Civil and Administrative Tribunal
New South Wales

Case Name:	**LUXURY BUILDING GROUP PL v/ats COTTEE and MARTIN**
Medium Neutral Citation:	[2023] NSWCATCD
Hearing Date(s):	10-12 October and 24-25 November 2022, written submissions to 29 April 2023
Date of Orders:	27 September 2023
Date of Decision:	27 September 2023
Jurisdiction:	Consumer and Commercial Division
Before:	G K Burton SC, Senior Member
Decision:	1. Order that Luxury Building Group PL pay Paul Robert Cottee and Danielle Louise Martin $500,000 on or before 31 October 2023. 2. Order as follows in respect of questions of costs: (1) Any costs application with further submissions and documents relating to questions of costs is to be filed and served on or before 14 October 2023. (2) Any submissions and documents relating to questions of costs in response are to be filed and served on or before 31 October 2023.
Catchwords:	REAL PROPERTY – HOME BUILDING – defective and incomplete works – money order – validity of termination – repudiation and acceptance – were liquidated damages a penalty – quantum meruit for incomplete progress payment stages and informal variations - Home Building Act 1989 (NSW) s 18B
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Home Building Act 1989 (NSW) Home Building Regulation 2014 (NSW)
Cases Cited:	ABB Power Generation Ltd v Chapple (2001) 25 WAR 158 (CA), [2001] WASCA 412 Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25

AMEV-UDC Finance Ltd v Austin (1986) 162 CLR 170
Andrews v ANZ Banking Group Ltd (2012) 247 CLR 205, [2012] HCA 30
Australia Capital Financial Management PL v Linfield Developments PL [2017] NSWCA 99, (2017) 18 BPR 36,683
Bajic v Paraskevopoulos [2018] NSWCATAP 205
Balfour Beatty Power Construction Aust PL v Kidston Goldmines Ltd [1989] 2 Qd R 105
Barwick v Shetab [2017] NSWCATAP 127
Bellgrove v Eldridge (1954) 90 CLR 613, [1954] HCA 36
Bonita v Shen [2016] NSWCATAP 159
Bradshaw v Complete Coating Commercial PL t/as CCC Civil [2017] NSWCATAP 209
Brenner v First Artists' Management PL [1993] 2 VR 221
Catapult Constructions PL v Denison [2018] NSWCATAP 158
Darin v Olzomer [2012] NSWCA 60
Downer EDI Rail PL v John Holland PL [2018] NSWSC 326
Eddy Lau Constructions PL v Transdevelopment Enterprises PL [2004] NSWSC 273
El-Wasfi v NSW; Kassas v NSW (No 2) [2018] NSWCA 27
GPM Constructions PL v Baker [2018] NSWCATAP 119
Gray Constructions PL v Hogan [2000] NSWCA 26
Growthbuilt PL v Modern Touch Marble & Granite PL [2021] NSWSC 290
Hanave PL v Wine Nomad PL [2022] NSWCATAP 361; [2023] NSWSC 265
Hanna v Kersten [2019] NSWCATCD 26
Hazeldene's Chicken Farm PL v Victorian Workcover Authority (No 2) (2005) 13 VR 435, [2005] VSCA 298
Hyder Consulting (Australia) PL v Wilh Wilhelmsen Agency PL [2001] NSWCA 313
Hyundai Heavy Industries Co Ltd v Papadopoulos [1980] 1 WLR 1129 (HL), [1980] 2 All ER 29, [1980] 2 Lloyd's Rep 1
Johnson t/as One Tree Constructions v Lukeman [2017] NSWCATAP 45
Karakominakis v Big Country Developments PL [2000] NSWCA 313
Latoudis v Casey (1990) 170 CLR 534
Laurinda PL v Capalaba Park Shopping Centre PL (1989) 166 CLR 623, [1989] HCA 23
Liebe v Molloy (1906) 4 CLR 347
Lumbers v W Cook Builders PL (in liq) (2008) 232

CLR 635, [2008] HCA 27
Mann v Paterson Constructions PL [2019] HCA 32
Marr v JCK Building Solutions PL [2018] NCATCCD, unreported, 4 December 2018, HB 16/43946
Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120
O'Dea v Allstates Leasing System (WA) PL (1983) 152 CLR 359
Oppidan Homes PL v Yang [2017] NSWCATAP 67
Oshlack v Richmond River Council (1998) 193 CLR 72
Owners SP 63341 v Malachite Holdings PL [2018] NSWCATAP 256
Owners SP 76674 v Di Blasio Constructions PL [2014] NSWSC 1067
Owners SP 78465 v MD Constructions PL [2016] NSWSC 162
Paciocco v ANZ Banking Group Ltd [2016] HCA 28, [2015] FCAFC 50, [2014] FCA 35
Paraiso v CBS Build PL [2020] NSWSC 190
Pavey & Matthews PL v Paul (1987) 162 CLR 221, [1987] HCA 5
Renard Constructions (ME) PL v Min Public Works (1992) 26 NSWLR 234
Ringrow PL v BP Australia PL (2005) 224 CLR 656, [2005] HCA 71
Roadshow Entertainment PL v ACN 053 066 269 PL (1997) NSWLR 462
Sopov v Kane Constructions PL [No 2] (2009) 24 VR 510, [2009] VSCA 141
South Australian Harbours Board v South Australian Gas Co (1934) 51 CLR 485
Stern v McArthur (1988) 165 CLR 489
Tabcorp Holdings Ltd v Bowen Investments PL (2009) 236 CLR 272, [2009] HCA 8
Tanwar Enterprises PL v Cauchi (2003) 217 CLR 315, [2003] HCA 57
Thompson v Chapman [2016] NSWCATAP 6
TCN Channel 9 PL v Hayden Enterprises PL (1989) 16 NSWLR 130
Unity Insurance Brokers PL v Rocco Pezzano PL (1998) 192 CLR 603
Walker Group Constructions PL v Tzaneros Investments PL [2017] NSWCA 27
Wright v Foresight Constructions PL [2011] NSWCA 327
Xu v Jinhong Design & Constructions PL [2011] NSWCA 277

Texts Cited:

Category:	Principal judgment
Parties:	Luxury Building Group PL (applicant in HB 22/02210, respondent in HB 22/22966) Paul Robert Cottee and Danielle Louise Martin (respondents in HB 22/02210, applicant in HB 22/22966)
Representation:	Counsel: Mr M Birch, solicitor (Cottee and Martin) Mr D Palmer (LBG) Solicitors Birch Partners (Cottee and Martin) Bundock Law (LBG)
File Number(s):	HB 22/02210 and HB 22/22966
Publication Restriction:	Nil

REASONS FOR DECISION

Outcome of proceedings

1 I have decided that the owners are entitled to a money order against the builder for $500,000.

2 At the conclusion of the final hearing when I reserved my decision, I noted that neither party wished to seek a hearing on costs and that both parties wished to defer questions of costs until after delivery of the substantive decision. I accordingly ordered that a hearing on costs (to the extent that s 50 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act) applies when there has been a substantive hearing) is dispensed with and that any costs application will be dealt with on the papers. Accordingly, I have ordered a timetable for any further documents and submissions on questions of costs. I have set out some principles governing costs at the end of these reasons, which I trust may be of assistance in respect of costs submissions.

Background, issues, procedural

3 Mr Cottee and Ms Martin (the owners) own land at Balgowlah Heights near Manly in the northern beaches of Sydney, NSW. They engaged Luxury Building Group PL (the builder) to knock down an existing house and to construct a new three-storey dwelling with surrounding works including pool and garage but with landscaping excluded (among some other items).

4 The parties signed a written fixed-price contract in the MBA BC4 form June 2020 on 19 June 2020 with a contract price of $1.493million including GST and HBCF premium. Contract documents included drawings and plans

provided by the owners, together with the builder's quotation dated 7 June 2020 which contained specification of scope of works. Contract interest for late payment was 8%pa: Sch 2 para 4(e) with cll 20(f), 23(c). Construction period was 11 months with commencement date 22 June 2020: Sch 2 para 5(a) and (b) with cll 2, 10 and 11. The contract date for practical completion was therefore about 22 May 2021 subject to extensions of time in accord with contract provisions.

5 Work began on 7 July 2020 and finished, incomplete, on 8 November 2021. The owners said that they had paid $530,550 being progress payments for contract stages 1-3 with a variation of $8,000 for piers, $447,900 for stage 4 (lockup) and $10,000 (reduced by agreement from $11,669) for a further variation, totalling $988,450. Stage 5 $373,259 which included over $100,000 of joinery works and stage 6 $149,291 totalling $522,550 of the contract price were unpaid, as were claimed variations of $8,409.50 said to be reduced to $6,325 (invoice 5 May 2021) and $29,063.37 (invoice 12 September 2021 re-issued 19 May 2022).

6 The owners entered into a contract dated 17 April 2022 for the new contractor to rectify some of the builder's alleged defective works in a scope of works dated 4 April 2022. That was a cost-plus contract with an estimate of $426,409.29 including GST. The owners have so far paid the new contractor $606,762.30 under that contract.

7 The owners have entered into a further BC4 contract dated 5 August 2022 with the same new contractor for a separate further scope of works dated 3

August 2022 at a fixed contract price of $522,511 including GST. As between the owners and the new contractor, this contract was on 17 August 2022 (signed by the owners 5 August 2022) converted into a further cost-plus contract dated 18 August 2022 with the fixed price as an estimate (as provided for bank finance) and the owners' commitment to pay above that estimate if required.

8 In proceedings HB 22/02210 filed 19 January 2022 the builder claimed in quantum meruit for parts of stage 5 and stage 6 of the works and for the unpaid variations of $6,325 and $29,063.37. The quantum meruit claim was quantified in a final amount by the builder's expert for the parts of stages 5 and 6 said to have been undertaken at $286,258.64 including 15% builder's margin and GST on a net trade cost of $226,291.42, compared with the invoiced amount just for stage 5 works said to have been completed at $261,275.

9 The parties' experts agreed a 15% margin rate but the contract rate for margin was 10%: contract cl 14 with Sch 2 para 1.

10 Additionally, the builder claimed $23,994 including GST for other variations under the contract that had not been paid.

11 The builder said that the owners' alleged termination of the contract on 8 November 2021 by letter was wrongful and thereby constituted repudiation which it accepted, ending the contract because of the owners' conduct, which prevented its completing stages 5 and 6 and claiming under the contract the progress payments for those stages.

12 In HB 22/22966 filed 26 May 2022 the owners claimed a money order for alleged defective and incomplete works following alleged lawful termination of the building contract, in respect of alleged breaches of the statutory warranties in s 18B of the *Home Building Act 1989* (NSW) (HBA). The alleged defects were said to exceed $2million with liquidated damages for delay of $2,500pw from required date for practical completion (cl 10(c) with Sch 2 para 3(a)), but the total claim was limited to the Tribunal's jurisdictional limit in HBA s 48K(1) of $500,000 with abandonment of any found excess.

13 The owners accepted that a quantum meruit, if established, was the appropriate method of claim for the builder because the contract mechanism for progress claims for that work had not been fulfilled: cl 20(d) of the contract. Any outcome positive to the builder on its claim was to be set against any damages awarded in the owners' claim and the cost of rectifying defective works must be taken into account when assessing reasonable value in quantum meruit: *Eddy Lau Constructions PL v Transdevelopment Enterprises PL* [2004] NSWSC 273 at [81]-[82]. (One however must be careful not to double-count this element if there is compensation awarded to remedy the defect, a matter raised below.)

14 The owners said that the evidence of the sole director of the builder (the principal) was unreliable as to the extent of works undertaken by the builder and in some respects contradicted the experts' evidence which should be preferred. Further, the scope of works in the quotation was secondary (in the case of discrepancy or ambiguity) to the general contract conditions under cl 4(a)(i).

15 The builder said that the delay damages claimed by the owners constituted a penalty.

16 The owners said that their termination following notice was valid. In particular, any joinery issues arose only because of the builder's inaction. They also said that the builder could not accept any alleged repudiation when it was in serious breach justifying termination of the contract and that conduct was causally connected to the alleged repudiatory conduct of the owners: *Roadshow Entertainment PL v ACN 053 066 269 PL* (1997) NSWLR 462 at 479-480. Those serious breaches were set out in the termination notice. In effect, the builder chose to leave the site and end the contract by doing so and the owners accepted that position.

17 The owners further said that the builder's process of leaving the site and associated correspondence did not amount to an acceptance by the builder of any repudiation by the owners; the builder did not mention in the correspondence any acceptance of alleged repudiation by the owners. Neither party relied on commencement of proceedings by the builder about nine weeks later as a relevant event.

