowed for. The "Original Bore Drilling Charge" is allowed for.

17. The item "100 LM Bore under ground power" at $4,450 is the item discussed above, calculated by Mr Elvidge on the highest possible assumptions, for which Mr Beare allowed $88.00. For the reasons given above, Mr Beare's figure is the one that the bore's change of site saved him, which saving he appropriately credited to Mr Elvidge.

18. The item "Electricity" has been claimed by Mr Elvidge in respect of the power used by Mr Beare when building the house. Mr Elvidge points out that the contract does not oblige him to pay for the electricity used by the builder and he is right. As far as I can see the contract is silent on the point.

19. The sum is not a large one, and Mr Beare, who on most points was a fairly pugnacious witness (and counsel in his own case) was disinclined to spend much time on it. But he genuinely seemed to have the wind taken out of his sails, regarding this item as a punch below the belt, a low blow. What other power, he rhetorically asked, was I expected to use?

20. One way or the other, a term must be implied. It seems to me clear that builder and client would have an expectation that the builder would use the client's town power on the job and would not be charged for it. That simply seems the most natural expectation. If town power were not to be available, the parties would both know that the builder would have to find his own, and expect the overall price to include an allowance for generators and fuel. It seems to me that if the client was expecting to pass on the cost of town power to the builder the contract should say so. I disallow this item of the counterclaim accordingly.

The Slab

21. This item, which is more than half the live counterclaim, arises as follows. Mr Elvidge's block looks flat to the untrained eye (mine), but in fact slopes

very slightly from the back fence down to the road. The concrete slab laid as the floor of the house is truly flat, with the result that the step down at the front, lower side, is noticeably greater than the step down at the back. In fact, the step down to the front verandah is close to the maximum 8 inches or so allowed by building regulations; that at the back is, in my memory, only about 2 inches.

22. Mr Elvidge did not expect this disparity, and he is unhappy with it. He is unhappy because the disparity is so marked that is obtrudes itself on his consciousness, that it surprises visitors to the house who are inclined to miss their step – I am sure the regular residents of the place soon get used to the difference and take it in their stride – and because the concrete skirt around the ends of the building does not present a smooth uniform appearance but necessarily contains kinks as the level changes.

23. He did not expect it, he says, because he was led to believe by the drawings (produced by Mr Beare) that the drop at front and rear would be the same. The drawings in question are part of Exhibit 6, in particular the three sheets of drawings each displaying 4 elevations. It is the case that these drawings do indeed give no hint that the drop from the interior floor to the house to the exterior floor of the verandah will vary. Mr Beare did not dispute this.

24. Of those four Elevations, the ones more relevant to the issue are Elevations 2 and 4, showing the ends of the house. Elevation 1, less immediately relevant, has two parallel lines protracted on the left hand side, labelled respectively “Floor level” and “Ground level”. Anyone perusing the drawings could in his mind’s eye protract a similar pair of lines on the other elevations. The inclusion of “Ground level” in the drawing of Elevation 1 could be argued to put the client on notice that the level of the ground mattered, that it was in the picture, that it would affect the outcome.

25. This was not Mr Beare’s argument. Mr Beare pointed out that these drawings contained few measurements and none of those measurements

touched upon the drop from the floor to the verandah. That is the case. He further argued that virtually every house block will evidence some difference in levels between front and back, or the two sides, or both, and that the steps down will therefore differ. I am persuaded that he is probably right about that. He argued that in the case of Mr Elvidge's block the unevenness would be difficult to remedy. The house could not be as it were lowered at the back. If it were rainwater runoff would flow into the house. That was convincing. He said one could not overlay the front verandah with a depth of concrete sufficient to bring that level up equal to the level at the back. That was less convincing. He said that if the front verandah level were to raised, the step off it to the front lawn would be dangerously high. That was convincing but not irremediable. He argued that there never was a term requiring the levels to be the same. That, in my view, is ultimately correct. I agree with Mr Beare that the Elevations depicted on the drawings, like the perspective drawings, (which likewise, but far more weakly, suggest that the drop will be the same front and back) are intended to give the client an overall view of the house, but that the binding items arising from the drawings are those measured and quoted, more particularly those in the drawings labelled Floor Plan Schematic Section, Energy Efficient Plan Floor Slab and Footing Plan, Verandah Sections and other detailed plans. And I note that in the Verandah Section the ground level is explicitly named while in the Schematic Section a line (drawn horizontal) which must be the ground level is clearly visible. It is clear to me that Mr Beare's overall position is correct. The builder takes the block as he finds it. The owner may be presumed to know the nature of the block. Any house is likely to be a bit higher here than there. In the absence of specific contractual provision, there is in my judgment no legal basis for Mr Elvidge's expectation that the two falls would be the same. I therefore disallow that item (the price of which would appear to be reasonable in itself, for a concrete pour to bring the – quite large – verandahs surface up 4 or 5 or 6 inches – see Exhibit 12, quotes obtained by Mr Elvidge).