18 The builder submitted that it "had a basis, of a secondary or residual nature", in contract for a partial payment for stages 5 and 6 in circumstances of delay by reason of a note to cl 20 that was expressed as a note and said "the contract parties are encouraged to make and pay smaller and more frequent claims as this is a good way to review and monitor the work and payment for work", together with the overriding duty to co-operate to progress the works in

cl 2A. The builder accepted that, in the absence of a contract pricing mechanism for part-stage progress claims, assessment would be on a quantum meruit basis. The owners said there was no contractual or legal basis for the contract argument. I accept that submission; notes do not usually form part of the contract or its interpretation and the duty of co-operation (absent a consent position) is in respect of performing the contract terms themselves, on the authority cited later in these reasons. In any event, as the builder accepted, such contentions did not advance the position beyond a quantum meruit assessment.

19 The builder claimed, on the authority of *Liebe v Molloy* (1906) 4 CLR 347, that there was an implied promise to pay for the reasonable cost of variations for which the requirements in cl 14 of the contract had not been complied with (other variations had been paid). The owners disputed the proposition. I accept the owners' submission. Any implied obligation, to be distinct from a restitutionary or quasi-contractual claim in its current formulation, cannot be implied into the contract if it is inconsistent with the contract. Accordingly, and congruent with authority discussed below, the claim for allegedly approved variations must meet the quantum meruit requirements of approval and proof of reasonable cost of labour and materials.

20 The builder claimed entitlement to notify delays under cl 11(a)-(e) of the contract (together with cl 9(b) in respect of materials supply delays) and said that it had given such notification. The owners disputed the process and the entitlement. They said that the principal's cross-examination showed that covid-related delays were not substantial. They contested that their actions

in respect of joinery or otherwise were the cause of relevant delay. The builder's first delay notice was on 30 June 2021, after the contract completion date; it contained insufficient particularity for the owners to assess and respond to a claim for six months' extension. The second delay notice dated 7 September 2021 suffered from the same deficiency and did not make clear if the delay claimed was concurrent or additional. Weather records were first provided in the builder's evidence of 28 July 2022 in the proceedings. The revised completion date sought could not be "at large" because the owners persistently requested a firm revised date. The builder did not seek to exercise suspension rights under cl 21 of the contract until the owners' notice of default was issued.

21 The owners accepted an extension of 15 working weeks, to 6 September 2021, as reasonable, but resisted extension beyond that. The owners' claim for delay damages was in final form from that date.

22 There was no dispute that the subject of each contract was residential building work as defined in HBA Sch 1 para 2(1)(a), 2(3)(a), 3(1) with *Home Building Regulation 2014* (NSW) reg 12. The building contract required homeowners' warranty HBCF insurance since it exceeded $20,000 in the reasonable market cost of labour and materials involved: HBA ss 7(2)(f1), 92, 94; *Home Building Regulation 2014* (NSW) reg 53. There was no dispute that the project was appropriately insured.

23 The claims appeared to have been brought within time for any type of alleged defect or incomplete work under HBA ss 18B, 18E and 48K.

24 The builder was appropriately licensed at times of the work and apparently remains so (from the absence of dispute about that matter).

25 Leave for legal representation was granted on 17 February 2022.

26 The owners relied upon independent expert witness building reports dated 1 March and 23 May 2022 in respect of alleged defects and estimated completion. The expert calculated the total value of defective work to be $2,136,149 including GST and completion of the estimated 30% remaining to be $811,503 including GST. In a report dated 13 June 2022 the expert responded to the builder's expert's reasonable cost and variation report described below, assessing if found the reasonable cost to total $143,932.88 for reasonable cost of completed but unpaid progress stages and a credit to the owners of $3.52 on the unpaid variations, both including GST.

27 The builder relied on an expert building report dated 21 March 2022 in respect of reasonable cost in relation to stage 5 and 6 works completed and unpaid, which the expert assessed at $294,690.38; the report also covered claimed unpaid variations. The builder's expert revised the reasonable cost to $286,258.64 in a report dated 25 October 2022 responsive to the owners' expert's report on this aspect mentioned above; that estimate included margin at 15% with no allowance for preliminaries. The builder's expert had produced a separate report dated 25 July 2022 in respect of alleged defects which also briefly commented on the estimate and charges of the new contractor under the cost-plus contract. He estimated defects at $353,991 including GST. Only $45,217.36 of net trade cost was agreed between the experts.

28 The experts conclaved and produced a conclave report which became contentious as described below.

29 On the final (fifth) day of hearing the builder confirmed that it did not seek a work order for any found defect in reliance on HBA s 48MA.

30 At the end of day 3 of the final hearing, 12 October 2022 (which was the original allocated hearing time), I made the following interlocutory orders:

> "1. Adjourn the proceedings part-heard before me in Sydney for a further two days of expert evidence, not necessarily concurrent, no earlier than 17 November 2022. A separate written notice of the new hearing date will be sent to you in the near future.
>
> 2. Order that on or before 19 October 2022 the parties provide by email to the Registry their unavailable dates for legal representatives and experts for dates from and including 17 November 2022 up to and including January 2023.
>
> 3. Order that the experts further conclave as soon as possible and produce as soon as possible a further conclave report with areas of agreement and disagreement and reasons for disagreement on the matters in Ex O1.
>
> 4. Order as follows:
>
> 4.1 Any affidavit from the experts on matters concerning the preparation of the conclave reports other than the report the subject of order 3 are to be filed and served on or before 26 October 2022.
>
> 4.2 Any affidavits from the experts in response to affidavits filed and served under 4.1 are to be filed and served on or before 9 November 2022."

31 I published the following reasons for those orders:

> "1. The proceedings were listed for a three day final hearing 10-12 October 2022 by notice of hearing dated 25 July 2022. There are very significant claims by each party against the other and most issues are in dispute, in terms of lay and expert evidence. The owners have capped their claim at the jurisdictional limit with their expert evidence exceeding that amount significantly.
>
> 2. Further evidence from both parties, some substantial, was received by leave, in the final position without objection at the start of the hearing. The lay evidence has occupied overall about two of the three days of hearing. Both

parties seek the opportunity for written submissions after receipt of transcript when the hearing concludes. There are many legal and factual issues in contention.

3. The expert evidence was expected to take about one day, taken concurrently, and was interposed after the builder's lay evidence had finished near the end of the morning of the second day. There were 48 issues involving expert evidence concerning defects (plus different approaches to treatment of preliminaries and margin) and further significant quantum meruit evidence. Most issues were still in dispute.

4. Over lunch on the second hearing day, a controversy emerged between the experts as to the status of the agreements in the three existing conclave reports. The focus was on the conclave defects report. It is inappropriate to go into detail as to the nature of the controversy since it is expected to be the subject of further affidavit evidence, cross-examination and submissions including potentially as to credibility and weight of the evidence.

5. A significant period of time was then spent clarifying which items in the conclave reports were said not correctly to have been recorded, particularly as matters agreed. It was hoped that some further expert concurrent evidence on such items might be taken after resumption and completion of the lay evidence. But both parties' legal representatives agreed that the evidence would not finish within the current three days for final hearing, an assessment that I shared. Both parties wished to go into evidence, cross-examination and submissions on the controversy just mentioned. The experts had spent the hearing time in further conclave attempting to refine further areas of agreement, including on some of the material allowed into evidence at the start of the hearing. They spent the morning of the third hearing day in further conclave on other of the further evidence adduced at the start of the hearing (being the invoiced works of the remedial builder) but could reach no agreement. It seemed useful that they articulate that agreement in a further conclave report.

6. The lay evidence took until mid-afternoon on the third hearing day to complete cross-examination and re-examination.

7. It seemed to me, on reflection, that there was a significant risk in taking any further concurrent evidence on issues where the further evidence on the provenance of the conclave reports described above may intrude into those issues as the concurrent evidence was taken. This was reinforced by the fact that it was likely that very little concurrent evidence could usefully be taken in the remaining hearing time. I was not confident that the expanded amount of concurrent evidence would finish within a day.

8. I have accordingly made the orders set out above to endeavour to bring the proceedings to finality given the events that emerged during the final hearing to date."

Principles governing recovery of progress payments, variations and quantum meruit

32 The present fixed-price contract provided, in cl 20 with Sch 2 para 4 and special condition in attachment A, that progress payments for a completed stage in the contract schedule (which might also contain a contractually-effective variation under cl 14(g)) was liable to be paid as an accrued right at the time it was properly claimed even if it was subject to account for overall payments and works at time of final payment. That claim is under the contract. By contrast, an entire contract is where nothing is due until substantial performance has occurred.

33 Where there is work unpaid at the end of a contract properly terminated by the builder and the right to charge for that particular work has not accrued under the contract, quantum meruit is available to recover in respect of the unpaid work, as it would be for work done under an entire contract properly terminated by the builder: *Paraiso v CBS Build PL* [2020] NSWSC 190 at [82]-[87], [99]-[101] citing *Mann v Paterson Constructions* at [62]-[63], [100], [101], [105], [110]; see further *Mann v Paterson Constructions* at [173]-[177]; for the position with an entire contract dependent upon substantial performance, see *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129 (HL), [1980] 2 All ER 29, [1980] 2 Lloyd's Rep 1. There will be general law damages rights for loss of bargain. Recovery will need to be reconciled between whichever rights are exercised.

34 Variations to contracts are required to be in writing signed by the parties and to contain a description of the work the subject of the variation and the price

or a means of calculating the price: HBA ss 6(1)(b), 7E(1), Sch 2 para 1(2); cl 14 of the building contract; *Paraiso* at [34]-[41].

35 Some of the unpaid variations did not comply with these requirements. Since they were non-compliant, the contested variation claims were contractually unenforceable by the builder under HBA s 10, although the builder could rely upon them by way of defence to a claim by an owner for a refund of monies paid in respect of them if as a matter of fact the variation was established as agreed or accepted by the owners and was properly valued: *Wright v Foresight Constructions PL* [2011] NSWCA 327 at [6]-[8], [43]-[48], [56]-[59].

36 In the circumstances where HBA s 10 rendered unenforceable by the builder a contractual claim for payment, the only claim by the builder for payment was in quantum meruit: *Paraiso v CBS Build PL* [2020] NSWSC 190 *a*t [32]-[43], [99]-[103]; see also *Xu v Jinhong Design & Constructions PL* [2011] NSWCA 277 at [105]-[106].

37 Former authority was to the effect that there was no cap of the contract price including contractually-agreed variations when there was repudiation or wrongful termination by the owner: *Renard Constructions (ME) PL v Min Public Works* (1992) 26 NSWLR 234 at 266-267, 277-278; *Sopov v Kane Constructions PL [No 2]* (2009) 24 VR 510, [2009] VSCA 141 (special leave refused) at [5] et seq, [21]-[22], [24], [27].

38 The contractual cap, if there is one (eg, in fixed price contracts) has now been held ordinarily to apply irrespective of who repudiates (or, one assumes, terminates) the works contract: *Mann v Paterson Constructions PL* [2019]

HCA 32 at [37], [53], [91], [99], [101]-[105], [205], [215]-[217]. This is consistent with the primacy of the contract between contracting parties in *Pavey & Matthews PL v Paul* (1987) 162 CLR 221, [1987] HCA 5 at 256 and in respect of an attempted third party restitutionary claim against one contracting party in *Lumbers v W Cook Builders PL (in liq)* (2008) 232 CLR 635, [2008] HCA 27, esp at [45]-[55], [76]-[77], [89]-[90], [111]-[112], [124]-[127].

39 Contract rates will be an upper limit on a quantum meruit claim for a variation (*Paraiso* at [102]-[103]), just as the relevant portion of the overall contract price for a particular stage of the contract is a cap on a quantum meruit claim for work done where the builder had accrued no contractual right to payment: *Mann v Paterson Constructions* at [105].

40 The measure of a quantum meruit claim is usually the reasonable cost of the work completed (labour and materials supplied with associated on-costs and margin): *Pavey e*sp at 224, 236, 250-252, 257, 262-264; *Sopov* at [33] et seq, [41] et seq; see esp Deane J in *Pavey* at 263 [24]:

> "What the concept of monetary restitution involves is the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or 'enrichment' actually or constructively accepted. Ordinarily, that will correspond to the fair value of the benefit provided (eg, remuneration calculated at a reasonable rate for work actually done or the fair market value of materials supplied)."

41 The passage cited continued with the giving of examples where one would additionally take into account other matters. One is where the remuneration for unsolicited work in improving property (thereby conferring an incontrovertible benefit) exceeded significantly the enhanced value of the

property. Another is where statutory unenforceability requires the resort to quantum meruit in which case fair and just compensation should be ascertained having regard to "any identifiable real detriment sustained by that other party by reason of the failure of the first party to ensure that the requirements of the statutory provision were satisfied" (per Deane J at 264 [24]). It should be noted that each of such examples modifies but does not necessarily replace the ordinary approach.

42 The builder bears the onus of establishing all elements of the claim in quantum meruit.

43 The prices charged by others in the market for the relevant materials or services is a measure of assessment and will be a particularly appropriate measure if there is no fixed contract price or amount (such as in a cost-plus contract): *South Australian Harbours Board v South Australian Gas Co* (1934) 51 CLR 485 at 499, 508; *Mann v Paterson* at [203].

44 The builder's actual costs of work done and material supplied are, if provided, evidence of but not determinative of the objectively reasonable cost of the work completed, which will depend on an assessment of all the relevant evidence including the nature of the arrangement under which the relevant work was performed (eg, fixed price, cost-plus), expert assessments of fair and reasonable cost and resultant challenges to the builder's actual costs: *Pavey* at 227-228, 257, 263; *Mann* at [204]; *Brenner v First Artists' Management PL* [1993] 2 VR 221 at 262-264; cp *Balfour Beatty Power Construction Aust PL v Kidston Goldmines Ltd* [1989] 2 Qd R 105 at 135-136;

Hanna v Kersten [2019] NSWCATCD 26 at [181], [185]-[187]; *Gray Constructions PL v Hogan* [2000] NSWCA 26 at [10], [18].

45 Documentary evidence such as invoices is also important in establishing that the work claimed for was in fact done by the builder and the scope of that work.

46 As summarised above, the builder must establish that it is unjust for the owner to retain the benefit of the work the builder establishes that it did, at additional expense to the builder, without remunerating the builder. A basis for establishing such injustice is a request by the owner, or acceptance by the owner with benefit to the owner. For items the subject of claim that are within the original contract scope of works or an established variation (even if it is not contractually valid because not in writing), the contract or the variation infers a request by the owner for the item to be done and acceptance by and benefit to the owner from its being done, unless there is an express rejection of the work. This accords with the objective basis on which request, acceptance and amount and benefit are assessed: *Brenner* at 257-261, cited with approval in *ABB Power Generation Ltd v Chapple* (2001) 25 WAR 158 (CA), [2001] WASCA 412 at [19]-23], [40]-[41]; *Bradshaw v Complete Coating Commercial PL t/as CCC Civil* [2017] NSWCATAP 209 at [32], [37], [39]-[40]; *Darin v Olzomer* [2012] NSWCA 60.

47 Although value of the work to the recipient owner is not the measure of a quantum meruit except as an aid to establishing the reasonable cost of work done and materials supplied, value of the work to the recipient is a factor in

exercise of discretion to award a quantum meruit as Barratt J recognised in the authority cited in *Eddy Lau Constructions PL v Transdevelopment Enterprise PL* [2004] NSWSC 273 at [63]-[84].

Consideration and conclusion on quantum meruit for incomplete contract stages

48 The builder relied upon the building experience of its expert, compared with the focus of the owners' expert in design, project management and contract administration. It seems to me that both experts' experience was appropriate for the task with this factor not being the distinguishing one.

49 The criticism by the owners' expert – that the contract does not provide for a progress claim within stages - does not meet the point that a quantum meruit potentially applies in those circumstances. The fact that these works were within contract scope establishes the necessary request.

50 I do not accept all the owners' criticisms of the builder's expert's quantum meruit assessment. First, not taking into account defective works in this assessment as instructed was appropriate with a compensation claim (by way of money or work order) against the builder to remediate the defects.

51 Secondly, it is difficult to see how an expert could do other than use photographs supplied by the builder at time of exit to assist in report preparation since that was an available contemporaneous record. The authenticity of the photographs was not directly challenged. The builder's photographs were but one source for assistance.

52 Thirdly, the builder's expert applied a lineal or square metre rate with respect to relevant items. The owners said that the contract provided for specified rates in the circumstances giving rise to a claim in quantum meruit. I respectfully disagree because the contract rates were for a provision which could be invoked if the builder legitimately ended the contract with partially-completed stages, as alternatives to general law loss of bargain damages or a claim in quantum meruit. I note that the owners' expert said in his final report that he largely agreed with the builder's expert's rates and quantities in this context, if found.

53 The owners were on stronger ground in other criticisms. First, I agree that for this exercise in quantum meruit the contract margin rate of 10% was more appropriate than the 15% margin rate agreed by the experts and used by both of them. The contract margin rate set a mark for what was work done pursuant to contract performance, as opposed to a higher margin for remedial and completion work which involves greater potential for complexity in organisation and greater risk. As said earlier, the contract rate is appropriate for variations and it is consistent with that approach to apply it to work within incomplete stages. The builder's expert's agreement with the owners' expert's assessment of stage 5 works if found must therefore be qualified.

54 Secondly, the owners' expert pointed out that the content of at least stage 6 works as analysed by the builder's expert (based on the builder's instructions in the points of claim as to stage 6 content that had been completed) contained some items which the owners' expert assessed as already claimed

and paid for in earlier stages: connections and pool concrete in stage 2; some electrical in stage 2; eaves, render and painting in stage 4.

55 The builder's expert's costings also appeared to contain allowances for items not installed or fully installed by the builder: staircase treated pine; cavity sliding doors in bedroom 1 (framing only installed); light switches, two-way switches, pendant lights, light fittings, ceiling fans, smoke detectors, data cabling.

56 If I had found (below) that the owners and not the builder terminated the contract, enabling the builder to rely upon quantum meruit, I would have considered that the builder had not established the amount claimed for incomplete contract stages and may have at best been able to establish stage 5 trade costs plus 10% margin and GST, a figure substantially less than the builder's claim and probably in the vicinity of just over $100,000.

Ending of the contract including claimed extensions of time

57 A contracting party's conduct may convey the objective impression that the party no longer intended to perform the contract according to its terms. This constitutes repudiation, in the form of renunciation, of the contract: *Laurinda PL v Capalaba Park Shopping Centre PL* (1989) 166 CLR 623, [1989] HCA 23 at [15]-[17]; *Koompahtoo Local Aboriginal Land Council v Sanpine PL* (2007) 233 CLR 115, [2007] HCA 61 esp at [43]-[56], [60], [68]-[71].

58 I accept the owners' submission that the notices for extension of time dated 30 June and 7 September 2021 were insufficiently detailed as to the delays supporting the claimed extensions and unclear as to whether they were

claiming a cumulative extension. An absence of decision in respect of them could not be relied upon because they provided inadequate information on which to make a decision. The earlier statement about delay in an email on 18 May 2021 was not a notice and could not be relied upon – it also was generalised. The statement in an email of 3 November 2021, to the extent it was a claim for extension of time, suffered from the same deficiencies.

59 Examples of the deficiencies were: an acceptance in cross-examination that the builder not the owners was responsible for window and door delays; inadequate explanation of how rain affected progress or alternative work, particularly after the roof and walls were built; the excessive time period claimed to be attributable to covid shutdown beyond the three weeks in the MBA updates.

60 The owners accepted a maximum of 15 weeks extended completion date, including 39.5 days for variations under the builder's extension notice dated 23 June 2021, with an adjusted completion date of 6 September 2021. I accept that on the evidence this was more than the maximum that the evidence taken at its highest might have established, which was more like 11-14 weeks.

61 There was no evidence that the parties agreed to vary the completion date so that effectively it was "at large" as the builder submitted. Consensual variation in writing was required under the contract. There was no claim of estoppel that was raised briefly in the builder's closing submissions. The owners'

consistent requirement of a specified completion date militated against any inference of such an agreement or basis for an estoppel in any event.

62 Taking the extended completion date accepted by the owners (6 September 2021), the owners were entitled to issue a contract notice of default for non-completion (cl 26) after that date (which was done on 24 September 2021) and a contract notice of termination at the time it was issued (8 November 2021) for continuing non-completion.

63 In reaching that conclusion I do not accept that the owners' changes of mind in respect of joinery were established to be the substantial cause of the project delays. The project was already delayed before the joinery issues emerged. As the builder's detailed and helpful chronology indicated (based on the documents), stage 5 (fixing) included much more than joinery. The builder did not clearly establish how the joinery issue substantially impeded the project catching up or completing or how much extra extension of time it caused for completion; assertion in solicitor correspondence is not proof and was in any event insufficiently specific. It was not established (just as it was not spelled out in extension of time notices already considered) that all other work had been completed apart from work which required the joinery to be supplied and installed before that other work was done, which was necessary if the builder was to establish that it was the owners' changes on joinery contractor which was the substantial cause of completion delay. Concessions in cross-examination by Ms Martin to the effect that joinery work was still being carried out (which could be for many reasons unrelated to the current forensic issues) and that completion of stage 5 or otherwise could not

be achieved without joinery being finished went nowhere without the matters in the preceding sentences being established.

64 In this respect I do not accept that the adverse inference for which the builder contends should be drawn from the refusal by the owners to produce documents being communications between the owners and their designer (appointed during the project) concerning the appointment and replacement of joinery contractors. The reasons for that process, even if they reflected in some way on the decision-making of the owners (on which I make no findings and do not need to make findings) are not relevant to what the builder needed to establish, which was that the process created a delay that substantially caused delay to the builder's progress of the works and inability to complete the works. The information on what the builder needed to prove was within the knowledge of the builder. Additionally, the refusal to produce and the reasons therefor were not tested by the builder's seeking to compel production.

65 Since the builder has not established a repudiation by the owner which it accepted or other right to termination, the builder has (on the authority discussed in the preceding section of these reasons) no basis for a claim in quantum meruit for work done but not to the stage of an accrued contract right. The builder by its conduct has brought about the position where it cannot complete the work to obtain the accrued contract right.

66 The position is different for variations. Those unpaid but contractually effective give rise to an accrued contract right. Those not paid and not

contractually effective nevertheless give rise to a quantum meruit if the elements can be established, being request or acceptance and completion of the work the subject of the variation.

Unpaid variations

67 I accept that the three variations claimed under the contract are established, with two in modified amount. They comprised variation dated 6 April 2021 approved 8 April 2021 in modified form (one less security camera equipment) by the owners for $11,349 including GST, variation dated 5 April 2021 approved 5 May 2021 in modified form (move bedroom wall) by the owners for $6,325 plus GST totalling $6,957.50, variation dated 17 May 2021 (move kitchen wall) approved 18 May 2021 for $4,235 including GST. The total is $22,541.50 including GST. In relation to the variation dated 5 April 2021 the builder's submission claimed $8,410 including GST but referred to acceptance only of item 2 (master bedroom wall) which I have adopted.

68 The builder claimed a total for unpaid variations, originally invoiced on 12 September 2021 and re-issued on 19 May 2022, for flooring and tiling of $56,504.68 including GST less credits of $27,441.31, leaving a net invoiced amount of $29,063.37 as previously mentioned. In the context of a contest on approval of and calculations for the variations and credits between the parties, I accept that the experts' resolution is the best evidence, subject to what is said below about methodology.

69 The experts agreed that the gross amount for the variations claimed was $40,608 excluding GST on the builder's submission and including GST on the

owners' submission; I have adopted the builder's submission. The agreement implicitly accepted that such variations were approved. The amount was assessed by the experts on a quantum meruit basis. From this figure the builder accepted that amounts claimed under the contract variations which had been included by the experts, being the variations dated 5 May and 17 May 2021, ought to be deducted to avoid double-counting. For the 5 May 2021 variation it appears that the adopted deduction ought to be at the entire amount of $8,410 including GST ($7,645 excluding GST) which I have followed. The corrected total is therefore $29,113 excluding GST and $32,024.30 including GST

70 The builder's expert agreed with the builder's calculation of credits at $27,441.31, leaving $13,167 owing to the builder. The owners' expert calculated the credits at $31,446.02 leaving $9,162 owing to the builder.

71 There is no clear basis to determine which analysis of the credits to prefer. In those circumstances, the best evidence appears to be the fact of agreement on an amount for variations and a concession by the owners' expert of a net amount of $9,162 owing to the builder on variations. I accordingly have taken the owners' expert's figure for credits of $31,446.02 from which that concession is derived.

72 The final amount for variations including GST is therefore $22,541.50 plus $32,024.30 less $31,446.02 which equals $23,119.78.

Principles governing loss arising from defective and incomplete work including mitigation

73 The ordinary, natural and probable consequence of a breach of statutory warranties under HBA s 18B as to compliance with approved plans (and laws, codes or standards), due care and skill and fitness for purpose is remediation to achieve compliance, care and fitness by doing of the remediation work or paying to have it done by others. As the High Court said in *Bellgrove v Eldridge* (1954) 90 CLR 613, [1954] HCA 36 at 617, cited with approval by the High Court in *Tabcorp Holdings Ltd v Bowen Investments PL* (2009) 236 CLR 272, [2009] HCA 8 at [15]:

> "In the present case, the respondent was entitled to have a building erected upon her land in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract."

74 This is applicable unless disproportionate on the principles discussed below.

75 Under HBA s 48O(1)(c) the owner is required to specify action by the builder that is grounded in proof by the owner of, not only the defect, but also the manner of remediation: *Catapult Constructions PL v Denison* [2018] NSWCATAP 158 at [46]-[61] and the authority there cited. In my view as I set out in *Marr v JCK Building Solutions PL* [2018] NCATCCD, unreported, 4 December 2018, HB 16/43946 at [46]-[54] and in subsequent decisions, an element of the manner of remediation in certain circumstances may inherently

require inspection, properly defined so as to be sufficiently specific, to establish the need for and required scope of remaining remediation.