26. The remaining two items on the list reproduced in paragraph 15 above include $196.90 for an installations fault that is not really contested by Mr Beare – and see Exhibit 11, proof of the invoice submitted by Col Pen Services Pty Ltd whom Mr Elvidge got into fix the problem, and proof of payment of that invoice. Mr Beare would say, no doubt truly, that he could have done the job for less, had he been given the chance to do so rather than having Mr Elvidge unilaterally take possession of the house, locking Mr Beare out. From that point of view that $196.90 belongs with the miscellancy of small faults dealt with below but I allow it, separately, here.

27. The last item is the figure of $88.00 for "Switch in house for bore". That sum, $88.00 is an odd figure – it seems too much for a switch and too little to include the cost of installing it. Mr Elvidge's evidence is that he expected, and believed he had contracted for that switch (by which the electrical pump powering the bore could be turned on and off) to be in the house, preferably in the laundry. Sure enough the specifications in the Tender List (Exhibit 8), which indisputably is part of the contract, has it on p 7, under the heading "Electrical Mains":

> "… 10 LM underground power to pump chamber, bore switch in house, 8 LM underground power to bore…..[my underlining]"

28. Mr Beare put the bore switch in the power box which is on the side of the house. Mr Beare says that that is "in the house", Mr Elvidge says that it is not, and I agree entirely with Mr Elvidge. To relocate the switch will involve a line from the power box, up the wall, through the ceiling space and down into the laundry, with conduiting, painting etc – a lot more that $88.00, I would think, at this juncture. There was not sufficient evidence before me to come to a genuine opinion as to the cost, but Mr Elvidge gets his claimed $88.00 easily.

A Miscellany of Small Faults

29. Mr Elvidge attached to his counterclaim a number of appendices, and two of these "C" and "D" include a list – a long list in the case of Appendix "C", of minor items under the rubric "Failure to do Works in a workman like manner".

30. Of these many items, Mr Beare argued that some remained to be remedied at the time he ceased work on the house. Others, such as cracks, he supposed might or might not have emerged in the, as it were, warranty period after an orderly handover – and others he thought were not unworkmanlike at all, whether they were apparent before or after Mr Elvidge occupied the house.

31. Mr Elvidge obtained a report from Mr John Brears, an engineer, which became Exhibit 13, commenting on the defects alleged by Mr Elvidge. To some extent Mr Brears's report supports Mr Beare's position – for example, item 1 on page 3, where, contrary to the quality of cement rendering argued for, and sincerely (in my view) expected by Mr Elvidge, Mr Brears writes:

> "The rendering generally is of an average standard but the preparation by the painter is poor, particularly around reveals".

32. Similarly with item 11, where Mr Brears disagrees with Mr Elvidge's allegation of a rust mark and finds the builder not at fault. Item 10 Mr Brears found to be not a defect at all.

33. Again, Mr Brears speaks of a number of faults – cracks in particular: see his items 3 and 12 – as being the Builder's responsibility to amend, "<u>if they were notified within the 13 week defect liability period</u>".

34. But Mr Brears finds most of the alleged faults to be faults indeed, and they were evident even to my untrained and disinterested eye on the view the Court had on the morning of 31/07/08. Mr Beare did not dispute those then, nor had he during the previous day's hearing. His case was that these defects were unsurprising, the sort of things that turn up at any job, and

which he routinely has fixed after inspecting the place before finally handing it over to the client. In the instance of Mr Elvidge's house that process did not happen, so the faults were left unmended, not because of any incapacity or unwillingness on Mr Beare's part, but because Mr Elvidge prematurely and unilaterally took possession of the premises and locked Mr Beare out.

35. There is no doubt that Mr Elvidge did this: he said so in his evidence, and gave his reasons. A statutory declaration of amusingly dodgy appearance – the text is typed on a piece of paper cut out and stuck to the Statutory Declaration form - has one John Vall declaring:

> "I am employed by Blackbear (NT) Pty Ltd trading as Beare Homes, as a Sub-Contractor to work as a Second Fix Carpenter.
>
> On the morning of 08th December 2006, Byron Neihsner, Site Supervisor to Beare Homes at the time, and I, went to the property at Lot 3018 Burdens Creek Road in Virginia.
>
> We went to the property at this time in order to straighten several glass sliding doors in the house that were not closing plumb to their frames.
>
> Upon arrival at the property I became aware that we could not gain access to the house as all the door locks had been changed.
>
> As Byron Niehsner stated the house had not been Handed Over to the Client, I understand that the Client had taken possession of the house and locked us, Blackbear (NT) Pty Ltd and workers, out".