76 In *Bellgrove v Eldridge* (1954) 90 CLR 613, [1954] HCA 36, the High Court said that the scope of remedial works must not be disproportionate to the defect. The High Court has also stated that there is a high bar for unreasonableness or disproportion once a breach is established: *Tabcorp Holdings Ltd v Bowen Investments PL* (2009) 236 CLR 272, [2009] HCA 8 at [13]-[20]; see also *Walker Group Constructions PL v Tzaneros Investments PL* [2017] NSWCA 27 at [186]; *Barwick v Shetab* [2017] NSWCATAP 127 at [87]-[88].

77 The analysis in the paragraphs in the *Tabcorp* decision, and the authority there reviewed, also makes it clear in these passages that reinstatement, provided it is not extravagantly disproportionate, is the appropriate measure of relief.

78 Reinstatement means what the builder was obliged to build, namely, contract works with a certain standard of amenity and presentation which includes not being at risk of emergent problems returning or growing. It also means that the form and finish of remediation and rectification produces an outcome that matches other components of the contracted works in form and finish and makes the works of the originally-intended quality and integrity.

79 There is a co-ordinate focus on the conduct of the owner in assessing the form of relief. In ordinary principles of contract law imported into construction contracts, an owner's claim for monetary compensation requires

the owner to act reasonably in relation to the claimed monetary loss in order for the claimed loss to be recoverable: cp HBA s 18BA(1), (5). This includes giving the builder a reasonable opportunity to remediate or complete, or to minimise damages by remediating what it can and will do: cp HBA s 18BA(1), (3)(b), (5). The owner may be justified in a reasonable loss of confidence in the willingness and ability of the builder to do the remediation and completion. The evidential onus is on the builder to prove that the owner acted unreasonably: *Owners SP 76674 v Di Blasio Constructions PL* [2014] NSWSC 1067 at [42]-[48], adopted in *Owners SP 78465 v MD Constructions PL* [2016] NSWSC 162 at [26]-[30] and *GPM Constructions PL v Baker* [2018] NSWCATAP 119 at [38]. This is consistent with the orthodox principles at general law: *TCN Channel 9 PL v Hayden Enterprises PL* (1989) 16 NSWLR 130 at 158; principles summarised in *Downer EDI Rail PL v John Holland PL* [2018] NSWSC 326 at [585] and authority there cited.

80 If the owner has acted reasonably then, since the builder is a wrongdoer, it will not defeat the owner's claim that the builder can suggest other and more beneficial alternative methods of remediation: *Unity Insurance Brokers PL v Rocco Pezzano PL* (1998) 192 CLR 603 at 654; *Karakominakis v Big Country Developments PL* [2000] NSWCA 313 at [187].

81 HBA s 48MA does not seem to reverse or otherwise disturb this evidential onus. What s 48MA does, at most, on the authorities mentioned in preceding paragraphs, is to require the decision-maker to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome. In having regard to a principle that states a preferred outcome,

the basis for the principle to operate still needs to be established. How that is established and when it is established is built on and derived from the rules just described about establishing measure of loss.

82 In relation to alleged incomplete work at the time specified for contract completion, an owner will not be entitled to damages in respect of that lack of completion where the delay arises from the conduct of the owner, including requested variations (before or after the contract completion date). This is an application or instance of the "prevention principle" that a party cannot insist on performance by the other party of a contract obligation if the insisting party has caused the other party's non-performance: *Probuild Constructions (Aust) PL v DDI Group PL* (2017) 95 NSWLR 82; [2017] NSWCA 151 esp at [114]-[115].

Approach in these reasons to the owners' defects and completion claims

83 The primary relevant evidence on alleged defects and cost to complete as finally formulated was from the experts. I have accepted their evidence where agreed on liability for breach of statutory warranty, scope of works and costings and have commented and made findings where their opinions and other evidence needed to be considered.

84 The controversy mentioned earlier in these reasons concerned the builder's expert's initially-expressed opinion that his views had not been correctly recorded in the conclave report dated 24 August 2022. When the matter resumed on fourth day of hearing, after service of further evidence from each

expert, the builder's expert accepted that he had overlooked the presence of the recording of his views in the version of the report that he signed.

85 The owners criticised the builder's expert for this oversight, the desire of the building expert to correct the signed conclave report, alleged further changes of opinion during the concurrent evidence after attempts at clarification of what that opinion was, and alleged argumentative evidence which amounted to advocacy for the builder.

86 Ex J3 was tendered on day 4 of the hearing and admitted to facilitate the parties' understanding of the building expert's concluded position for orderly cross-examination during concurrent expert evidence.

87 I have taken into account the status of Ex J3 and the owners' criticism in the course of findings on the 48 defects issues and related completion costs for the works alleged to be defective. The experts were in contention in whole or part on most matters.

88 There was interaction between characterisation of matters as defective or incomplete works. Either, where found, is a breach of statutory warranty under HBA s 18B for non-compliance with contract plans and specifications and applicable laws (which bring in relevant standards and codes), or with due diligence and within contract time periods to complete the works, or requirements of completion with due care and skill.

89 In the next section of these reasons I deal with alleged defects and related completion costs for the works claimed by the owners to be defective and

which were grouped in this manner in the expert reports and conclave report in its iterations.

90 In the section of these reasons following the next section I consider the separate category of completion costs for the remainder of the specified contract works, on which the owners' expert reported but not the builder's expert. In that section I remove what are found to be completion costs for works already dealt with in the section of the reasons dealing with defects and related completion, as pointed out by the builder in closing submissions.

91 This is a somewhat convoluted process. It seems to me the clearest way to grapple with how the expert evidence was structured and the attempts to buttress that evidence by reference to the two contracts (mentioned earlier in these reasons) into which the owners have entered to remedy alleged defects (with only some of the alleged defects being the subject of the first of those contracts) and to complete both the works which had alleged defects and the significant balance of other works under the original contract with the builder that remained when the builder's contract was terminated.

92 In cross-examination the builder's expert in effect agreed with the owners' position that found defective works for which the builder had claimed payment should be treated as defective works rather than being treated as incomplete works. That treatment extended also to found defective works generally, with remediation costs including completion related to those works.

93 Since I have found that the contract was terminated on 8 November 2021 and damages for incomplete and defective works are both claimed, the distinction

between defective and incomplete works has much-diminished, if any, relevance. I have accordingly not repeated on each occasion where the builder's expert said that the works were incomplete rather than defective and could be rectified if the builder had stayed onsite (which I have called the completion argument).

94 Each defects item in the conclave report was addressed with an item number together with a further number starting with "6". Since I have dealt with the items in sequential order apart from items not pressed by the owners, I have referred to the brief descriptions of items rather than by numbering.

95 The major two items not pressed by the owners in their defects claims were $4,774 for damp substrate board in the vicinity of the fireplace flue and $200,092 for alleged mould growth and high moisture levels in plyboard substrate to external cladding. The former was not pressed in closing submissions after extensive concurrent evidence; the latter was not pressed during the hearing. The issues appeared to have some similarities.

96 Where costings are referred to, to avoid repetition and unless otherwise indicated, the owners' expert's costing is given first then the builder's expert's costing. The figures are net trade cost unless otherwise indicated. On-costs are separately dealt with at the conclusion of the section.

97 Contrary to the builder's closing submission, I do not accept that what the owners' expert said to an architect at a preliminary stage of the expert's assessment should be used to support a submission of a globally-disproportionate final opinion.

98 I do not need to rely upon the estimates of experts where rectification or completion work has been or is being carried out and an actual cost invoiced or incurred (not estimated) is in evidence. In that situation the actual cost invoiced or incurred should ordinarily provide the basis for damages unless shown to be unreasonable: *Hyder Consulting (Australia) PL v Wilh Wilhelmsen Agency PL* [2001] NSWCA 313 esp at [96]-[99].

99 In the present case I was provided with amounts paid by the owners to the new contractor of $606,762.30 under the earlier-mentioned cost-plus contract on a project costing schedule dated 16 March 2022 which provided estimates (not invoiced or incurred amounts) for the specified items that were cross-referenced by the owners to the conclave report and which did *not* include all alleged defective works the subject of these proceedings. Contrary to the builder's closing submission, I do not accept that an earlier view by the new contractor of estimated rectification cost in the cost-plus contract estimate either bound that contractor or reflected relevantly or with material weight upon the owners' expert's assessment.

100 The amount paid under the cost-plus contract to the new contractor on progress claims, the estimates for the specified items and the amounts for equivalent items in the owners' expert's costings were said to be similar and that was called in aid of the accuracy of the owners' expert's costings, which were said to be excessive and disproportionate by the builder.

101 I have not had regard, in the assessment and decision below, to the project costing estimates or to any correlation between the owners' expert's costings

for items and the progress amounts paid to the new contractor for such items (to the extent such correlation has been openly analysed in submissions – it is not my role to go beyond the analysis in submissions to which the other party has had opportunity to respond).

102 The project costings as estimates (not invoiced or incurred amounts) do not fit within the *Hyder* test.

103 The correlation exercise, which I invited the parties' experts to undertake at the end of day 3 of hearing, may have met the *Hyder* test if done with specificity for items that were the subject of the owners' claim in the next section of my reasons – that is, a specific part of paid progress claim could be allocated to a particular claimed item. The owners' expert said that he could undertake the correlation but could not reach agreement with the builder's expert – a correlation by the owners' expert alone was not the subject of evidence or submission. The builder's expert in a supplementary report dated 9 November 2022 said that the task could not be performed "with any definitive accuracy. The invoices provided have been reconciled to each scope of work claim, however there is no Scope of Works claim (SOW), however, there is no (SOW) being followed as the work is being performed as a do and charge basis". Although somewhat opaque, I think that was intended to mean that the narrative on progress claims for scope of work covered by the progress claim (on a do-and-charge basis) was not able in that expert's view to be sufficiently correlated in itemised quantification to items claimed by the owners.

104 If the exercise had provided an invoiced or incurred cost that met the *Hyder* test, then it would substitute for the experts' opinions if the defect was found. As estimates intended to support one expert opinion over another, it was not complete and had insufficient probative weight to take it as supporting the owners' expert's opinion without the opportunity to test the new contractor's invoiced costs in its progress claims (which if allowed in effect would provide a second expert opinion for a party that usually is not allowed in any event).

105 As said below, there was one actual invoice in evidence for work on a claimed defects item which I would have used if I had found for the owners on that item.

106 In the section of these reasons dealing with the bulk of claimed completion costs, I have also not used the contract price amount of $522,511 on the earlier-mentioned second contract with the new contractor based on a separate completion costing schedule dated 3 August 2022. There is no analysis in evidence or submissions that correlates components of that price to alleged defects not covered by the first contract with the new contractor and to other works to complete the house in comparison with the specified works for the original contract with the builder.

107 Accordingly, it did not meet the *Hyder* test and had insufficient probative weight to support the owners' expert's opinion on completion costs.

Consideration and conclusion on alleged defective and related incomplete works

Non-protected structural steel

108 The experts agreed that the current steel as installed needed to be recoated. The estimates were $4,461 and $1,560.10. The owners' expert's higher costing was prepared by reference to the engineer's instructions for that process.

109 The builder's expert agreed in concurrent evidence with the engineer's instructions and also agreed that he did not inquire with the engineer in preparation of his costing.

110 I accept the owners' expert's costing.

Front entry structure

111 The experts agreed with the engineer that the front awning needed to be reconstructed and on the scope of remedial works. The estimates were $6,460 and $2,587.62.

112 I accept the owners' expert's costing which has not been shown to be disproportionate and was detailed.

Crack to right side of entry

113 The experts agreed that the crack exists. The owners' expert's costing was $668; there was no alternative costing. The builder's expert said that the crack was only approximately 1mm, there was no delamination from the

substrate, such a superficial crack from shrinkage did not require repair and in any event would be fixed as part of adjacent work being rendered.

114 I accept the owners' expert's costing, which has not been established to be disproportionate. There is the risk of further damage in a location where finish is important.

Missing piers

115 The experts agreed that no piers had been installed to the western end of the pool and agreed on the owners' expert's scope of works which was based on the engineer's opinion who designed the pool. As already said, the dispute as to whether it is incomplete or defective work (the completion argument) has lost relevance after contract termination.

116 The estimates were $5,772 and $5,095. I accept the owners' expert's costing as reflecting a scope of works prepared by the appropriately-qualified expert.

Wall overhang

117 The builder's expert appeared to disagree only because the work was not complete, which is not relevant as previously said (the completion argument). The experts agreed the remediation method (based on an engineer's instruction) and cost of $926 which I accept.

Wall out of plumb

118 Liability and cost were agreed at $2,975 which I accept.

Alfresco ceiling

119 The experts disagreed that there was a defect but, if found, agreed on replacement but disagreed on cost. Although he said that the standard AS 2589-2007 cl 3.12 did not apply and that the ceiling was not open to the weather, the builder's expert agreed in concurrent evidence that the builder had not taken precautions to prevent compromise of the plaster sheeting by external weather by sealing it shortly after the (unknown) installation date – consequently, there was water entry around a skylight and the outer edges of the ceiling where flashings had not been installed.

120 I find the defect established on the basis of the damage from weather that should not occur if properly constructed with sealing in a timely manner. The classification of sealing as incomplete work had lost its relevance.

121 I prefer the owners' estimated cost of $9,379 as more complete than the builder's expert's costing, which did not include a bulkhead and replacing the furring channel (inevitably damaged since it was glued to the removed plasterboard).

Rear balcony

122 The experts disagreed on defect liability and costing, with the owners' expert's costing being $9,888.

123 The owners' expert identified various waterproofing defects including upturn and spigot installation.

124 The builder's expert pointed to the absence of detail on the plans but in concurrent evidence accepted that the builder ought to have sought instructions and "falls on his sword" if constructed without seeking instructions and an issue arises. He also agreed that with a new build the owners were entitled to construction according to the plans and specifications.

125 The builder's expert also accepted that he had not included cost to cut back the tiles around the floor waste, install the puddle flange and install waterproofing. He agreed that the private certifier in a letter had required a certificate from the waterproofer as to method and materials otherwise remediation was required, or required re-waterproofing with installation of appropriate graded stormwater outlets, and that the alternative method that he proposed had not been discussed with the certifier.

126 In circumstances where the owners' expert's opinion correlates with the view of the certifier in the absence of waterproofing certification and the alternative had not been discussed with the certifier, I accept the owners' expert's conclusions and detailed costing.

Roof parapet fascia

127 After initial disagreement on required material and quantity, the builder's expert agreed that alcobond, not other metal, should have been installed. Overnight the experts agreed on quantity (between their figures but closer to the builder's expert's estimate) and cost at $32,205.94 which I accept.

Roof sheeting

128 The experts agreed liability, method and costing of $38,000 for box gutter, fascia and capping replacement but disagreed on roofing replacement.

129 During concurrent evidence it was agreed that the difference in opinion was whether or not the roof sheeting was required to be removed for remediation of guttering including a larger box gutter and because of defects in the sheeting itself which the owners' expert said had been compromised with scratches to the colourbond coating, with the risk of future rusting.

130 After vigorous exchanges and some rhetorical exaggeration in concurrent evidence, eventually the experts agreed the roof area at a figure close to the estimate of the owners' expert. I accept the owners' expert's costing analysis at $63,802 which was based on Rawlinson's cost guide and was detailed.

Missing roof deck

131 It was effectively accepted by both experts that the builder had not constructed the deck which was shown on the plans.

132 The builder's expert said the deck could not have been constructed because of inadequate head height but agreed that this would have been obvious to the builder when quoting and that the builder ought, when the issue emerged, to have sought instructions from the owners.

133 The owners' expert was not cross-examined about his costing of $16,446. It was therefore not challenged as to its basis – for example, ought it to be a credit against total contract price because it couldn't be built or against what

had been paid because it was in a completed stage, or was it, rather, compensation for cost of completing with appropriate head height. In the absence of challenge I accept the owners' expert's costing.

Game room balcony

134 The builder's expert did not agree on liability or scope. The owners' expert costed the item at $11,989 or $8,501 if the clients saved the cost of rectifying absence of external to internal differential height which would require structural alteration rather than just waterproofing. The owners pressed for the complete works. On an "if found" basis the builder's expert during concurrent evidence gave an estimate of $5,906.

135 The absence of waterproofing and differential were clear and the owners were entitled to have the works constructed according to applicable codes and the plans. The owners' expert's costing was detailed and not produced on the run in concurrent evidence. I accept the owners' expert's opinion and costing.

Plumbing

136 The owners' expert relied upon the report of an independent, licensed plumber who identified numerous defects. He costed these at $12,628. The builder's expert said that he did not have the required expertise and provided no costing.

137 In the absence of contesting evidence and a request that the plumber be made available for cross-examination, I accept the owners' evidence as not

established to be disproportionate in cost for the works identified and not challenged.

Main bedroom ensuite

138 The experts disagreed on liability but “if found” agreed a scope of remedial work and costing of $15,500.

139 The owners’ expert identified in detail with supporting observation and photographs waterproofing and tiling defects and plumbing defects. He inspected six times between 14 October 2021 and 26 February 2022 including on 18 November 2021. The builder left site work on 8 November 2021.

140 It appeared that the tiling, sheeting and waterproofing had possibly been stripped to the builder’s expert’s observation by the time of his inspection on about 21 March 2022. His inspection on this occasion was to provide a quantum meruit not a defects assessment; as indicated above, the builder’s expert’s view was that defective works could not be identified as such before completion. The stripping had occurred to his observation by the time of his defects inspection on 25 July 2022. He made no inquiry about who removed the tiles.

141 Photographs provided by the builder to the builder’s expert and certification by the waterproofer also provided by the builder were not attached to the builder’s expert’s report although they were elsewhere in evidence.

142 The builder submitted that certification by the waterproofer, which was relied upon by the private certifier, inferred that any damage was caused by

subsequent intervention, possibly by the new contractor who, as mentioned earlier, undertook some remediation work.

143 There was no positive evidence as to when the new contractor or any other person undertook work on the bathrooms but it was unlikely that such work occurred before the owners' expert's first inspection ten days after the builder's exit from site. It was not suggested that the owners' expert had disturbed the existing work in the manner shown in the photographs. This left the builder's submission as speculative.

144 A waterproofing certificate of itself does not forestall a finding of defective work; rather, it provides an avenue of redress if defective work is found. The evidence of the builder's director that he observed the waterproofing, and general photographs taken by him of the waterproofing and tiling and shown to the builder's expert, are not evidence that the waterproofing was properly installed. The fact that waterproofing may have been damaged when tiles were subsequently removed does not gainsay expert evidence that the waterproofing was already defective.

145 In those circumstances I accept that liability for defective works has been established by the evidence of the owners' expert at the "if found" costing of $15,500.

Second bedroom ensuite

146 The experts disagreed on liability but "if found" agreed a scope of remedial work and costing of $13,536.

147 The builder's expert said that by time of his inspection the wall tiles had been removed and the waterproof membrane damaged in the process by persons unknown to him (about whom he did not inquire). There was also the waterproofing certificate.

148 As already said, the owners' expert inspected six times between 14 October 2021 and 26 February 2022 including on 18 November 2021 which was ten days after the builder left site work. He identified non-compliant tiling installation, damaged waterproofing and non-compliant waterproofing installation and a chipped tile. It appears that there was no removal of tiling and consequential waterproofing damage as observed by the builder's expert at the points of the owners' expert's earlier inspections.

149 The state of the evidence was accordingly similar to that for the main bedroom ensuite.

150 For similar reasons I find liability in the builder for $13,536.

Bathroom 1

151 The experts disagreed on liability but "if found" agreed a scope of remedial work and costing of $13,536.

152 The state of the evidence was substantially similar to that for the other bathrooms just described.

153 For similar reasons I find liability in the builder for $13,536.

Laundry

154 The experts disagreed on liability; if found the owners' expert's costing was $6,781 and the builder's expert's was $7,968.67 with the difference relating to an allowance for more tiling by the builder's expert.

155 The builder's expert did not recall whether the room had been re-waterproofed by the times of his inspections. He again pointed to builder's photographs at time of exit and waterproofing. He regarded some of the photographs as showing incomplete work. He agreed that one photograph showed peeling bond breaker and damage to waterproofing. He agreed that he assumed part of the builder's work had been removed to enable waterproofing to be reapplied.

156 I accept that the inference from the builder's expert's evidence just described supports the need for remedial work to the waterproofing. I accept the owners' expert's costing.

Powder room

157 The experts disagreed on liability; if found the owners' expert's costing was $11,213 and the builder's expert's was $8,862.22.

158 The builder's expert did not recall his inspection of this room other than to point to what he inferred was intervening work after the builder left the site.

159 I accept the owners' expert's opinion based on photographs that the powder room was tiled and that such removal and replacement was required. I also

accept the owners' expert's effectively-uncontradicted opinion that there was defective work requiring re-waterproofing and re-tiling.

160 I am not satisfied that the item of plumbing repair labour (8 hours at $75ph totalling $600) has been established to be a separate and additional charge beyond the plumbing already allowed and deduct that from the owners' expert's costing to result in $10,613.

Gaps around windows

161 The experts disagreed on liability but "if found" agreed a scope of remedial work and costing of $1,700. The builder's expert did not view all windows; the owners' expert noted that all windows required sealing but that the item would be covered if all windows were replaced with double-glazing discussed below. Since I have found liability in the builder for the double-glazing, the $1,700 is not separately awarded.

Squeaking stairs

162 The owners' expert said the stairs squeaked when walked on; the builder's expert did not notice a squeak and said that the stairs would be tightened when fully installed. "If found" agreed costing was $1,360.

163 On that state of the evidence I do not accept that the owners have established a defect that constitutes a breach of one of the statutory warranties set out earlier.

Missing stair access to garage

164 The experts agreed that a staircase had not been constructed in accord with the amended CDC plan. The respective costings were $8,680 and $2,364.

165 The owners' expert's costing was based on personal experience of constructing staircases, compared with the builder's expert's commissioning of staircases. The component of $4,500 in the owners' expert's costing for actual stair construction I accept has not been shown to be disproportionate.

166 However, the owners' expert also assumed a costing based on cutting through an existing concrete floor which appears to be disproportionate to achieve compliance with a plan when a variation could be approved for alternate stair access. I accordingly do not allow that component.

Sitting room plasterboard

167 The experts agreed if-found cost of rectification at $3,100 although they had disagreed on method (and remediation has already occurred). The builder's expert disagreed by reason of his completion argument only. In this aspect the available costing evidence is that agreed figure, which I accept.

Dining room sliding door

168 The experts agreed onsite that the door was out of plumb since the wall was out of plumb, with the wall remediation being separately covered. As already said, the completion argument was no longer relevant on my findings. I accept the agreed "if found" costing of $340.

Misaligned column

169 The experts accepted the costing of $150 for tightening bolts on the column which was agreed to be necessary and I accept that agreed position.

170 The builder's expert said that the plans had not been followed and could not be followed, but accepted that the builder ought to have sought instructions rather than act unilaterally; that was said by the owners in the course of the concurrent evidence to be as a matter of due care and skill and contract requirements under cl 4(b). The builder's expert went on to say that the owners would in effect have had no choice but to accept the re-worked configuration with which the owners' expert did not agree. There was no evidence of formal instruction or of any required variation. There was no mention of a figure beyond the agreed $150 in closing submissions. I accordingly find this item limited to $150.

Missing rear steps

171 When the completion argument is removed, there was essentially no dispute on liability, only on scope and cost. Both experts agreed on remediating an overpour which the builder's expert accepted was defective work remediation. In concurrent evidence both experts accepted that they had overlooked an agreed amount of $500 for treating cut reinforcing steel. Both agreed the concrete thickness. The revised figures were $10,414 and $5,650.

172 The concurrent evidence showed that both experts relied upon costing experience and Rawlinson's costing guide but were considerably divergent on some aspects. The owners' expert gave explanation (that the cost of

concrete included reinforcement steel) and an example of very recent minimum concrete pump hire cost that leads me to accept that the owners' expert's costing has not been shown to be disproportionate and I accept it.

Stormwater tank (OSD)

173 It was common ground between the experts that the hydraulic plans showed the OSD tanks were to be located under the alfresco area and that the tanks had not yet been installed there or elsewhere but that the stormwater line was in place.

174 The builder's expert accepted in concurrent evidence that the area shown for the OSD tank installation on the plans could have been excavated before the alfresco area with its supporting piers were constructed and that the builder ought to have sought instructions from the owners, before constructing the piers, on whether there was to be a variation for excavating the rock found in the planned OSD location or a re-location of the tanks. Rather, Ms Martin said, and I accept, that the builder did not raise any such issue until 31 August 2020, some time after construction of the piers. Ms Martin was not cross-examined to suggest otherwise and the builder's principal's evidence on this point initially appeared to agree and was then confusing.

175 On that evidence I accept that the owners were deprived of the opportunity to consider and obtain advice about the options for locating or re-locating the OSD tanks and then to decide on which variation would be undertaken – rock excavation in the original location (which the builder had made not possible)

or re-location to the site directed by the engineer which the owners confirmed in early September 2020.