36. At that date, 8 December 2006, the works were so close to practical completion that Mr Elvidge's premature seizure probably only anticipated a regular handover by a few days, but it is in my view clear that his choice, in a context of a rising volume of disputation between him and Mr Beare; and of rising frustration with the time taken to complete, means that clause 19(e) of the building contract (Exhibit 1) came into effect:

> "(e) Should the Proprietor take possession of the Works by either himself or any tenant or other person, authorised by him using the

> Works or any part thereof without the agreement of the Builder, the date of practical completion shall be the date possession is taken, unless practical completion has already been established otherwise".

37. Mr Elvidge does not dispute that and says, and I accept, that in fact he moved in on 6 December 2006. Mr Beare is in no position to dispute that. The dispute liability period – 13 weeks – therefore runs from that date, pursuant to Clause 21 of the contract Exhibit 1.

38. Exhibit 15, a bundle of the email correspondence shows, most particularly in an email from Mr Elvidge dated 2 March 2007 (within the 13 weeks from 6 December 2006) that all or almost all of the miscellany of faults complained of my Mr Elvidge, and admitted by Mr Beare – the occasional defective tile, doors not perfectly hung, at least some of the cracks etc – were notified to Mr Beare in writing, as requested by clause 21.

39. At the same time, Mr Beare was demanding the final payment due within 10 days of practical completion, according to clause 20. The payment was not made, the remedial works were not done, Mr Beare has withheld the Certificate of Occupancy, and eventually filed his claim.

40. Mr Beare said in evidence that he was still willing to fix up the things complained of, once he gets his money. His list of flaws admitted is a little shorter that Mr Elvidge's list of flaws alleged, and if Mr Beare's estimates as to what it would cost his business to amend the admitted flaws is even half the true figure, his willingness does not strain credulity. Mr Beare thinks it would involve 2 hours' time of a renderer, 2 hours for a painter, 2 hours for a tiler, each at about $40 per hour, and an hour for a handyman at about $30 - less than $300 all up. I suspect with travel time and a few hitches in the jobs it will in practice take more than that, but there is no reason for me to believe it would be of a different order of magnitude.

41. As is evident from Mr Vall's statutory declaration, Mr Beare did clearly have a procedure arranged to attend to some of the flaws – the purpose of

Mr Vall's thwarted visit was to readjust doors. I accept that Mr Beare would likewise, quickly and without much argument, have replaced tiles and mended any cracks, including the ugly, but superficial crumbling of the exterior render mentioned at item 28 of Mr Beare's report Exhibit 13. It is equally evident that Mr Elvidge's impetuous occupation of the house frustrated Mr Beare's procedure.

42. Mr Elvidge, in his evidence and submissions, spoke feelingly of having contracted for deluxe finishes in his house, and having got, in his view, something less than that. In the face of Mr Brear's opinion as to the rendering, and with Mr Beare having not been given a chance to touch up some of the more annoying items, Mr Elvidge's submission on that point go nowhere in particular.

43. In my opinion, Mr Beare should make good the visible cracks (including the one that he thinks and I think too has been amateurishly repaired by Mr Elvidge) should touch up the painting where necessary (as per Item 1 of Mr Brear's report), should fix the various doors – of rooms and cupboards, as per items 5, 6, 7, 8, 9, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, of Mr Brear's report, replace the unsatisfactory tiles – as per items 13 and 20. If he does so, as he said he was happy to do, then no damages would arise on this miscellany from the counterclaim. If Mr Elvidge is unwilling to have the willing Mr Beare do the work, then Mr Elvidge will have failed to mitigate damage, and no damages will arise. If Mr Elvidge is willing and Mr Beare not so, Mr Elvidge should have the work done or quoted for, and I will reopen the case to assess damages in those circumstances and those circumstances only. For that purpose I will list the matter for mention before me on 1 December 2008 at 9.30am. If no one then appears I will assume that Mr Beare has done the work, or that Mr Elvidge doesn't want him to.

44. Otherwise, I order:

1) On the claim: Judgment for the plaintiff in the sum of $9666.30 (i.e. the $9,800 finally claimed minus $330 for carted water, plus filing and bailiff fees of $196.30).

2) On the counterclaim: Judgment for the defendant in the sum of $284.90, i.e. $196.90 for the item in paragraph 26 above and $88.00 for the bore switch in the house. I disallow the claim for the cost of Mr Brear's report as a disbursement, the counterclaim having so substantially failed.

The defendant must pay the plaintiff the sum of $9381.40.

Upon receipt of payment of that sum the plaintiff must promptly take all necessary steps to obtain for the defendant a Certificate of Occupancy for the house.

Dated this 3rd day of October 2008.

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R J Wallace
STIPENDIARY MAGISTRATE