176 The owners' loss would be any difference between the greater amount (if greater) of a variation to re-locate the tanks and the amount to excavate and install the tanks in the location originally planned (but no longer possible). There was no separate costing for the excavation alternative. Accordingly, I am left only with evidence of the re-location amount with no evidence of what to net against it. The builder had an evidential onus to show the missing amount. I therefore proceed on the evidence I have.

177 The builder's expert accepted that he had not allowed a component for installing the tanks in his costing of $10,255.60. The owners' expert gave a detailed explanation of his costing for such installation, which I accept. However, the owners' expert accepted that he had over-allowed for extra piping which, when corrected, reduced his total costing to $19,767 (the correct maths in the builder's closing submission; the owners' closing submission was $7 less). I accept $19,767.

Misaligned plasterboard wall

178 The builder's expert said that the owners' expert had found a small out-of-plumb because his level was placed on an expansion joint where there was a build-up of plaster cement over the setting beads. "If found" there was ultimately expert agreement on the builder's expert's remedial method (with an agreed cost of $1,013) which focused on effectively smoothing out the

expansion joint finish. I consider that the owners are entitled to such an aesthetic finish.

In-ground electrical cable

179 There was no competing measurement for the owners' expert's invasive measure that was dug to 250mm depth. The owners' expert said the minimum required depth under the driveway slab when poured was 300mm.

180 The builder's expert accepted that the cabling would not be compliant at existing ground level, that the cabling depth may be compliant once the driveway was poured over it but that such depended on the finished levels including whether there was required excavation so that the new slab would finish at the existing ground level: "once they started excavating they would've realised we need to actually lower our electrical cable".

181 On that basis I accept that the owners' expert is correct that the trench needed to be re-excavated to the compliant depth, the cabling laid and then re-filled.

182 The builder's expert accepted that the dramatically different costing of $2,432 that he gave compared with $9,046 for the owners' expert was largely because of the different proposed methods. The owners' expert's detailed costing included all components with reference to a costing guide and has not been shown to be disproportionate. I accept it.

Ground floor sliding door

183 Both experts pointed to the discrepancy between the structural engineering and architectural plans. Consequently, once the structural column was installed, it was not possible to construct the nib cavity wall to accommodate the sliding door as architecturally planned.

184 After a circuitous and somewhat tortuous patch of concurrent evidence the builder's expert agreed with the owners' expert's original proposition that, if the discrepancy had been discovered or mentioned earlier, the owners would have had the opportunity to discuss and give instructions to achieve an alternative solution. In my view, which also appeared consistent with the expert's opinions, it was the responsibility of the builder under the statutory warranties of due care and skill and the contract requirement in cl 4(b) to point out such discrepancy and seek written instructions in a timely manner.

185 As to the alternative proposed solutions, the owners' expert suggested re-locating the column within the window mullion at a costing of $14,643 and the builder's expert proposed a resized nib wall at $10,083.10. It seems to me on the confusing discussion in concurrent evidence that the resized nib wall was a proportionate solution and in this situation re-locating the column was disproportionate. There was no evidence of any cost of variation under alternative solutions to deduct from this amount.

Bowing rear step

186 During concurrent evidence the common position was reached that the 50mm bow in the rear step was best rectified by the owners' expert's method that

involved grinding to level before tiling since packing glue behind the tile would not fix a bowing of this dimension. The builder's expert said that the time allowed by the owners' expert was excessive. The respective costings were $1,250 and $484.96. With the steps involved in the chosen method the higher costing has not been demonstrated to be disproportionate.

Damp study room wall

187 During concurrent evidence the position was reached that the owners' expert removed a double-count in his costing to reduce it to $1,880 and the builder's expert, who had originally costed at $744.60, accepted on photographic evidence that a whole plasterboard wall and ceiling above together with mouldy skirtings needed replacement. In my view this indicated that the owners' expert's scope of remediation and costing was not disproportionate and I accept it.

Water ingress to garage

188 There appeared to have been two locations for alleged water entry.

189 The first was from the balcony over the garage (including its balustrade) and the roof over the study which has already been discussed, where there was removal of tiles and damage to screed, waterproofing and blueboard. The second was from the base of a wall abutting a retaining wall and garden.

190 The builder had been paid for Stage 4 (lock up) at which point the building was required by applicable codes and standards to be watertight. This appears to me to meet the builder's expert's contention that the builder wasn't

given the opportunity to undertake damage prevention, since it should already have been done. To the extent this was a variation of the completion argument (that there was not further opportunity prior to completion to remedy emerging defects after lock-up stage was reached), it is not relevant for reasons previously given.

191 The builder raised matters of intervening activity by others since it left the site together with certification and observations of waterproofing being done which were substantially similar to those discussed earlier in relation to the bathrooms. A substantially similar response meets them in the present context. The builder's expert in the present context agreed that he had seen the roof and balcony damage when he first inspected in March 2022 but that he did not know who uplifted tiles or damaged blue board or when. He also had not seen bubbling water at the wall base on his inspections in March and July 2022.

192 In contrast, the owners' expert gave evidence of water ingress, watermarking in wall joints, 99.9% water saturation on moisture metering the block wall, observing no waterproofing to the external of the retaining wall in contrast to surface reverse waterproofing compound on the garage block wall with moisture readings between 46% and 83% on that part of the wall. He also said that, during his inspection on 26 February 2022, there was water ingress from the top of the block wall adjacent to the entry stairs and active water spouting from a crack in the garage concrete slab which required demolition and excavation to determine then remediate the cause (potentially a broken stormwater pipe).

193 The builder's expert's scope and costing focused on replacing damaged surfaces at $959. I consider more appropriate and proportionate the owners' expert's scope and costing of $23,527 which focused on waterproofing where the moisture readings inferred that it was defective in addition to remediating existing damage.

Missing north front wall

194 The primary difference was what was required. The owners' expert said that the plans required a structural wall 4.5 to 5m high at a cost of $10,585. The builder's expert said that the plans were not clear and that the best reading was a non-structural timber wall with foam cladding sitting on existing rock at a cost of $2,860.43 and fixed at the top to the roof as a screen. The builder's expert did not address the owners' expert's costings because of the completion argument. In particular, he had not costed the footings and construction of the lower part being the block wall.

195 If the plans were unclear, then it was the responsibility of the builder exercising due care and skill and under cl 4(b) of the contract to clarify them by notifying the owners and seeking instructions. There was no evidence that the builder had sought to do this. There was no evidence that this would have resulted in a variation or the cost of any variation.

196 I accordingly accept the owners' expert's opinion on scope and costings for which the builder is liable.

Joinery

197 I do not accept that the evidence demonstrates that the owners separately engaged a joinery contractor. The builder remained responsible for whichever joinery contractor was engaged to carry out the works. I accept Ms Martin's evidence that the relevant joinery work was undertaken by DNB and was installed on 16 July 2021.

198 This rendered largely irrelevant the builder's expert's costing at $4,970. The expert's opinion was based on plans that were not the installed joinery and on changes to layout allegedly made by the owners that reflected the builder's evidence which I do not accept, together with a quotation for some rooms by someone who did not do the joinery work. He had not critiqued the owners' expert's costing.

199 By contrast, the owners' expert justified his costing of $10,585 by reference to what had been installed and the plans for that installation.

Door jamb installation

200 The remediation had occurred before the builder's expert's inspection.

201 The builder submitted that there was no photographic evidence of each of the twelve doors, only two, and that the studs which packed the gap between door jamb and frame were sufficient in themselves.

202 The owners' expert gave detailed evidence, uncontradicted, of his observations of all twelve doors which included the looseness of the packers and the absence of nails affixing through the packers to prevent their

loosening and falling out. His costing was based on the need for customised assessment and remediation of each packer given width variations of the gap being packed.

203 The absence of an Australian standard does not detract from the need to exercise due care and skill under the relevant statutory warranty. The builder's expert accepted in concurrent evidence that the allowance each side of the doors was excessive at 30mm.

204 I accept the owners' expert's opinion on remediation and costing at $12,249 as opposed to the builder's expert's nil costing. In this aspect the available costing evidence does not include the actual remedial cost, for which the builder could have summonsed had it wished to challenge the owners' expert's costing (in the absence of its own expert's opinion or in any event).

Sagging roof

205 Both experts observed the installation (without removing roof sheeting) of steel angle plates bolted to roof rafters and agreed in the conclave report that the installation was to rectify the sagging roof. The builder's expert appeared to have made a reasonable inference to this effect from his conclave inspection. The owners' expert had taken photographs from before the angle plates were affixed. The builder's expert pointed to the engineering certification which, as said earlier, is not a complete answer if defective work is otherwise established.

206 Given the experts' agreed position and the evidence on need for remediation, I accept that there was defective work in breach of statutory warranty, with the scope and costing of remediation to be determined.

207 The owners' expert had not allowed for roof sheeting in his costing since this was the subject of an earlier item. He provided a lowest and highest costing for structural work of $2,720 and $10,186 since "It's unknown how the structure has been affected underneath the roof sheeting". The builder's expert's costing effectively on an "if found" basis was $3,280.

208 It was not possible to isolate a cost for inspection to assess scope within the owners' expert's costings from the overall highest costing. However, the worst case had a strong basis, in the existing remediation that was observed, for the need for extensive remediation.

209 In the absence of the parties isolating the actual invoiced cost for that remediation work, I accept the highest costing of the owners' expert as reasonable and not having been shown to be disproportionate. If I am later found to be wrong on drawing that inference, I would have accepted the "if found" costing of the builder's expert as the effectively-conceded reasonable remedial cost.

Boundary retaining wall

210 The builder's expert accepted that one normally would start building works with necessary retaining, to avoid collapse including on other works. Access to construct such wall is likely also to be easier at such point. I accept that the logic of this position, which was also that of the owners' expert, was

reinforced by the photographic evidence of the owners' expert that the existing timber sleeper retaining wall was collapsing.

211 Accordingly, it appears likely that the failure by the builder to have built the retaining wall earlier, particularly given its closeness to the pool and other works, was also an instance of lack of due care and skill. At best, at a later point it would be more expensive and require a small excavator, for which the builder's expert had not allowed in his costings.

212 I accordingly accept that the owners have established a breach of statutory warranty of due care and skill.

213 I also accept that the owners' expert's costings at $28,114 are more realistic than the builder's expert's costings at $12,730.81 "if found" and have not been shown to be disproportionate. In particular, the builder's expert did not allow for necessary excavation of footings and concrete to footings, nor for excavator hire and a realistic time assessment for concrete pump hire, all of which were significant.

Double-glazing to windows

214 The builder's expert agreed that the windows were not double-glazed in accordance with specification. He proposed a remedial solution of application of reflective high-performance UV film at a costing of $7,537.82. He noted instructions that the parties agreed such a solution. There was no evidence that such would have the same effect and endurance as double-glazing.

215 The owners' expert costed replacement of the windows with double-glazing to accord with specification at an uncontested costing (on this solution) of $70,271. That was undoubtedly the finding if the instructions to the builder's expert were not supported by the evidence, which they were not. The owners were clearly entitled to have compliance with the specification.

216 The builder's principal did not give evidence in chief on the topic and Ms Martin was not cross-examined to suggest that there was such an agreement.

217 In cross-examination the principal agreed that all of the windows and doors were to be double-glazed except for the louvre windows, the first quotation from the window supplier specified double-glazing but the revised quotation did not, the contract documents specified double-glazing (particularly the window schedule and BASIX certificate), and some windows delivered to site were not double-glazed which was his error.

218 The principal said that the supplier had said some windows were not available double-glazed so he was going to put a film on them. The supplier was not called to support this assertion, there were no supplier documents to support it and there was no evidence of the owners being told about the proposed film let alone agreeing to it – indeed, the principal agreed that he did not tell the owners about the absence of double-glazing before installation. The supplier's quotation was based on the CDC drawings. The builder's quotation said that windows would match architect's design and BASIX. There was no suggestion of a price reduction which would have been significant for the alternative solution.

219 Accordingly, there was no basis to find a variation from the specification in the contract documents of double-glazing.

Missing rear roof first floor

220 Both experts agreed that the roof had not been constructed. The costings were $5,632 and $4,901.98.

221 The builder's expert said that the architectural plans were contradictory with necessary details missing. The experts differed over which plans governed this aspect of construction.

222 If the plans were unclear then it was the responsibility of the builder exercising due care and skill and under cl 4(b) of the contract to clarify them by notifying the owners and seeking instructions. There was no evidence that the builder had sought to do this.

223 Although the difference is slight, I prefer the costing by the owners' expert which provides for the resolution of the perceived discrepancy in favour of the larger alternative construction.

Pool

224 The experts agreed that the pool had not been built strictly in accord with the plans.

225 The owners' expert said that the pool was 400mm wider than plan and slightly out of alignment with the southern kitchen wall. His remediation was to demolish and rebuild the pool at a cost of $47,033. In concurrent evidence he

agreed that the pool was not structurally defective. He said that the slight misalignment was important because of the “visual aesthetics”.

226 The builder’s expert referred, on his instructions, to a site meeting to confirm the size of the pool which was attended by the certifier. His costing was $13,140.83 to complete the existing pool.

227 Neither expert challenged the other’s costing if the other expert’s scope was preferred.

228 I do not need to resolve any controversy about the site meeting which, if it occurred in the alleged terms, would fulfil the obligation to seek owner instructions.

229 In my view, given that the pool is structurally sound and the departure from the plans is relatively minor, the owners’ expert’s solution is established to be disproportionate and I accept the builder’s expert’s costing.

Electrical compliance

230 On an “if found” basis for the builder’s expert, the experts agreed a cost of $3,960 to complete the works. The completion argument of the builder’s expert was irrelevant for reasons previously given. The owners’ expert relied upon documents provided by the owners which demonstrated in my view that the works remained to be completed and fully certified.

Fascia framing

231 The experts agreed that the roof framing was sheeted with battens used to straighten the framing under the sheeting.

232 The owners' expert said that the rafter span of 1m was too far apart to provide adequate support for the fascia beam, with consequent sagging, warping and twisting that was evident; the approved design spacing was at 450mm and 600mm centres. He also pointed to the extended exposure of the timber members without fascia capping to the elements for almost a year since the engineer's inspection mentioned below to the time that the owners' expert inspected as a further reason for their replacement, with need for further engineering opinion that would be integral to the remediation. His costing was $14,100 which was not in itself challenged as to amount if the underpinning scope of work was accepted.

233 The builder's expert relied upon an engineer's certificate provided 28 March 2022 but based on inspection 16 March 2021 that the roof framing (among other items) was "generally in accordance with the abovementioned [contract] drawings and site instructions issued during construction and Australian Standards AS 1170.1, AS 1684.2, AS 3600 and AS 4100". The site instructions provided for metal cleats at 1m centres welded to connect to the LVL fascia beam. He said that there was no defect; his "if found" costing was $2,721.01.

234 There was no evidence that the site instruction by the engineer to "add breaker rod" had been done – such a rod would have tied the framing

together. This weakens any inference from the engineer's certificate (based on an inspection that resulted in issue of the site instruction) which in any event is not conclusive, as explained earlier in relation to certificates.

235 Absent evidence of complete compliance with the site instruction, it seems to me that the basis for dispensation from compliance with the plans has not been established.

236 Further, and in any event, the builder's unauthorised delays (as I have found) meant that the builder was responsible for a period in which exposure of the timber that deteriorated began, before contract termination. The owners' expert's acceptance in concurrent evidence that exposure after contract termination "could have impacted" does not affect that conclusion, the process having its origin in the delay period.

237 Such delay and deterioration would not have occurred had the builder completed the works and remedied defects in accord with its contractual obligations including any properly-obtained extensions. That loss continues because the defects and incomplete works remain unremedied. The builder has not discharged its onus to show that the owners acted unreasonably and has therefore not mitigated that loss. The underpinning scope of work is the replacement of the roof timber in the manner of remediation put forward by the owners' expert.

238 I accordingly find liability in the builder for the loss as assessed by the owners' expert.

Plumbing

239 Neither expert saw the builder's plumbing work since it had been removed and re-done by the new contractor. That plumbing was said by the builder's expert to have been outside his expertise as has already been noted. The respective expert's costings were $8,040 and $1,350. The owners' expert said that he had been advised by the new contractor that the originally-installed plumbing was non-compliant at an invoiced cost of $6,950 which would be the evidence of costing to rely upon as said earlier.

240 However, there was inadequate explanation to show that this amount did not overlap with the previous plumbing item. In those circumstances I do not accept this item.

Airconditioning

241 The experts agreed that a rigid ducted airconditioning system was unsuitable for installation in the limited ceiling cavity space of 100mm between floor joists and ceiling frame – duct size was a minimum of 300mm. The builder's expert agreed in concurrent evidence that the ducts had been squeezed which was not good practice. (An earlier item which separately claimed in respect of squashed ducting was not separately pressed during concurrent evidence since it was included within the larger item.)

242 Although neither expert was a mechanical engineer, I accept that they both had sufficient expertise to assess the unsuitability of the semi-installed ducted system and to suggest the optimal replacement.

243 I accept that the owners' expert's assessment of a variable refrigerant volume multi-split-system was more comprehensive (including on velocity effect) than the builder's expert's suggested semi-rigid narrow sections through narrow areas. I accept the owner's expert's costing for that option (with removal of the existing installation) at $56,070 rather than the builder's expert's costing "if found" of $7,520.60.

Termite protection

244 The owners' expert said that he did not observe termite protection to have been installed to any part of the building perimeter. The builder's expert said that he did not observe termite protection but he was provided with photographs that showed blue termite protection had been installed except along one wall and the timber framing was H2 termite-treated pine. Costings were $3,936 and $656.29 (the latter for the limited scope of rectification).

245 I accept the owners' expert's observational evidence as the most direct evidence available and the costing based on that evidence.

Total net trade cost

246 Total net trade cost on the above items as found is $588,549.87.

On-costs and total for defective and related incomplete works

247 The owners' expert specified five fixed amounts and one percentage amount: preliminaries $67,430; scaffolding $115,011; site management and labour $192,000; HBCF insurance $17,813; consultant fees $33,600, and contingency at 10%.

248 The owners' expert said that he preferred a line cost method for items in remedial work which were able to be the subject of detailed analysis of what was required (contrast contingency); he had provided a detailed analysis which was not the subject of detailed challenge on most items. He said that site supervision and labour covered work (such as moving materials and clean-up during specific tasks) that was not within the trade labour and trade supervision allowed for in specific items. He had costed scaffolding (which the builder had removed on exit) primarily for roof work (there was also the missing 5.5-6m wall), for six months of an eight month works programme, against a costing guide. He had allowed specific time for an engineer, architect, stormwater engineer and surveyor. He had calculated HBCF insurance. From his workings in his report it appeared that the calculation was 0.84% base premium on contract price plus 9% stamp duty on base premium plus GST, plus GST at 10%.

249 The builder's expert allowed 20% for preliminaries which he said included insurance and site management. He had not allowed separate amounts for consultant fees and scaffolding from his costing of specific remedial items. He had not allowed a contingency. He said that, over many jobs, it worked out at about his 20% so it was a "quick reference tool". He had costed scaffolding and labour in specific items although in concurrent evidence he accepted that he had not specifically costed scaffolding at all. He said that the owners' expert's estimate for scaffolding time was excessive and that anchor points for harness could be added to undertake roof work, although that was not costed. He accepted that scaffolding would be needed for the 5.5-6m wall.

250 Taking 20% of the found net trade cost, the builder's expert's assessment was $117,709.97 compared with $484,713.99 for the owners' expert. I do not accept the builder's closing submission that the owners' expert's amounts were insufficiently particularised given that expert's detailed analysis.

251 Although the builder's expert's percentage method is often used (and at a lower rate than 20%) for preliminaries, in this case I have mostly adopted the owners' expert's approach for the following reasons: I have substantially accepted the owners' expert's net trade costings; the owners' expert has said that those costings did not include the add-ons that are being considered here and there is no objective material contesting that proposition; those add-ons are clearly matters that form part of project costs; the amounts of those add-ons have, even if contested, not been the subject of detailed analysis contradicting the owners' expert's detailed analysis.

252 Dealing with the specific items, I accept the preliminaries category at $67,430 which is 11.46% of found net trade cost and well within the range for such matters.

253 I consider that contingency at 5% would reflect a more reasonable risk assessment given the degree of comprehensiveness of existing investigation, being $29,427.50 of net trade cost.

254 I accept, through absence of effective contest, scaffolding $115,011, site management and labour as differentiated by the owners' expert $192,000 and consultant fees $33,600.

255 With those add-ons the figure prior to margin is $1,026,018.30.

256 Margin, as said earlier, was agreed at 15% for remedial work which I consider reasonable given the nature of the work and extent of organisation and supervision required (the builder's expert in concurrent evidence indicated a usual choice of 20% for remedial work). The same margin of 15% appears to have been used for completion costs which I consider reasonable for the same reasons.

257 With 15% margin the total is $1,179,921. With GST the total is $1,297,913.10.

258 I accept HBCF insurance as a separate cost in this instance since a remedial builder will be required to take it out and it will be a significant component beyond what might otherwise be included within preliminaries. On total works amount at $1,179,921, the base premium at 0.84% is $9,911.34 and stamp duty at 9% on that base premium plus GST ($10,902.47) is $98.12, totalling $11,000.59.

259 The total with HBCF premium is accordingly $1,308,913.60 for defective and incomplete works that have been dealt with in this section.

Consideration and conclusion on completion cost for balance of specified works

260 The owners' expert estimated completion costs of $641,505 net trade cost which totalled $737,730 with 15% margin plus GST which totalled $811,503.

The builders' expert did not provide a completion costing which I assume reflected the completion argument.

261 In the absence of challenge to his analysis beyond the matters about to be discussed, and given the detailed costing reasoned preparation of his completion costing report, I accept the balance of the owners' expert's completion costings.

262 The builder's closing submissions said that the completion costing did not refer to plans or specifications or provide a scope of works. The owners' expert's task however was to cost on the incomplete works in the original contract scope of works which appears from his costings analysis.

263 As pointed out in the builder's closing submissions, the owners' expert's separate completion costs for pool $85,372 and retaining wall $51,899 ought not to have been included because a costing for remedial work which included completion had already been taken into account when dealing with these items as defective works. These were the only items the subject of the builder's closing submissions in the category of "double-count".

264 Preliminaries at $24,980, labour and site management at $72,000 and final site clean at $11,000 were challenged as insufficiently particularised. I have accepted them as sufficiently detailed and for the reasons given in respect of such items in relation to defective works.

265 I have excluded hard and soft landscaping as matters for which the builder had contractual exclusions. These were respectively $46,322 and $60,750 totalling $107,072.

266 These amounts total a deduction of $244,343 which leaves a net trade cost total of $397,162 excluding margin at the agreed 15% already referred to and GST. With margin the total is $456,736.30. With GST at 10% the total is $502,409.93. I do not accept the builder's submission that the rest of the scheduled analysis should be rejected because of these specific items. Rather, it seems that the specified items were the ones found that could be the subject of criticism.

Delay claim including alleged penalty

267 The owners said: after 18 May 2021 they constantly sought a practical completion date; the builder provided no more than extending estimates, being three months in May 2021 and three months on about 30 June 2021. I have already found that there was no contractual extension of time or other basis for extension beyond that accepted by the owners of 15 weeks.

268 The builder said that the delay damages clause was a penalty and there was no proof of the owners' actual loss from delay.

269 In *Paciocco v ANZ Banking Group Ltd* [2016] HCA 28, the High Court upheld the decision of the Full Federal Court. In the Full Federal Court [2015] FCAFC 50, the decision of Gordon J at first instance [2014] FCA 35 had been overturned in relation to credit card late payment fees, which her Honour had held to be a penalty (with customers entitled to recover the difference

between the fee and ANZ's proved actual loss), and upheld in relation to non-payment, over-limit, honour and dishonour fees, which her Honour had held not to be penalties.

270 The High Court's consideration was limited to the late payment fee. The main focus of principle for the Court was on the basis for and scope of the doctrine of penalties in relation to contracts. The High Court confirmed and further explained the test which it had laid down in related litigation in *Andrews v ANZ Banking Group Ltd* (2012) 247 CLR 205, [2012] HCA 30.

271 The first step is to apply ordinary principles of contract interpretation to find whether or not the contractual term (considered at time of entry into the contract) is accessory (collateral) to a primary obligation - in effect a security for performance of the primary obligation (be that a major or minor obligation).

272 I accept that the liquidated damages provision was such a collateral obligation in the present case.

273 If it is so found, then the court must examine factors which include whether or not the amount stipulated to be paid is a genuine pre-estimate of damage, is extravagant and unconscionable in relation to the greatest provable loss, and is payable on the occurrence of a range of events of varying degrees of seriousness. This is to ascertain whether or not the amount of the payment is "out of all proportion" with the payee's "legitimate interests", but strict proportionality is not required. Legitimate interests are not restricted to the avoidance of damage resulting from non-compliance. They may extend to broader commercial interests including maintenance of profits from use of

assets. See particularly Kiefel J (French CJ agreeing) at [28]-[29], [33], [42]-[48], [54], [57], [62], Gageler J at [127], [145], [157]-[166], [169], [172], [176], Keane J at [216], [221], [240], [243], [254], [256], [259], [270], [273], [278]-[279], [283]-[284].

274 The broad definition of legitimate interests was a corollary to the High Court's recognition (declared in *Andrews* and recognised in *Paciocco*: Gageler J at [119]) that the doctrine in equity could in principle extend beyond its classical operation at common law of payment stipulations for a breach of contract, to include the ending of contracts without a breach (eg, by exercise of a right of early termination or surrender) and other events which were neither a breach of contract nor another event which it was the responsibility or obligation of the relevant party to avoid.

275 Extension beyond breach of contract had been considered, but not determined, in earlier High Court authority, mainly involving finance leases and similar types of finance contracts. There the Court had extended the doctrine beyond traditional "liquidated damages" provisions to more elaborate terms that set out in substance (irrespective of legal form) rights on specified breaches (such as recovery and re-sale of leased items, or payment of other monies). These rights were potentially different from what would be recovered at general law for some of the breaches specified: *O'Dea v Allstates Leasing System (WA) PL* (1983) 152 CLR 359 at 368, 373, 375, 395-396, 400; *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, particularly per Mason and Wilson JJ at 185-186, 192 et seq, Deane J at 197 et seq, but cf Dawson J at

211, 213-216; *Ringrow PL v BP Australia PL* (2005) 224 CLR 656, [2005] HCA 71 at [12].

276 Some of these cases had recognised the operation of similar principles governing relief against forfeiture, elaborated in *Stern v McArthur* (1988) 165 CLR 489, and further expounded in *Tanwar Enterprises PL v Cauchi* (2003) 217 CLR 315, [2003] HCA 57. The doctrines are applied at different times: penalties by reference to circumstances at time of entry into the contract; relief against forfeiture after entry into the contract, for example, at a time of non-performance: *Australia Capital Financial Management PL v Linfield Developments PL* [2017] NSWCA 99, (2017) 18 BPR 36,683 at [325], [356]-[357].

277 The High Court in *Paciocco* agreed by a 4:1 majority (French CJ, Kiefel, Keane and Gageler JJ, Nettle J dissenting) with the Full Federal Court's analysis that Gordon J had conflated what was required to be taken into account in assessing what was a penalty with what could be recovered *if* the payment amount was found to be a penalty.

278 When assessing whether a payment was a penalty the range of "legitimate interests" was taken into account. If the amount was found to be a penalty, the payee was restricted to its actual proved loss, which may be less.

279 The inference from the High Court's reasoning is that inability to prove actual loss, but ability to prove (by expert evidence or otherwise) the scope of financial, commercial or other legitimate interests affected by the manner of performance or non-performance of the other party, is a sound rationale for

the fixing of a payment in those circumstances. Because a party cannot prove its actual loss in these types of transaction, it may have a legitimate interest, depending on the nature of the contract, to fix a uniform payment.

280 In essence, a penalty is a collateral stipulation that goes disproportionately beyond protecting a party's legitimate interests so that it acts in terrorem of non-compliance or non-performance; liquidated damages or amount are a genuine pre-estimate of a party's loss in a situation of breach or other trigger event: cp *Growthbuilt PL v Modern Touch Marble & Granite PL* [2021] NSWSC 290 at [86]-[88]. The onus is on the party asserting a penalty: see, eg, Gageler J in *Paciocco* at [167].

281 I do not accept that the provision was established to be a penalty on the above test.

282 The provision operated on delay beyond the contract date (including valid contractual extensions) for practical completion. Practical completion is a vitally important milestone in contract performance. A range of consequences for parties can arise that constitute legitimate commercial and personal interests to be protected in the event of delay, most of them potentially serious, such as extension of finance obligations and alternative accommodation expenses. Provided it is not extravagantly disproportionate, an attempt to estimate the range of losses at date of contract in a single amount will avoid extensive and expensive dispute and proof in individual situations to the benefit (as at date of contract) of all parties in reducing transaction risks and costs by a reasonable pre-allocation. (The difficulty is

acknowledged within cl 11(c)(i) and (iv) of the building contract itself – the former refers to "agreed *pre-estimated* general and liquidated damages" (emphasis added), the latter to an inserted amount in Sch 2 item 3(a) which "must reflect the actual cost of the delay to the Owner"; the two are inconsistent unless read as a pre-estimate of actual cost.) The provision in question at the amount it set was not extravagantly disproportionate given the range of potential consequences.

283 The owners' accepted extended completion date was 1 September 2021 which is justified for reasons previously given. There was no contract provision preserving the operation of the liquidated damages clause beyond termination of the contract on 8 November 2021, when a party's obligation under primary contract obligations is replaced (absent preservation) by a right to proven damages.

284 The owners did not plead or seek to establish actual damages for delay as a separate claim beyond the liquidated damages provision. The documentary evidence and testimony about actual expenses was put forward for the purpose of showing that the liquidated damages provision was not extravagantly disproportionate. It also contained items which were effectively an alternative basis for compensation (extended loss of enjoyment of the house) to others (alternative accommodation) or were relevant to another head of damage (defective works remediation finance and site clean-up).

285 The period of liquidated damages from 1 September to 8 November 2021 is 68 days or 9.71 calendar weeks. The owners are therefore entitled to that time at $2,500pcw, totalling $24,275.

Total net amount to owners

286 As provided in cl 28(c)(i) of the contract and under the general law, the owners are entitled to the total for remediation and completion costs of $1,811,323.50 plus liquidated damages of $24,275, totalling $1,835,598.50. From this is to be deducted unpaid amounts found to be owing to the builder under the contract ($nil) and in quantum meruit for variations ($23,119.78) and any further amount representing the original contract price balance that the owners would have paid the builder ($1,493,000 - $976,450 = $516,550) totalling $539,669.78 – note the $18,000 agreed and paid variations effectively net out and are not included.

287 The net amount I find that the builder owes the owners is $1,295,928.80. The owners have waived any claim above $500,000.

Costs

288 Section 60 of the NCAT Act, together with rule 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (the Rules), provide that the ordinary costs rules apply, even in the absence of special circumstances required by s 60 of the NCAT Act, where "the amount claimed or in dispute in the proceedings is more than $30,000". It has not been authoritatively determined if s 50 of the NCAT Act requires the parties to be given an

opportunity to make submissions seeking a further hearing on costs, rather than having costs determined on the written material, when there has already been a hearing on the substantive matters. The parties have here already dispensed with seeking a further hearing on costs, as noted above.

289 In *Allen v TriCare (Hastings) Ltd* [2017] NSWCATAP 25 at [37]-[38], the Appeal Panel found that "'[P]roceedings'" refers to the process set in motion, or commenced, by lodging an application or notice of appeal. That process includes the steps taken by the Tribunal to hear and determine whether to grant the relief sought in the application or notice of appeal, as well as any interlocutory or ancillary steps. Proceedings are defined by the subject matter raised in the application or notice of appeal. The participants in proceedings are limited to the parties determined in accordance with [s 44 of the NCAT Act and the Rules]". The fact that an order was made that the proceedings be heard together with evidence in one being evidence in the other does not affect this analysis.

290 In *Owners SP 63341 v Malachite Holdings PL* [2018] NSWCATAP 256 at [3]-[5] the Appeal Panel summarised the operation of r 38 as follows:

> "[3] Rule 38(2)(b) applies to the following proceedings:
>
> > (1) Where the relief claimed in the proceedings is for an order to pay a specific amount of money, or an order to be relieved from an obligation to pay a specific amount of money, and that amount is more than $30,000;
> >
> > (2) Where an order is sought in the proceedings for the performance of an obligation (such as to do work), and the Tribunal has power make an order to pay a specific amount of money, even if not asked for by the claimant, provided that

(a) there is credible evidence relating to the amount the Tribunal could award; and

(b) that evidence, if accepted, would establish an entitlement to an order for an amount more than $30,000.

[4] Rule 38(2)(b) may also apply to proceedings where the orders sought in the proceedings depend upon the claimant proving there is a debt owed in order to establish an entitlement to the relief sought, and that amount is in dispute and is more than $30,000.

[5] Rule 38(2)(b) does not apply to proceedings:

(1) Where a claim for relief in the proceedings (not being a claim for an order to be paid or be relieved from paying a specific sum) may, as a consequence of that relief being granted, result in the loss of any property or other civil right to a value of more than $30,000; or

(2) Where there is a matter at issue amounting to or of a value of more than $30,000 but:

(a) no direct relief is sought and no order could be made in the proceedings requiring payment or relief from payment of an amount more than $30,000; or

(b) the relief sought does not depend on there being a finding that a specific amount of money is owed."

291 In *Hanave PL v Wine Nomad PL* [2022] NSWCATAP 361 at [40]-[42] the Appeal Panel expounded aspects of the above summary which were not the subject of findings in the partly-successful appeal to the Supreme Court on aspects of the substantive decision [2023] NSWSC 265:

"[40] As made clear in *Malachite* at [75] and following, r 38 is not concerned with the value of rights that might be in issue or any change in wealth. Unlike s 101(2)(r) of the *Supreme Court Act 1970* (NSW), r 38 does not require consideration of whether the proceedings:

(1) involve a matter at issue amounting to or of a value of $30,000 or more, or

(2) involve (directly or indirectly) any claim, demand or question to or respecting any property or civil right amounting to or of the value of $30,000 or more.

> [41] Rather, r 38(2)(b) applies where "the amount claimed or in dispute in the proceedings is more than $30,000".
>
> [42] The questions to be determined are what is the amount "claimed", what is the amount "in dispute" and what are "the proceedings" in circumstances where there are two applications, the second in the nature of a cross-application ("cross application")."

292 The threshold amount was exceeded in both claims on the test as explained in *Allen*, *Malachite* and *Hanave*.

293 The starting point for exercise of costs discretion on the usual principles is that costs follow the event. "The event" is usually the overall outcome of the proceedings – did the successful party have to go to the Tribunal (in this case) to get what it achieved, rather than being offered at least that relief. If there are distinct, separate or dominant issues on which the party seeking relief did not succeed, that may be taken into account in the exercise of costs discretion, either as an award of costs of those issues to the party who had success on them or as a discount of the costs of the overall successful party, or some other appropriate exercise of principled discretion. The exercise of the discretion involves impression and evaluation. Appeal Panel decisions have made no order as to costs (to the intent that each party paid its or their own costs of the appeal) where there has been a measure of success on both sides: *Johnson t/as One Tree Constructions v Lukeman* [2017] NSWCATAP 45 at [25]-[29]; applied in *Oppidan Homes PL v Yang* [2017] NSWCATAP 67.

294 Costs will include the assessed or agreed amount for the expenses on expert reports if these have not been claimed and allowed as damages.

295 Costs are usually ordered on the ordinary basis as agreed or assessed, unless the parties tender material and/or make submissions that justify an award of costs on the indemnity basis as agreed or assessed, in whole or part.

296 For an award of costs on other than the ordinary basis, a party's conduct of the proceedings themselves, or the nature of the proceedings themselves (for instance, misconceived), or an outcome less favourable than an offer, are considered.

297 The above principles are authoritatively explored in *Latoudis v Casey* (1990) 170 CLR 534 and *Oshlack v Richmond River Council* (1998) 193 CLR 72 and followed and applied in this Tribunal in *Thompson v Chapman* [2016] NSWCATAP 6 and *Bonita v Shen* [2016] NSWCATAP 159, citing earlier consistent authority.

298 The principles on indemnity costs have resonance with at least some of the "special circumstances" in s 60(3) of the NCAT Act that are required to justify a costs order when rule 38 does not apply; special circumstances means out of the ordinary but not necessarily extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11]. If special circumstances are required to be found to justify a cost order, it is logical that such an order would be on the ordinary basis unless there is something in extent or type beyond what justifies the finding of special circumstances in order to award costs on the indemnity basis. Otherwise the anomaly could

arise that any special circumstance justified indemnity costs being ordered for the same reason as special circumstances were found.

299 Principles on offers are explored in *Thompson v Chapman* at [91] in reliance upon authority in the NSWCA and Supreme Court there cited, to which can be added *Hazeldene's Chicken Farm PL v Victorian Workcover Authority (No 2)* (2005) 13 VR 435, [2005] VSCA 298 and *El-Wasfi v NSW; Kassas v NSW (No 2)* [2018] NSWCA 27, together with the effect of legal representation in *Bajic v Paraskevopoulos* [2018] NSWCATAP 205 at [27].

300 In summary: the offer must constitute a real and genuine compromise; rejection must be unreasonable in the circumstances; reasonableness of rejection is to be assessed at the time the offer is made, not with the armchair of hindsight; relevant factors in assessing unreasonableness include the stage of the proceedings when the offer was made, time allowed to consider the offer, extent of compromise in the offer, the offeree's prospects in the litigation at the time the offer was made, clarity of terms of the offer, whether an application for indemnity costs was foreshadowed in the event of rejection and whether there was legal representation for the party considering the offer.

ORDERS

301 I make the following orders:.

1. Order that Luxury Building Group PL pay Paul Robert Cottee and Danielle Louise Martin $500,000 on or before 31 October 2023.

2. Order as follows in respect of questions of costs:

(1) Any costs application with further submissions and documents relating to questions of costs is to be filed and served on or before 17 October 2023.

(2) Any submissions and documents relating to questions of costs in response are to be filed and served on or before 31 October 2023.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar