
# Civil and Administrative Tribunal
## New South Wales

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| **Medium Neutral Citation:** | **Mac v Antworks Pty Ltd [2016] NSWCATCD 75** |
| **Hearing dates:** | 7 April, 8 April 2015 and 31 August 2015 |
| **Decision date:** | 28 September 2016 |
| **Jurisdiction:** | Consumer and Commercial Division |
| **Before:** | D Goldstein, Senior Member |
| **Decision:** | 1. Antworks Pty Ltd must pay Colin Mac and Nina Mac the sum of $108,774.64 immediately.<br><br>2. Antworks Pty Ltd must immediately deliver to Colin Mac and Nina Mac certificates in its possession relating to Termite works, Timber Framing and Glazing Works relating to the work carried out under the contract the subject of these proceedings.<br><br>3. The parties are at liberty to make a costs application in these proceedings.<br><br>4. Any costs application pursuant to section 53 of the Consumer, Trader and Tenancy Tribunal Act 2001 must be lodged in the Tribunal and served on the costs respondent within 21 days of the date of this order either attaching or referring to the documents relied upon in support of the application.<br><br>5. The costs respondent will have 21 days after the date it receives the application referred to lodge in the Tribunal and serve on the costs applicant its submissions, if any, in response to the cost applicant's costs application, such submissions either attaching or referring to the documents relied upon.<br><br>6. The cost applicant will have 14 days after the date it receives the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent its submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon.<br><br>7. The Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal. |
| **Catchwords:** | Extensions of time, termination of building contract, |

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| | defective and incomplete work, liquidated damages |
| **Legislation Cited:** | Civil and Administrative Tribunal Act 2013<br>Consumer, Trader and Tenancy Tribunal Act 2001<br>Consumer, Trader and Tenancy Tribunal Regulation 2009<br>Home Building Act 1989 |
| **Cases Cited:** | David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353<br>Fairey Australasia Pty Ltd v Joyce and Anor [1981] 2 NSWLR, 314 at 321<br>Hometeam Constructions Pty Ltd v McCauley [2005] NSWCA 303<br>Hungerfords v Walker 171 C.L.R., 125<br>Robinson v Harman (1848) 1 Ex.850<br>Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359<br>SRA v Consumer Claims Tribunal 14 NSWLR at 473<br>Tramways Advertising Pty Ltd v Luna Park (1938) 38 SR (NSW) 632 |
| **Texts Cited:** | Building and Construction Contracts in Australia, Second Edition |
| **Category:** | Principal judgment |
| **Parties:** | Applicants: Colin Mac and Nina Mac<br>Respondent: Antworks Pty Ltd |
| **Representation:** | Counsel:<br>Mr D. Neggo for the applicants<br>Mr I. George for the respondent<br><br>Solicitors:<br>Adams & Partners for the applicants<br>J.P. Gould for the respondent |
| **File Number(s):** | HB 13/12266 |
| **Publication restriction:** | Unrestricted |

## REASONS FOR DECISION

1 These proceedings were commenced in March 2013.

2 The Consumer Trader and Tenancy Tribunal was abolished as of 1 January 2014 and the *Consumer, Trader and Tenancy Tribunal Act* 2001 and the *Consumer, Trader and Tenancy Tribunal Regulation* 2009 were repealed. As the application was not fully determined at that time, the proceedings were ‘unheard proceedings’ as defined in clause 6 of Schedule 1 of the *Civil and Administrative Tribunal Act* 2013.

3 Transitional provisions in relation to unheard proceedings are set out in clause 7 of

Schedule 1 of the *Civil and Administrative Tribunal Act* 2013. Pursuant to section 7(3) of Schedule 1 to that Act, the current Tribunal has and may exercise all the functions that the Consumer, Trader and Tenancy Tribunal had immediately before its abolition, and the provisions of the *Consumer, Trader and Tenancy Tribunal Act* and *Consumer, Trader and Tenancy Tribunal Regulation* continue to apply to unheard proceedings which expression includes pending proceedings.

4 In these reasons for decision I will refer to the applicants as the owners and to the respondent as the builder.

5 The owners claim the sum of $128,099.00 from the builder.

6 In response to the owners claim the builder has brought a cross application in which it makes claims against the owners in the sum of $76,611.57.

7 These proceedings and the builder's cross application was heard over 3 days in 2015.

8 The evidence in the proceedings was as follows:

(a) Exhibit A three volume bundle of documents and affidavit of Nina Mac sworn 18 December 2014;

(b) Exhibit B two photographs 25 March 2015;

(c) Exhibit C 5 swimming pool photographs and one swimming pool plan;

(d) Exhibit D photograph showing date 27 May 2012;

(e) Exhibit E record of experts conclusions 8 April 2015;

(f) Exhibit F Mr Nisbett's report of 12 December 2014;

(g) Exhibit G bundle of five photographs of site;

(h) Exhibit 1 Mr Mac's statement 4 June 2013; and

(i) Exhibit 2 photographs of front of residence.

9 The owners and the builder were legally represented. Their counsel have provided written submissions, for which I am grateful.

10 There is no dispute that the owners' claim in these proceedings is a building claim as defined in the *Home Building Act* 1989 (the 'Act') and that I have the jurisdiction under the Act to hear and determine that claim.

**The contract**

11 The contract is as described in paragraphs 2 and 3 of the owners counsel's submissions. There is no dispute about that description of the contract which I accept.

12 It is agreed that the contract anticipated that the works would commence on 1 October 2011. It was later agreed between the parties that the works would commence on 8 February 2012 (and the construction period would be 250 days). However there is a disagreement between the parties about what the date for completion was.

13 Clause 1(b) of the contract set out the implied warranties contained within section 18B of the Act.

**Date for Completion**

14 Clause 10(b) of the contract required the builder to proceed with due diligence to bring the works to Practical Completion within the construction period stated in item 6B of schedule two of the contract. The parties agree that item 6B of schedule 2 referred to a construction period of 250 days. The owners submit that the date for practical completion was 19 September 2012. The builder disagrees with this submission and states that the date for practical completion was 25 March 2013.

15 The owner submits that the builder's quotation 7064 was a contract document. Schedule 3 to the contract required the parties to state the documents detailing the contract work. The builder's quotation 7064 is referred to in Schedule 3 in relation to the description of the work to be completed by the builder. The quotation is therefore a contract document if only for that limited purpose.

16 In addition, Schedule 2 of the contract stated under item 5, dealing with the method of payment, that payments would be made when the following stages of the works were reached:

(1) 'As per progress payment

(2) quotation number 7064'

17 Item 12 of schedule 2 of the contract also referred to quotation 7064 insofar as prime cost items were concerned.

18 I find that quote 7064 was a contract document, having effect in connection with:

(a) The description of the works,

(b) progress payments for the stages of the works; and

(c) prime cost items,

19 The parties agree that after the contract was signed there was an agreement which changed the commencement date of the contract. The owners also submit that there was also an agreement that the works would be completed by 19 September 2012.

20 The owners' submissions are that after the contract was signed, there was in early February 2012 an amendment to the builder's quote 7064 showing a new commencement date of 8 February 2012, and at the same time the parties amended the quote to show a new work completion date of 19 September 2012. It is common ground that there was an agreement that there was a new commencement date of 8 February 2012. The amendments to quote 7064 are signed by the parties. Mr Lee of the builder agreed while giving evidence in the Tribunal that the new date for completion of the works would be 19 September 2012. I find that the amendment to quote 7064 went to both the commencement date and the completion date.

21 I find that the parties in effect amended the contract in early February 2012 when they agreed on a new commencement date of 8 February 2012 and that the new Date for Practical Completion of the works would be 19 September 2012. In my view their agreement as recorded on quote 7064 as signed by them must be given effect. However I find that their simple agreement did not displace important provisions of the contract such as clause 11 which dealt with delays and extensions of time. Nor did their

agreement displace clause 10(b) of the contract to the effect that the construction period and in my view, the new Date for Practical Completion of the works of 19 September 2012 would be subject to change or adjustment under clause 11.

22 The builder submits that it is entitled to extensions of time, a submission disputed by the owners.

23 The builder's extension of time case is founded on its letter of 10 September 2012.

24 Clause 11 of the contract stipulated certain events which would entitle the builder to an extension of time if the progress of the works was delayed. I do not intend to set it out in full. Briefly, it required the builder to notify the owners in writing of matters which caused delay within a reasonable time of becoming aware of their occurrence, with a stated extension of time. The clause further provided that if the owners did not dissent in writing from the builder's notification within 5 days, the construction period would be extended by the builder's stated extension of time.

25 The builder's letter of 10 September 2012 was addressed to 'The lending Authorities CC: Nina Mac and Colin Mac [*****]Road Fairfield NSW'.

26 The contract stated the owners address to be [***]Road Fairfield NSW. Clause 30 of the contract dealt with service of notices. It stated that all notices and other documents would be deemed to have been given received or served if delivered to the other party at the relevant address in the contract and would be affected on the date of actual receipt.

27 I find that despite the curious reference to 'The lending Authorities' the builder's letter was sent to the owners at their address as stated in the contract. The letter which was stated to be for an extension of time, claimed an extension of time of 131 days for seven causes of delay.

28 The first cause of delay was for a section 96 application for a swimming pool. The delay claimed was 30 days between 12 February – 12 March. The next five causes of delay related to rain in the period March – July. The final cause of delay was in connection with a section 96 application for a retaining wall and redesign of stormwater. The delay claimed was 45 days.

29 Clause 11(a)(viii) of the contract allowed a claim for an extension of time for inclement weather thereby justifying the five claims based on rain. Clause 11 does not allow the builder an extension of time for making a section 96 application to the local council. If the council delayed in granting any necessary consent or approval, clause 11(a)(ix) would allow a claim for an extension of time. However the builder's extension of time claim was not based on council delay.

30 Having regard to clause 11 of the contract and the builder's letter of 10 September 2012, I find that clause 11 did not allow the builder to claim an extension of time for making section 96 applications to the local council.

31 Given that the builder's extension of time claim was dated 10 September 2012, I find that the builder had not complied with clause 11(b) of the contract in connection with its

March, April, May, June and July wet weather claims because it had not notified the owners '*in writing of any matters which cause delay within a reasonable time of becoming aware of their occurrence'*. I find that the builder would have been aware of the delays caused by rain at the end of the months referred to. I further find that a notice of rain delays for those months in September 2012 was not given '*within a reasonable time of becoming aware of their occurrence'.*

32 11(c) of the contract provides that:

> 'Should the **Owner** not dissent, **in writing**, from the above notification within **five (5) days** the construction period will be extended by the period claimed in the notification under **Sub-Clause (b).**'

33 The builder places reliance on clause 11(c) of the contract as it submits that the owners did not reply to its 10 September 2012 letter within 5 days with the result that the construction period was extended by 131 days.

34 I find that on the proper construction of clause 11 of the contract, clause 11(c) will only operate when the builder provides a notice that complies with clause 11(b) of the contract and in particular the requirement that the builder is to notify the owners '*in writing of any matters which cause delay within a reasonable time of becoming aware of their occurrence'*. The reason for such a construction is clause 11(d) of the contract set out below. If clause 11(c) were to operate in circumstances where the builder had not complied with its clause 11(b) obligations such as giving notice in a reasonable time, and where the owners failed to give written dissent within 5 days, clause 11(d) would have no work to do.

35 Clause 11(d) of the contract provides that:

> 'Delay in notifying or a failure **to notify** a delay will not of itself prohibit **an extension** of time provided the matter which is claimed to cause delay is shown to cause delay to the **works**.'

36 The builder's failure to comply with clause 11(b) is not the end of its entitlement to an extension of time.

37 I find that despite non-compliance with the requirement in clause 11(b) to notify the owners '*in writing of any matters which cause delay within a reasonable time of becoming aware of their occurrence'* the builder will be entitled to claim an extension of time if clause 11(d) is satisfied.

38 The owners submit that there is no evidence which establishes that rain in March, April, May, June and July caused delay to the works. The builder's submissions do not refer to any such evidence which shows that the rain claimed caused delay to the works. Records of rainfall are the obvious example of relevant evidence.

39 On the evidence before the Tribunal I find that the builder has not satisfied clause 11(d) of the contract because it has not tendered any evidence to establish that rain in March, April, May, June and July 2012 caused delay to the works.

40 As a result of the findings in the preceding paragraphs I find that the builder was not entitled under the contract to an extension of time of 131 days as claimed in its 10 September 2012 letter.

**Termination of the contract**

41 The owners claim that they terminated the contract and rely on clause 28 of the contract. I do not propose to set clause 28 out in full. However in my view clause 27 of the contract is relevant. It states:

> 'With regard to any notice issued by a party pursuant to or which relies upon **Clauses 26, 28 or 29** the said notice must accurately set out the matters giving rise to the issuing of the notice. Any notice which merely recites the words or intent of **Clause 26, 28 or 29** without proper details will not be a valid notice.
>
> Further, any document which exists and is relied upon to support the position put forward in any of the above notices must also be served with the notice. A failure to do so will mean the notice served will be of no effect as a notice.'

42 On 23 February 2013 the owners by their solicitor sent the builder a letter which they submit had the effect of terminating the contract. The letter sent on behalf of the owners did not state that the owners actually terminated the contract.

43 The letter did not refer to clause 28 of the contract. It stated:

> 'It is an essential term of the Contract that all building and construction work must be finish and/or complete by **19 September 2012**. We are instructed that you have failed to perform the above-mentioned term.
>
> We hereby place you on notice to cease all work **effective immediately** and refrain from entering the property. Our client reserves their rights to seek orders against you and/or your company for losses and damages.'

44 The test for 'essentiality' was laid down by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park* (1938) 38 SR (NSW) 632 where his Honour stated:

> 'The test of essentially is whether it appears form the general nature of the contract...or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and this ought to have been apparent to the promisor." [641 -642] and
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> "If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight." [642]

45 I find that it was not an essential term of the contract that all building and construction work had to be finished and/or complete by 19 September 2012. As found above, the agreement of the parties that the Date for Practical Completion would be 19 September 2012 was subject to the operation of clause 11 of the contract whereby that date could be extended. In addition the contract provided in clause 10(c)(i) that if the builder failed to bring the works to practical completion by the Date for Practical Completion, which I have found was 19 September 2012, subject to any extension of time under clause 11, then the builder would be obliged to pay the owners the sum of $250.00 per calendar week for every week from the Date for Practical Completion until the date Practical Completion was achieved.

46 In the contractual framework that I have found existed, which allowed for extensions of time to the date of 19 September 2012 and pre-estimated general and liquidated damages if completion was not achieved by 19 September 2012, or any extended date, I find that it cannot be said that the owners would not have entered into the contract unless they had been assured of a strict or a substantial performance of the promise to

complete by 19 September 2012. The contract itself allowed (by way of extensions of time) for the possibility that there would not be strict or a substantial performance of that promise and provided for compensation to the owners in the event that the promise was not complied with in relation to the date of 19 September 2012 or any extended date.

47 For the reasons set out above I find that the reliance on the breach of the so called essential term did not entitle the owners to terminate the contract, since there was no such essential term. As a result I find that the letter sent on their behalf did not operate to terminate the contract.

48 The owners do not press the 23 February 2013 letter alone as the basis of their termination case. They rely on the position as stated in *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 that if a valid ground existed for termination, a party can later justify termination of the contract by reference to that ground even if that ground was not relied upon at the time of termination. I would add that there cannot be any dispute that the principle relied upon applies in Australian law and is binding on me.

49 The builder submits that the owners' letter of 23 February 2013 did not operate to terminate the contract and itself was a repudiation by the owners. The builder also submits that any termination notice based on delay was capable of remedy and the builder should have been given the time stipulated in clause 28 of the contract to remedy the default. The owners failure to state in their notice their intention to terminate the contract was also relied upon by the builder.

**Valid grounds existed for termination, not referred to by the owners**

50 The grounds upon which the owners rely as justifying a termination of the contract are that the builder had:

(1) consistently failed to proceed with the works with due diligence or in a competent manner;

(2) suspended the works without cause;

(3) persistently neglected to comply with clause 12 of the contract, namely to comply with the requirements of local authorities; and

(4) failed to complete the works by the Date for Practical Completion.

51 The owners submit that the issues referred to above could be relied upon as existing as at 23 February 2013 to justify termination of the contract.

**Failing to proceed with the works with due diligence or in a competent manner**

52 The issue is whether the builder had at 23 February 2013 *'fail[ed] to proceed with the works with due diligence or in a competent manner with regard to the circumstances of the contract works'* which was a cause for issuing a default notice under clause 28(a)(ii) of the contract. Since the contract allowed for termination based on this cause of default, there is no question of whether such a default would otherwise entitle the

owner to terminate the contract.

53 Although the owners do not address this issue I have assumed from their submissions that they approach this cause for termination as being in two parts. First, that there was a failure to proceed with the works with due diligence. Secondly, the builder had failed to remove or remedy defective work, such that the works were materially affected. I have assumed that the owners contend that the second part demonstrates that that there was a failure to proceed with the works in a competent manner.

54 Insofar as the first base is concerned, the owners in their submissions rely on their letters to the builder dated 12 August 2012, 19 August 2012 and 7 October 2012 which required three lists of work to be carried out. The 19 August 2012 letter required listed of work to be carried out by 13 August 2012 and 17 September 2012. In this correspondence the owners were urging the builder to carry out incomplete work and to rectify specified items of work promptly.

55 The question of whether a builder had failed to proceed with the works with due diligence was considered by the Court of Appeal in *Hometeam Constructions Pty Ltd v McCauley* [2005] NSWCA 303. At [169] - [181] McColl JA stated:

> '169 It might be accepted that the appellant's failure to complete the Works by the date for practical completion might be some evidence of delay (see *Westminster Corporation v J Jarvis & Sons Ltd and Another* [1970] 1 WLR 637 at 643 per Lord Hodson, at 645 per Viscount Dilhorne). However, whether delay is of itself sufficient to raise an inference of lack of due diligence must depend on the circumstances.
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> 170 Despite the prevalence of clauses in building contracts requiring the work to be performed with "due diligence", defining the nature of that obligation has proven elusive.
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> 171 In Re Stewardson Stubbs& Collett Pty Ltd & Bankstown Municipal Council, Moffitt J observed (at 1675 – 1676) that:
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> > "... [T]he question of what precisely constitutes a failure to proceed with reasonable diligence is a matter of some difficulty. However, it is an allegation of a general failure to proceed with that degree of promptness and efficiency that one would expect of a reasonable builder who has undertaken a building project in accordance with the terms of the contract in question."
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> 172 In *Hounslow London Borough Council v Twickenham Garden Developments Ltd* Megarry J considered a requirement that a building contractor "proceed regularly and diligently with the works" and said (at 269):
>
> "[W]hat is the meaning of the words 'regularly' and 'diligently'? These are elusive words, on which the dictionaries help little. The words convey a sense of activity, of orderly progress, and of industry and perseverance: but such language provides little aid on the question of how much activity, progress and so on is to be expected. They are words used in a standard form of building contract in relation to functions to be discharged by the architect, and in those circumstances it may be that there is evidence that could be given, whether of usage among architects, builders and building owners or otherwise, that would be helpful in construing the words. At present, all that I can say is that I remain somewhat uncertain as to the concept enshrined in these words; and this necessarily increases the task of Mr. Harman in establishing a strong case that the contractor has failed to proceed regularly and diligently with the works, so that the architect's notice is good." (emphasis added)
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> 173 In *Hooker Constructions Pty Ltd v Chris's Engineering Co* [1970] ALR 821 at 822-823, Blackburn J considered whether a head contractor had validly terminated a building sub-contract on the basis that the sub-contractor had failed "to proceed with the works with reasonable diligence" as required by the contract. After observing that the "onus is on the plaintiff to show the [sub-contractor] was in default in a way ... caught by this provision", his Honour said (at 822) that he had "not found it easy to construe this

phrase ‘reasonable diligence’ in the context of this case”. He concluded that “a sensible construction of the phrase is that the actual extent of work completed is of some significance” and that “ ‘diligence’ in the contract means ... not only the personal industriousness of the defendant, but his efficiency and that of all who worked for him”.

174 He also said (at 823) that he was entitled to accept as evidence that the defendant had not displayed reasonable diligence, “evidence that the work was, at the material time, seriously incomplete together with evidence that there were no circumstances preventing the defendant from overcoming this situation”.

175 In *Hooker* the plaintiff led evidence that at the time it purported to terminate the sub-contract, the defendant’s work was “seriously behind what could reasonably be expected [and] that the situation was not due to anything which was beyond the defendant’s control”. Although the defendant adduced evidence to show that “through no fault of his own, he was unable to get the necessary material to bring the work to the stage where it should have been at the material time”, this did not convince Blackburn J who held the plaintiff had proved the contract was validly terminated.

176 In *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd* (1996) 12 BCL 317 Giles J (as his Honour then was) accepted that “where there was a specified future date for practical completion, whether [the builder] was prosecuting the project diligently was a question of fact, substantially determined by whether it was proceeding at a rate of progress according to which practical completion would be achieved by the specified date but with regard also to whether accelerative measures could bring achievement of completion by the specified date.” His Honour considered competing expert evidence as to the time required to complete the building work but concluded it was unnecessary in the circumstances of that case to resolve the difference between those views.

177 As each of these cases demonstrates, “you cannot have diligence in the abstract. It must be related to the objective”: *Greater London Council v Cleveland Bridge and Engineering Company Ltd* (1986) 34 BLR 50; see also *Hick v Raymond & Reid* [1893] AC 22 at 29 per Lord Herschell LC (“there is no such thing as reasonable time in the abstract”); *Maynard v Goode* [1926] HCA 4; (1926) 37 CLR 529 at 538 per Isaacs J (“[t]he question of what is ‘reasonable time’ is always relative; that is, it means ‘a reasonable time under the circumstances’ ”).

178 There were, in my view, in the context of the Contract, at least two ways the respondent could have established that the appellant had failed to perform the works with due diligence.

179 First she could have proved:

(a) the work the appellant was required to carry out under the Contract; as events transpired this included the original contract works and the rectification work;

(b) what, in addition to the contract period, was a reasonable time within which the appellant ought to have executed the original contract works and the rectification work;

(c) that the appellant had failed to execute the work within that reasonable time;

(d) that, to the extent the appellant proffered explanations of why the work had not been executed within that reasonable time, those explanations were unacceptable.

180 As I shall explain, the appellant’s case was, essentially, that this was the way the respondent was required to prove her case and that she had failed to do so.

181 Secondly, in my view, the respondent was also entitled to seek to prove lack of due diligence by establishing a case of delay in progress during construction. This appears from both *Stubbs* and *Hooker*. On this basis she could have established a failure to carry out a reasonable amount of work by a given time; that that period of time be measured by reference to all the work to be performed under the Contract or, in absolute terms, by reference to a lack of activity on site over a significant period that could not be satisfactorily explained. The onus of proving lack of due diligence was on the respondent. If the facts established by the respondent are capable of giving rise to an inference of lack of due diligence, the appellant may discharge any evidentiary onus that may pass to it, by explaining why the work progressed at that rate: see *Hobbs*. That evidence should be “sufficient ... to turn the scale”: *Brady v Group Lotus Car Cos plc* [1987] 3 All ER 1050 at 1059 (CA) per Mustill LJ. ‘

56

The evidence relied on by the owners, as referred to above, establishes that before the Date of Practical Completion of 19 September 2012, in the period 12 – 19 August 2012, the owners were writing to the builder demanding that it carry out and complete specific items of work referred to. The fact that this correspondence was sent before the date for Practical Completion indicates to me that it was possible for the builder to attend to the issues that were being raised by the owners and bring the works to practical completion by the Date for Practical Completion.

57 On 7 October 2012 after the Date for Practical Completion, the owners wrote again to the builder setting out a list of 15 items of work that they said needed to be attended to.

58 Some of the items referred to in this letter indicate that substantial work remained to be carried out. The owners referred to:

> 'Finish all brick works, face bricks and sand stone immediately. Damage sand stone and face bricks will not accepted'
>
> Fix exposed rusted RIO in concreted slab in front of laundry door from hall way.
>
> Roof tiles not finished and still cause damage to timber framing
>
> Fix up stair all ceiling joists to a acceptable level
>
> Fix up stair all wall stud to an acceptable alignment in one surface line'

59 The owners' letter of 7 October 2012 has not been contradicted by the builder. I accept it as establishing that the builder had not brought the works to practical completion by the date for Practical Completion of 19 September 2012. Further I accept the owners' letter of 7 October 2012 as establishing that as of that date there was still work to be completed which was of a substantial character as opposed to being made up of minor omissions and defects which did not prevent the works being reasonably fit for their intended use.

60 Neither the evidence in these proceedings, the way in which the proceedings were conducted, nor the parties' final submissions concentrated specifically on the reasons why the builder did not achieve practical completion by 19 September 2012 and what if any factors stood in its path. However the evidence that I have referred to as disclosed by the owners correspondence of 12 August, 19 August and 7 October 2012 and the fact that the builder did not achieve practical completion by the Date for Practical Completion persuades me that at least up to 7 October 2012 the builder had failed to proceed with the works with due diligence. In circumstances where the evidence discloses that the builder had not attended to items of incomplete work by the date for practical completion and in addition was unable to point to any claim for an extension of time to that date, I infer that the builder has failed to proceed with the execution of the works with due diligence and with the degree of efficiency and promptness necessary to achieve that contractual objective.

61 On 6 January 2013 the owners wrote to the builder complaining about its performance. Significantly they stated that the builder was 4 months behind the contract schedule for the lock up stage and that there were small defects and incomplete work to be attended to. The builder responded on 6 January 2013 and stated that it would do no further

work until the owners had fixed the payment situation. The builder also stated that the owners had made many changes to the plans, inferring that delay was attributable to them.

62 It is convenient at this point to consider the second ground relied upon which also has a connection with the issue of whether the builder failed to complete the work with due diligence.

**Suspension of the Works**

63 Clause 21 of the contract allowed the builder to suspend the works if the owners failed to make a payment in the time required by item 5 of Schedule 2. The builder was required to give a written notice of suspension to the owners.

64 The owners address the suspension issue in their written submissions stating that the builder suspended without cause.

65 The builder's email of 6 January 2013 stated so far as is relevant:

> 'I have decided it that I am not going to any more works for you until you have fixed the payment'

66 Although the builder's email was short and informal, the issue is whether it was a notice of suspension under clause 21. Clause 21(a)(i) and (b) stated:

> 'Should the **Owner fail to**:
>
> (i) pay or cause to be paid any payment or any part thereof including an amount of GST was in the time required by **Item 5 Schedule 2**;
>
> then the **Builder** may, without prejudice to his right to determine this contract, suspend the works.'
>
> 'The **Builder** is to give notice in **writing** of any suspension under this clause to the **Owner**.'

67 In *Hometeam Constructions Pty Ltd v McCauley* it was held in connection with a Notice of Default that:

> 'The Notice of Default should be construed non-technically, in accordance with business common sense, fairly in its context; the question was how a reasonable recipient would understand it.'

68 In my view the builder's suspension email should be construed in an identical manner to that stated in connection with a notice of default in *Hometeam Constructions Pty Ltd v McCauley.*

69 The builder's notice construed non-technically, in accordance with business common sense and fairly would I find lead a reasonable recipient to understand it as stating that the builder was stopping work until such time as the owners had paid to it money due under the contract.

70 In considering the builder's email of 6 January 2013 it is appropriate in my view to have regard to the fact that at that time the builder had outstanding claims for variations as referred to in the affidavit of Mr Lee sworn on 8 November 2013. At paragraphs 48 – 60 Mr Lee refers to a number of variation claims which total $39,430.00. The builder's variation claims were given in the period 5 July 2012 – 10 December 2012.

71 The owners submissions are that all of the builder's progress claims had been paid in their entirety and that as a result there could be no suspension under clause 21(a)(i). The owners further submit that the builder's variation claims should fail because the builder failed to comply with the contractual procedures as regards carrying out variations.

72 In the builder's cross application I have the considered its variation claims and have concluded that its claims for variations were not maintainable because the builder failed to comply with sections 6 and 7 of the Act as well as clause 14(d) of the contract as the variations the subject of its claims were not detailed in writing and signed by the parties to the contract. I have also found that the owners had paid the builder's claims for progress payments 1 – 6 by 10 December 2012.

73 In the builder's cross application I have also had regard to the fact that the builder's progress claim 007 was dated 14 December 2012 and was in the sum of $26,558.00 excluding GST. The amount claimed is consistent with the progress claim schedule contained in its quote 7064 dated 18 June 2011, which was a contract document. The stage reached was '90% Render Work is Completed'. There is no evidence that progress payment 007 was paid by the owners. Progress claim 007 is to be found in Mrs Mac's statement referred to at paragraph 71, and at page 345 of Volume 1 of the Agreed Bundle. Mrs Mac has given un-contradicted evidence that she agreed with Mr Lee of the builder that progress claim 007 would be paid by the owners when the builder gave the 'Council a plan for the front fence and satisfy Council's requirements'. Her evidence is that on 16 January 2013 the builder provided her with a front fence plan which she submitted to Council.

74 Mr Mac had another version of events as regards progress claim 007. He states in his affidavit of 1 August 2014 that in late January 2013 he had a conversation with the builder when he was asked when he was going to pay progress claim 7. Mr Mac refused to pay and stated that he would pay when certain conditions he imposed were met. The builder agreed to finish the waterproofing as a condition to payment. Mr Mac's evidence is that the waterproofing was finished on 7 February 2013. I find that the owners were obliged to pay progress claim 7 on that day.

75 I find that it was on 16 January 2013 when the builder performed its part of the agreement with Mrs Mac to give the Council a plan for the front fence and satisfy Council's requirements, which I find in context of the conversation referred to, were the council's requirements relating to the front fence. However for the reasons in the preceding paragraph I find that as at 7 February 2013 progress claim 007 in the sum of $26,558.00 plus GST became payable by the owners.

76 The consequence of the above findings in connection with the suspension issue is that in these proceedings and in the cross application I have found that as at 10 December 2012 the owners had paid progress claims 1 -6, that progress payment 007 only became payable on 7 February 2013 and that the owners were not liable to pay the builder's variation claims.

77 It follows from these findings that the builder did not have the right to suspend the works when it did on 6 January 2013.

78 There is the further issue of whether that state of affairs continued to 23 February 2013, the date of the owners' solicitor's letter purporting to terminate the contract. The parties' final submissions do not address this issue. The decision in *Shepherd v Felt and Textiles of Australia Ltd* that if a valid ground existed for termination, a party can later justify termination of the contract by reference to that ground even if that ground was not relied upon at the time of termination must, in my view, mean by reference to the 'time of termination' that the grounds now relied upon must have existed as at 23 February 2013.

79 In connection with issue of whether the builder failed to complete the work with due diligence, I have found that up to 7 October 2012 the builder had failed to proceed with the works with due diligence. In addition the evidence discloses that at 6 January 2013 the owners were stating to the builder that there were small defects and incomplete work to be attended to. The builder then without cause suspended the works with the result that I find that as at 23 February 2013 it had failed to carry out the work with due diligence.

**Defective work – Failing to proceed with the works in a competent manner**

80 In connection with the defective work issue, the owners rely on giving the builder various letters and lists requiring rectification of defective work on 15 July 2012, 29 July 2012, 12 August 2012, 19 August 2012 and on 7 October 2012.

81 Clause 28(a)(iv)b) of the contract provided that the builder failing to remove or remedy defective work, such that the works were materially affected would be a cause of default upon which the owners could rely in order to issue a notice of default.

82 While the contract did not provide for the owners giving the builder notice requiring it to rectify defective work, nonetheless clause 28(a)(iv)b) made the existence of defective work a cause of default which triggered the right to issue a default notice.

83 The issue is in my view is whether as at 23 February 2013 the defective work referred to in the owners letters and lists as referred to above remained un-remedied. As stated above, the decision in *Shepherd v Felt and Textiles of Australia Ltd* that if a valid ground existed for termination, a party can later justify termination of the contract by reference to that ground even if that ground was not relied upon at the time of termination must, in my view, mean by reference to the 'time of termination' that the ground of un-remedied defective work as relied upon must have existed as at 23 February 2013

84 The owners have not provided any evidence that there was defective building work that could not be remedied as at 23 February 2013. While they wrote numerous letters regarding defective work, the last of those letters was written on 6 January 2013 and then only in relation to small defects. The evidence does not support a finding that as at 23 February 2013 defective work was a valid ground for terminating the contract.

85 For the above reasons I find that the owners were not entitled to rely on their letters lists and demands regarding defective work to the builder as a valid ground for terminating the contract as at 23 February 2013 on the basis of failing to proceed with works in a competent manner.

**Failure to comply with clause 12 of the contract, namely to comply with the requirements of local authorities**

86 Under this heading the owners rely on the builder's failure to comply with clause 12 of the contract, namely to comply with the requirements of local authorities as an existing ground that could be relied upon as at 23 February 2013 to justify termination of the contract

87 Clause 12 of the contract required the builder, among other things, to comply with and give all notices required by New South Wales legislation or any regulation or by-law of a local authority or public service company or authority which had jurisdiction over the works.

88 Clause 28(a)(iv) a) provided that if the builder was in breach of the contract in that it refused or persistently neglected to comply with clause 12, that would be a cause for the owners to terminate the contract.

89 The issue is whether the owners can justify termination of the contract by reference to this ground. The owners deal with this issue extensively in their submissions.

90 The evidence in connection with issue is dealt with in the owners' retaining walls and ground level claim which is factually complex. However relevant evidence emerges from the owners submissions.

91 The owners rely on the fact that on 6 March 2012 an inspector from the City of Ryde inspected the works being undertaken by the builder. The inspector noted that the builder had constructed a block wall along the perimeter boundaries and the walls had not been shown on plan and the site was in an overland Path. The builder was advised to demolish and remove the walls or seek a section 96 modification.

92 The owners also rely on the fact that on 10 July 2012 the City of Ryde ordered the owners to demolish and remove the unauthorised retaining wall on the southern side of their property and the retaining wall adjoining the swimming pool area because the building work referred to had been carried out without the benefit of a prior development consent and construction certificate.

93 No doubt the City of Ryde's order of 10 July 2012 prompted the builder to make a section 96 modification application which was dealt with by the Council on 21 January 2013. The section 96 application sought approval for the retaining wall on the southern side of the property and the retaining wall adjoining the swimming pool area.

94 I find that the builder complied with the 6 March 2012 City of Ryde Building Inspection Report by making a section 96 application, I do not consider that it was in breach of clause 12 of the contract as regards the requirements of that document. I also find that by making a section 96 modification application in response to the City of Ryde's 10

July 2012 order, the builder was not in breach of clause 12 of the contract in connection with that order, because of the modification application.

95 The City of Ryde did not as part of its Section 96 consent specifically require the demolition of the block wall.

96 On 21 January 2013, before the contract was terminated by the owners, the City of Ryde issued Section 96 Consent No MOD2012/0135 dated 21 January 2013 which allowed, inter alia, 'Retaining walls to …southern boundary'. The relevant evidence is at page 350 of exhibit 1. I find that as 21 January 2013 there was no outstanding notice issues by the City of Ryde in connection with the retaining walls the subject of its 10 July 2012 order.

97 For the reasons set out above I find that the owners were not entitled as at 23 February 2013 to rely on the fact that the builder had persistently neglected to comply with clause 12 of the contract, namely to comply with the requirements of local authorities as a ground which justified terminating the contract.

**Failure to complete the works by the Date for Practical Completion**

98 Finally, the owners rely on the fact that the builder had failed to complete the works by the Date for Practical Completion as a ground which as at 23 February 2013 justified them terminating the contract.

99 In my view the fact that the builder had not achieved practical completion by the due date of 19 September 2012 would have justified termination as at 23 February 2013.

100 My finding that there was no substance to the builder's extension of time claims reinforces this conclusion. In that regard the builder had taken no action to protect its position under clause 26 of the contract in connection with its extension of time claims.

101 As a result of my findings in the owners' favour in connection with the builder's:

(a) Failure to proceed in a regular and diligent manner;

(b) Unjustified suspension of the works; and

(c) Failure to bring the works to practical completion by the Date for Practical Completion,

I find that at 23 February 2013 the owners were entitled to terminate the contract and in that regard the defaults by the builder, as found, were incapable of remedy.

**The owners' claims against the builder**

102 The owners' submissions identify 41 heads of claim which make up their claims against the builder.

103 The builder addresses a number of these claims in its submissions by stating that the owners' claims are incomplete work. The submission is developed by stating that the owners are unable to claim for incomplete work because:

(a) They repudiated the contract ;

(b) The due Date for Practical Completion had not been reached; as at 23

February 2013; and

(c) As a result of the owners taking possession of the site and excluding the builder therefrom, the works are deemed to be practically complete pursuant to clause 22 of the contract and as a result the works cannot be said to be incomplete.

104 The builder's submissions as described above fail because I have found that the owners were entitled to terminate the contract as at 23 February 2013. That right to terminate does not arise as a result of their former solicitor's letter of that date but because the owners were as at that date entitled to terminate because of the defaults that I have identified in paragraph 101 of these Reasons for Decision. The builder's submissions also fail because I have found that the builder was not entitled to the extensions of time that it claimed in its 10 September 2012 letter. Further, because I have found that the owners were entitled to terminate the contract on 23 February 2013, they were I find entitled to take possession of their property. The contract being lawfully terminated came to an end on that date with the result that contrary to the builder's submission, clause 22 of the contract had no application or effect in order to deem the works to have been practically completed.

105 As a result of the builder's breaches of the contract which entitled the owners to terminate they will be entitled to the damages to place them in the same position as if the contract had been performed.

106 In *Hungerfords v Walker* 171 C.L.R., 125 at 143 the High Court stated:

> "The Plaintiff is entitled to full compensation for the loss which he sustains in consequence of the defendant's wrong, subject to the rules as to remoteness of damage and to the Plaintiff's duty to mitigate his loss. In principle, he should be awarded the compensation which would restore him to the position he would have been in but for the defendant's breach of contract or negligence."

107 This is the basic principle set out in *Robinson v Harman (1848) 1 Ex.850*:

"that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed."

108 The builder's submissions make brief comments on the 41 items which make up the owner's claims. I note that the owners cross refer these items in their submissions with the Amended Scott Schedule in Reply and Joint Report signed by their experts on 29 August 2014. I will call this document the 'conclave report'. There is also the fact that the owners' expert produced a report dated 12 December 2014, which is exhibit F in the proceedings.

109 In order to deal with the owners' claims, I will deal with each item of claim in turn. The order in which the owners' claims are dealt with is a descending order of quantum as in the owners' submissions, rather than the order in which they appear in the scott schedule and the experts' joint report.

110 I note that so far as quantum is concerned that the experts are unable to agree on a builder's margin. The owners' expert states that the margin should be 25%. The builder's expert states that the margin should be 20%. The experts do not explain why

they settled upon the margin that they refer to. I have decided that I will use the builder's more conservative margin of 20% in calculating rectification costs.

**Item 1 Plumbing, drainage and gas – amount claimed $22,499.00**

111 The builder states the amount for this item is nil. The builder's position as I understand its submissions is the owners should fail in connection with this item because it relates to uncompleted work. However I have found in favour of the owners on the termination issue which entitles them to the cost to complete.

112 I note that the conclave report records the owners expert as stating 'OE1 could not support claim'.

113 However in exhibit F, the owners' expert considered this item on the basis of the cost to complete the plumbing, drainage and gas works and estimated the cost to complete the plumbing works to be $19,652.00 excluding GST. The builder's expert has not filed evidence contradicting this estimated cost. There is no suggestion so far as I am aware that this work could not be categorised as uncompleted. In any event as I have stated the builder submits that this item of claim relates to uncompleted work.

114 The owners' evidence regarding the cost of completion of the plumbing works is not particularly clear. They have produced a quote from First State Plumbing for $15,840.00 inclusive of GST. They have also provided a tax invoice dated 2 October 2013 from First State Plumbing in the sum of $2,066.00 inclusive of GST in relation to what appears to be additional work, over and above the original quotation. There is a further tax invoice dated 17 October 2013 from First State Plumbing which again appears to be in connection with additional work over and above the original quotation in the sum of $393.25 inclusive of GST. Mrs Mac annexes a further tax invoice dated 8 December 2013 from First State Plumbing in the sum of $3,817.00 inclusive of GST to her affidavit of 18 December 2014.

115 This tax invoice relates to excavators, loaders, dirt removal and labouring for eight hours. I am not persuaded that the tax invoice dated 8 December 2013 relates to the cost of completion of the plumbing works. That is certainly not clear or apparent or even suggested from the face of the tax invoice.

116 Based on the evidence referred to above I find that the owners have produced evidence which satisfies me that the costs of $15,840.00 + $2,066.00 + $393.25 = $18,299.25 are reasonable in completion of the plumbing works. The owners have not actually produced proof that these amounts have been paid to First State Plumbing. Nonetheless I accept their quotes and tax invoices, with the exception of the tax invoice dated 8 December 2013, as evidence of the reasonable cost to carry out this work.

117 The owners have been successful in establishing $18,299.25 in connection with this head of claim. Since the costs provided are from a contractor, I find that there is no reason to apply overhead, margin or profit to the cost, as often occurs when damages are assessed based on an expert's estimation. These costs would be included in the contractor's figures and on that basis there is no reason for those allowances to be

added.

**Item 2 Retaining walls and ground levels amount claimed - $21,668.00**

118 The builder states the amount for this item is nil. The builder's position as I understand its submissions is the owners should fail in connection with this item because it relates to uncompleted work. However I have found in favour of the owners on the termination issue which entitles them to the cost to complete.

119 The conclave report records that there is no agreement between the experts in connection with this item of claim. The conclave report records that the owners' expert has calculated the costs to rectify as $16,416.75. He then adds margin and GST to that amount.

120 The basis of this claim is that the builder constructed a retaining wall along the south western boundary of the site without council approval.

121 The fact is that on 10 July 2012 the City of Ryde ordered the owners to demolish and remove the unauthorised retaining wall on the southern side of their property and the retaining wall adjoining the swimming pool area because the building work referred to had been carried out without the benefit of a prior development consent and construction certificate.

122 I find that, no doubt in response to the 10 July 2012 order, the builder applied for a section 96 modification application which was dealt with by the Council on 21 January 2013. The builder's section 96 application sought approval for the retaining wall on the southern side of the property and the retaining wall adjoining the swimming pool area.

123 On 21 January 2013 the City of Ryde issued Section 96 Consent No MOD2012/0135 dated 21 January 2013 which allowed, inter alia, 'Retaining walls to …southern boundary'. The relevant evidence is at page 350 of exhibit 1.

124 However the City of Ryde's Section 96 Consent dated 21 January 2013 stated that the finished levels on the southern boundary should be in accordance with an Aztec Engineer's Drawing 170210 Revision G November 2010.

125 Clause 1(c) of the contract required the builder to ensure that the work under the contract would comply with the conditions of a development consent, or complying development certificate and any construction certificate.

126 To the extent that the builder did not comply with the development consent's the owners will be entitled to damages to overcome any such failure. The measure of such damages will be the cost of the work necessary to comply.

127 The owners' evidence is if I may say difficult to follow. The gist of it is that the builder did not comply with the original development consent giving rise to the City of Ryde's 10 July 2012 order. Further as I understand the evidence, because the builder's section 96 modification application was not successful it became necessary for the owners to make a further application, which they did giving rise to an updated construction certificate being issued by the City of Ryde on 26 April 2013.

128 In order to see if some order might be inserted into this aspect of the case I requested the experts to confer to see if some agreement might emerge which might clarify or simplify issues.

129 The experts have produced a handwritten document which is Exhibit E. They have concluded that there are inconsistencies in the construction certificate approved plans so far as the retaining wall on the southern boundary is concerned. The experts stated:

> '1. The experts agree that the Removal of the section of retaining wall from the front corner of the building to the SW boundary corner, a distance of approximately 6.0 m was required to achieve Compliance for the provision of overland flow path for PCA approval.
>
> 2. The necessary work included removal of fill material to lower the rainwater tanks to the level specified by AZTEC Drawings Revision 'I'.
>
> 3. The experts agree that the approved Hydraulic design plans are not consistent with the approved architectural plans and vice-versa.
>
> 4. In respect of the various reference dates of our inspections of the subject property it is a common opinion that the site level work was incomplete'.

130 Having regard to the experts agreements I find that a removal of a section of a retaining wall is necessary as stated by them, and that removal of fill material is required as part of that process.

131 The amount claimed by the owners has been assessed by their expert as relating to carrying out the following work:

(a) Remove imported fill - $8,463.00;

(b) Remove the extended retaining wall - $858.75; and

(c) Build a new retaining wall - $7,095.00.

132 The opinion of the expert supports the removal of imported fill and removal of the extended retaining wall. However they do not address the need for building of a new retaining wall. Both the owners' expert and engineer gave evidence in their reports tendered in these proceedings that stated that a new retaining wall was required. Since they did not state that such work was required in exhibit E, I will not allow a component for that work.

133 Based on the experts' common position I will allow the owners the sum of $8,463.00 + $858.75 = $9,321.75 + 20% margin + GST. The total amount found in the owners favour is $12,304.71.

**Item 3 Electrical works amount claimed - $10,802**

134 The Joint Expert Report dated 31 March 2014 states at item 15 in relation to Electrical Wiring 'Conclave outcome is that OE1 could not support claim'.

135 However in exhibit F, the owners' expert in his report dated 12 December 2014 considered this item and estimated the cost to complete the electrical works to be $9,973.89 excluding GST. The builder's expert has not filed evidence contradicting this estimated cost.

136 The builder's position as I understand its submissions is the owners should fail in

connection with this item because it relates to uncompleted work. However I have found in favour of the owners on the termination issue which entitles them to the cost to complete.

137 The owners' expert started by costing the contract work based on the scope of works using Cordell's at $19,652.00 excluding GST. He ascertained that the owners had paid progress payments of $9,973.89 in connection with electrical work, leaving a balance for uncompleted work of $9,973.89 which he breaks up and details on page 6 of exhibit F.

138 I accept Mr Nisbett's evidence which was un-contradicted.

139 However the owners claim $10,802.00 for this work. This amount is made up of $9,500.00 payable to the builder's subcontractor of which $9,000.00 has been paid with the balance of $500.00 owing and another invoice in the sum of $1,302.00 claimed.

140 The owners rely on Mrs Mac's evidence as contained in her affidavit sworn 18 December 2014, which forms part of exhibit A. Paragraph 3.3 of her affidavit deals with the relevant costs. Mrs Mac states that the owners retained the builder's electrical subcontractor to complete the work and paid $9,000.00 for that to be done. In addition the owners state that they expended a further sum of $1,302.35 in connection with the electrical work.

141 The invoices supplied by the electrician to the owners are basic. Without the owners experts' evidence of cost to complete, they would be of little evidentiary value. However they are dated after the date of termination by the owner and therefore relate to work carried out post termination. I accept this evidence on the basis that it confirms the owners' expert's opinion of the cost to complete electrical work in the sum of $9,973.89.

142 As to the owners evidence that they expended a further sum of $1,302.35 in connection with the electrical work, I have considered the invoices annexed to Mrs Mac's affidavit to substantiate this expense. Those documents do not establish that they relate to electrical work. Because the invoices annexed to Mrs Mac's affidavit do not substantiate this expense as relating to electrical work, I do not accept her bald statement that the documents evidence the carrying out of electrical work.

143 I will find for the owners in the sum of $9,500.00 in relation to this item. I also find that there is no reason to apply overhead, margin or profit to the cost, as often occurs when damages are assessed based on an expert's estimation. These costs would be included in the electrician's figures and on that basis there is no reason for those allowances to be added.

**Item 4 Eaves gutters and downpipes amount claimed - $10,701**

144 The Joint Expert Report dated 31 March 2014 states at item 1 on page 30 in relation to Eaves Gutters and Downpipes Responsibility not agreed Rectification not agreed Cost not agreed.

145 The builder's position as I understand its submissions is the owners should fail in

connection with this item because it relates to uncompleted work. However I have found in favour of the owners on the termination issue which entitles them to the cost to complete.

146 This item according to the owners' submissions is a mixture of defective work and incomplete work.

147 The owners rely on their expert's evidence in connection with this item which is at page 610 of Exhibit 1 being his supplementary report dated 23 December 2013 at paragraph 5.3.

148 The builder's expert addressed the owner's expert's evidence in the Joint Expert Report of 31 March 2014 where his comments are recorded.

149 The owner's expert relies on the owners' photographs to conclude that the gutters do not drain adequately. This, if established, would be an example of defective work.

150 He further observes that downpipes installed are a mixture of 50mm and 90mm downpipes, but the relevant contractual drawing requires 90mm pipes as depicted on drawing 170210. I note that the relevant information is on Sheet 5. This, if established, would also be an example of a breach of the contractual warranty in clause 1(b) of the contract in that there has been a failure to comply with the contractual drawings.

151 The owner's expert also states that there is guttering work which has not been completed.

152 As a result of the above matters the owners' expert has concluded that the entire eaves gutters and downpipes will require removal and replacement. He then costs that work at $7,708.00 and concludes that a quote for that work in the sum of $7,500 excluding GST is acceptable.

153 The builder's expert comments upon the owners' photographs and states that the details of the depth of any asserted ponding is not provided to enable evaluation. He states that the photos provided by the owners are inadequate to justify a replacement of the gutters which were installed by the builder. Comment is also made upon a document provided by First State Plumbing who were engaged by the owners to carry out various items of work. A First State Plumbing document attached to the owners' expert's supplementary report dated 22 September 2013 states 'It seems that gutters do not have adequate fall to drain water to downpipes.'

154 The builder's expert criticises the statement by stating that First State does not appear to have inspected or tested the gutter as there are no details provided to support the statement. Nonetheless I note that First State plumbing state that their comment is part of a Preliminary Observation.

155 The builder's expert states that if there are five locations where the gutter falls require adjustment, the reasonable cost is calculated by him as $1,070.00.

156 In *Khan v Kang* [2014] NSWCATAP 48 the Appeal Panel stated at [49 – 50]:

> 'It is not the case that a quotation to rectify or complete work can never be evidence supporting a claim for defective or incomplete work.

> A quotation from a supplier willing to rectify defects or complete incomplete work can, depending on the circumstances and the nature and content of the quotation, constitute evidence of the defects or incomplete work and of the amount required to remedy the defective work or complete any incomplete work. For example, if the person providing the quotation was suitably qualified or experienced, inspected the work, identified defects or incomplete work on that inspection, recorded his or her observations in the quotation and gave a price to rectify or complete the work, it is difficult to understand why that quotation would not provide evidence in support of a claim for defective or incomplete work. The weight to be given to the evidence would, of course, depend upon many factors. Nonetheless, it would be wrong to conclude that simply because an applicant relied only upon a quotation or quotations for the rectification or completion of work that there was no evidence to support the claim that the work was defective or incomplete.'

157 First State Plumbing document dated 22 September 2013 attached to the owners' expert's supplementary report is not a quotation. Nonetheless by parity of reasoning the same comments as set out above in the passage quoted may be applied to it. However given the very brief observation made regarding the adequacy of falls, I will not give that evidence great weight.

158 I agree with the builder's expert that the owners' photographs are not sufficiently persuasive to justify the removal and replacement of all guttering installed at the residence by the builder. In addition, the quote relied upon by the owners expert as to quantum does not prove any detail such as it could provide evidence of defective work in the context stated by the Appeal Panel in *Khan v Kang* as quoted above.

159 The owners' evidence does not persuade me that the guttering installed by the builder needs to be removed and replaced. However I am satisfied that the builder's work was defective in that undersize downpipes were used and that the work was incomplete in the details stated by the owners' expert. This evidence was not contradicted by the builder's expert.

160 I will calculate the cost of the necessary rectification work by using the Aspect Constructions quote in the sum of $7,500.00 excluding GST as a base. I will allow $330.00 for the rain head element of uncompleted work. For the downpipes, I will allow $1,600.00 as evidenced by a First State invoice at page 32 of Mrs Mac's affidavit sworn 18 December 2014, having deducted a notional $100.00 for a patio drain.

161 The total amount to be allowed in favour of the owners in connection with this item will be $1,600.00 + $330.00 =$1,930.00+ $386.00 as 20% margin = $2,316.00 + 231.60 GST = $2,547.60.

**Item 5 Front fence amount claimed $10,142**

162 There is an agreement by the expert's in connection with this item in the Joint Expert Report dated 31 March 2014.

163 The agreed cost is $5,900.00 plus $1,784.00 for a footing, plus margin and GST.

164 The amount found in the owners favour is $7,684.00 + 20% margin plus GST = $10,142.88.

**Item 6 Rainwater tanks amount claimed - $9,682**

165 The builder's position as I understand its submissions is the owners should fail in connection with this item because it relates to uncompleted work. However I have found in favour of the owners on the termination issue which entitles them to the cost to complete.

166 I accept that it is common ground that the builder did not supply and install rainwater tanks.

167 The builder's quotation clearly provides for '5540 litre x 3 rain water tanks and moter (sic) supply by owner.'

168 The Joint Expert report states in connection with this item 'Conclave common ground is that the Contract documentation stipulates Owner will supply items claimed'.

169 I find that on the plain meaning of the quotation the owners were to supply the 5540 litre x 3 rain water tanks and motor. There is no reason in my view to disregard the plain meaning of simple words and the agreement of the parties experts.

170 This item of the owners' claim is dismissed.

**Item seven Front and side facade amount claimed - $8,104**

171 The builder's position as I understand its submissions is the owners should fail in connection with this item because it relates to uncompleted work. However I have found in favour of the owners on the termination issue which entitles them to the cost to complete.

172 The Joint Expert report states in connection with this item 'Defect and liability not agreed.

173 This item relates to whether the design of this aspect of the works was varied. The relevant drawing is one drawn by the builder, drawing A/NM008.

174 The builder's quote stated, inter alia, Architecture and Landscape Plans drawing # A/NM000 – Rev J to A/NM019 would apply.

175 The owners' expert states that he observed that the 'parapet wall beams finish approximately 100mm below the balcony soffit'. He then states that he observed drawing A/NM008 which showed the wall beam finishing 600mm below the balcony soffit. I assume when the owners' expert refers to 'wall beam' he is referring to the 'parapet wall beams' as referred to in the opening sentence of this paragraph. He does not attach a copy of the drawing to which he refers. Nor have I been referred to any document in Exhibit 1 which shows drawing A/NM008 revision J, although I note that the drawing is at page 146 of Exhibit 1. I am unable to observe whether or not drawing A/NM008 revision J provides the detail or information that the owners' expert refers to. Finally the owners' expert concludes 'the absence of the beams is a defect'. What absent beams are being referred to, is not clear to me, nor so far as I can ascertain, shown on the drawing.

176 The builder's expert does not agree. He states that the soffit line referred to by the owners expert is shown in one of the structural plans and in any event the design was

changed in A/NM008 revision L a copy of which he has attached to his report, such copy having been signed by one of the owners. A/NM008 revision L is dated and stamped after the contract was entered into.

177 The owners' expert has not provided the level of detail or explanation in his evidence that gives me any comfortable satisfaction that the matters that he refers to are correct. Unfortunately this is a difficult technical issue that the owners' expert has failed to illuminate with any clarity at all. In addition the builder's expert has provided a plausible explanation that the builder has followed the contractual documents. After all the document which the builder's expert asserts has been put into effect was signed by one of the owners.

178 I find that the owners have not established this item of claim on the balance of probabilities. The claim is dismissed.

**Item 8 Garage door amount claimed - $6,900**

179 The builder's position as I understand its submissions is the owners should fail in connection with this item because it relates to uncompleted work. However I have found in favour of the owners on the termination issue which entitles them to the cost to complete.

180 The builder's expert has agreed that this is incomplete work. Mrs Mac's affidavit sworn 18 December 2014 attaches the necessary evidence to establish that the owners have paid for this item.

181 I find that the owners have established that this item formed part of incomplete building work and that they have paid $6,900.00 for the supply of this item. I will make an award in their favour in this amount.

**Item 9 Sewer and stormwater drainage amount claimed - $6,114**

182 The builder's position is that the owners' entitlement for this item was nil.

183 The Joint Expert Report states in connection with this item, Responsibility not agreed. Rectification not agreed. Cost not agreed.

184 The owners' expert has dealt with this item in his supplementary report. He states that he inspected the defective items referred to in a quotation from First State Plumbing dated 15 October 2013, a copy of which was attached to his report. That quotation dealt with a number of subjects including storm water drainage. The expert stated that what he observed was that the sewer and stormwater pipes had been laid with inadequate ground cover causing the pipe to be damaged in isolated areas. He also stated that the pipes had been laid without any base or surrounding aggregate for protection.

185 Photographs were attached to his report. He stated that in his opinion there were defects in the storm water and sewage work carried out by the builder in that drainage pipes had not been installed in accordance with AS3500. 5:2000 4.14 and Table 4.6 which he attached to his report. His method of rectification was to remove the defective

sewer and stormwater pipes, excavate trenches to correct levels and reinstall existing and new PVC drainage pipes. He estimated the cost of that exercise to be $6,114.00 the amount claimed by the owners.

186 The builder's expert's comments are contained in The Joint Expert Report. The builder's expert does not contradict the owner's expert about whether defective work was in fact performed. I accept the owners' expert's evidence in that regard.

187 The builder's expert then makes observations regarding the First State Plumbing quote dated 15 October 2013 and the way in which the owners' expert has assessed the rectification costs.

188 I prefer the evidence of the owners' expert in this item. He has inspected the work the subject of the claim.

189 The owners will be entitled to an order in their favour in the sum of $6,114.00 plus margin of 20% and GST. The amount found in the owners favour is $8,070.48.

**Item 10 Waterproofing to planter boxes amount claimed - $3,264**

190 The owners' expert's evidence is that interior of the garden box has not been cement rendered or waterproofed. The builder's position in connection with this item is that it is not supported by evidence. I accept the evidence of the owners' expert.

191 The issue in connection with this item is what was the contractual requirement?

192 The builder's quote states under the heading 'Waterproofing' 'Waterproofing by builder'.

193 The builder's expert states that waterproofing is somehow grouped with wall and floor tile and then states:

> 'I therefore interpret that the waterproofing referred to is the internal wet areas, which has been carried out and completed.'

194 I do not regard it to be the province of the builder's expert to be offering interpretations regarding the construction or interpretation of the builder's quote if the meaning of the quote or a part of it is not clear. In fact I regard that as nothing more than advocacy by the builder's expert on behalf of his client. There is no relevant reason why the subject matter of waterproofing should be in any way limited exclusively to floor tiling or wall tiling. Waterproofing is a separate subject matter which I construe as covering all waterproofing work that is required in connection with the performance of the works. The quote states that 'Waterproofing is to be done by the builder'.

195 I will find in the owners' favour in connection with this item. The amount found will be $2,474.00 + 20% margin + GST = $3,265.68.

**Item 11 Concrete patio amount claimed - $3,162**

196 The builder's position in connection with this item is that it is not supported by evidence.

197 The Joint Expert Report states in connection with this item Agreed incomplete work, 'If found' cost agreed $2,396.00.

198 Since I have found for the owners on the contract termination point they will be entitled

to completion costs.

199 I will find in the owners' favour in connection with this item in the sum of $2,396.00 plus 20% margin and GST. The amount found in the owners' favour is $3,162.72.

**Item 12 Falls to drainage points on balcony amount claimed - $2,725**

200 The owner's expert observed the work when it had a membrane applied but not tiled over. The slab was observed to have low areas which in his opinion would allow moisture to pond and cause efflorescence. The owners' expert's opinion was that rectification was required.

201 After that report the builder tiled over the balcony preventing inspection by the builder's expert.

202 The builder's expert states that the builder was only required to reach lock up. I cannot see that as being relevant.

203 I accept the owners' expert's evidence in connection with this defect item. I am satisfied based on the owners' expert's evidence that there has been a breach of clause 1(a) of the contract in that the slab has low areas which have not been evened out by a screed and that without rectification work efflorescence will occur.

204 I will find in the owners' favour in connection with this item in the sum of $2,725.00 plus 20% margin and GST. The amount found in the owners' favour is $3,597.00.

**Item 13 Broken swimming pool filter cover amount claimed - $1,610**

205 The builder's position in connection with this item is that it is not supported by evidence.

206 The Joint Expert Report states in connection with this item Agreed Item should be defective 'if found'.

207 The factual evidence has been provided by the owners that a sub-contractor to the builder broke the swimming pool filter cover at the residence. This evidence has not been contradicted. I accept the owners' evidence in connection with this item.

208 The experts are agreed that the rectification cost is $1,610.00.

209 I will find in the owners' favour in connection with this item in the sum of $1,610.00 plus 20% margin and GST. The amount found in the owners' favour is $2,125.20.

**Item 14 Other plumbing issues amount claimed - $1,942**

210 The Joint Expert Report states in connection with this item, Responsibility not agreed. Rectification not agreed. Cost not agreed.

211 The owners' expert stated in his supplementary report that he had regard to the First State Plumbing document dated 12 November 2013 in connection with the location of an installed ventilation pipe, the floor waste pipe to the sauna room and repairs carried out on a broken water meter. That document advised the owners of defects observed by First State Plumbing.

212 The experts are in agreement that vent pipe has been installed in a defective manner

and requires rectification.

213 The owners' expert states that he inspected the sauna room and water meter and that repairs had been carried out. The First State Plumbing quotation which is undated but for the sum of $15,840.00 attached to the owners' expert's report does not address these issues. The First State Tax invoice for $2,066.00 does refer to a broken water meter. However that tax invoice has been allowed in connection with Item 1. There is no evidence to which I have been referred about who carried out the repair to the floor waste pipe to the sauna room.

214 Given that the owners' expert has stated that repairs have been carried out to the sauna room, I will make no finding about that work, particularly in the absence of any submission that the repair had been made at the owners' instruction and expense.

215 I will allow the amount estimated by the owners' expert in connection with the rectification of the vent pipe, $265.00 plus 20% margin and GST. The amount found in the owners' favour is $349.80.

**Item 15 Northern elevation external beam amount claimed - $1,410**

216 The Joint Expert Report states in connection with this item, 'Defect and Liability not agreed'.

217 The gist of this defect item is that the builder has not constructed this element of the works in accordance with Drawing A/NM010/J which the owners' expert states, shows the northern elevation beam finishing 300mm below the floor frame. It is said by the owners' expert that the builder has constructed the works so that the beam referred to finishes flush with the underside of the wall frame. The owners' expert characterises this as a defect. In my view it is more accurate to say that there has been a failure to comply with section 18(B)(1)(a) of the Act which is a warranty that work will be carried out in accordance with contractual drawings.

218 The builder's expert's evidence is that the work has been carried out in accordance with the structural plans.

219 The owners' submissions in support of this item rely upon concessions made in cross examination by the builder's expert. The owners transcript references of 31 August 2015 at T84 16- 17 and 6-11 are said to be admissions that what was constructed was not consistent with the drawings and that the work proposed by the owners expert would deal with the discrepancy.

220 However I do not agree that the transcript establishes the concessions asserted by the owners' submissions. However the transcript does indicate that the owners have had work carried out in the area under consideration.

221 Having regard to all of the evidence in connection with this item, I prefer the builder's expert's evidence as it is more detailed and persuasive. The owners' expert's evidence relies on a dimension of 300mm which is not shown on drawing A/NM010/J. Although the builder's expert agrees that a lay person might say that the dimension referred to is

300mm, he does go on to say that consideration must be given to structural steel elements. I find that if there are conflicts or discrepancies between drawings, detailed drawings should prevail. The builder's expert has taken that course by having primary regard to the design engineer's details.

222 For the reasons provided this aspect of the owners claim is dismissed.

**Item 16 Hot water unit amount claimed - $1,805**

223 The Joint Expert Report states in connection with this item, 'Agreed incomplete work Conclave agreement 'if found' cost is $1,368.00'.

224 I have found in favour of the owners on the termination issue which entitles them to the cost to complete, including this item.

225 I will make an order in the owners favour in connection with this item in the sum of $1,368.00 plus 20% margin and GST. The amount found in the owners' favour is $1,805.76.

**Item 17 Box gutter amount claimed - $1,452**

226 The Joint Expert Report states in connection with this item, 'Agreed at Conclave' Builder's expert's scope and cost of $1,100.00'

227 I will make an order in the owners' favour in connection with this item in the sum of $1,100.00 plus 20% margin and GST. The amount found in the owners' favour is $1,452.00.

**Item 18 steps amount claimed - $1,146**

228 The Joint Expert Report states in connection with this item 'Item subject to item 12 works, if found levels are incorrect, cost of $896.00 agreed.'

229 The item 12 works in the Joint Expert Report are Retaining walls and ground levels (at item 2 above). I found that the experts agreed that:

> 'The necessary work included removal of fill material to lower the rainwater tanks to the level specified by AZTEC Drawings Revision 'I'

230 It follows in my view that because the experts agreed that removal of fill was required, the levels are incorrect. On that basis I find that the provision of steps is necessary.

231 I will make an order in the owners' favour in connection with this item in the sum of $869.00 plus 20% margin and GST. The amount found in the owners' favour is $1,147.08.

**Item 19 Garage facade amount claimed - $810**

232 The Joint Expert Report states in connection with this item, 'Agreed item'.

233 The amount for this item stated in the Joint Expert Report states is $810.00.

234 I will make an order in the owners' favour in connection with this item in the sum of $810.00 plus 20% margin and GST. The amount found in the owners' favour is

$1,069.20.

**Item 20 Builders clean up amount claimed - $950**

235 The Joint Expert Report states in connection with this item, 'Agreed incomplete work agreed cost to complete $720.00.'

236 I have found in favour of the owners on the termination issue which entitles them to the cost to complete, including this item.

237 I will make an order in the owners' favour in connection with this item in the sum of $720.00 plus 20% margin and GST. The amount found in the owners' favour is $950.40.

**Item 21 Intercom - amount claimed $750**

238 The Joint Expert Report states in connection with this item, 'This is subject to lay evidence. If found agreed cost of $750.00'

239 Unhelpfully I have not been referred to lay evidence which may be relevant to this issue.

240 The builder's quote provided for a 'One (1) intercom with camera – two way system'.

241 I assume that this item relates to incomplete work. However the owners' expert does not provide that evidence at paragraph 5.4 of his supplementary report or in his original report.

242 The owners have not provided any evidence to support this item of their claim. For the reasons that there is neither lay nor expert evidence to establish that this item of work was either defective or incomplete, this item of the claim is dismissed.

**Item 22 Skylights amount claimed - $726**

243 The Joint Expert Report states in connection with this item, 'Agreed at Conclave 25/3/14 cost of $550.00'.

244 I will make an order in the owners' favour in connection with this item in the sum of $550.00 plus 20% margin and GST. The amount found in the owners' favour is $726.00.

**Item 23 Damage to footpath amount claimed - $528**

245 The Joint Expert Report states in connection with this item 'Item for lay evidence, no evidence as to condition of footpath prior to commencement of works.'

246 The affidavit Mrs Mac sworn 18 December 2014 annexes a photograph of the footpath at 26 January 2012. This evidence and the photographs at pages 593 and 594 of exhibit 1 satisfy me that the builder has caused damage to the footpath. I accept Mrs Mac's evidence at paragraph 3.5 of her affidavit sworn on 18 December 2014.

247 I will make an order in the owners' favour in connection with this item in the sum of $400.00 plus 20% margin and GST. The amount found in the owners' favour is

$528.00.

**Item 24 Glass panels amount claimed - $396**

248 The Joint Expert Report states in connection with this item 'Agreed incomplete work and cost of $300.00.

249 I have found in favour of the owners on the termination issue which entitles them to the cost to complete, including this item.

250 I will make an order in the owners' favour in connection with this item in the sum of $300.00 plus 20% margin and GST. The amount found in the owners' favour is $396.00.

**Item 25 Glass bricks amount claimed - $110**

251 The Joint Expert Report states in connection with this item 'Agreed at Conclave 25/3/14 cost of $84.00'.

252 I will make an order in the owners' favour in connection with this item in the sum of $84.00 plus 20% margin and GST. The amount found in the owners' favour is $110.88.

**Item 26 Letterbox amount claimed - $99**

253 The Joint Expert Report states in connection with this item 'Agreed incomplete if found agreed cost $75.00.

254 I have found in favour of the owners on the termination issue which entitles them to the cost to complete, including this item.

255 I will make an order in the owners' favour in connection with this item in the sum of $75.00 plus 20% margin and GST. The amount found in the owners' favour is $99.00.

**Item 27 Other amounts claimed by the owners**

256 The owners claim the sum of $37,854.00 for late completion under *Hadley v Baxendale,* either the first or second limb.

257 This claim ignores the fact that clause 10(c) of the contract provided the owners with the right to claim $250.00 per calendar week by way of agreed pre-estimated general and liquidated damages if the builder failed to bring the works to practical completion by the date for practical completion, as extended. The clause states that the '**Builder** is to pay or allow to the O**wner** by way of agreed pre-estimated general and liquidated damages'. (Emphasis added).

258 Clause 10(c) of the contract does not allow the owner to have the option of agreed pre-estimated general and liquidated damages on the one hand and common law damages on the other. I would go further by stating that since clause 10(c) inserts the word 'general' into the traditional liquidated damages clause, the contractual intention is that the owners' rights as to both liquidated and general damages are limited, in this case to $250.00 per calendar week. In addition I find that since the contract used the

words the '**Builder** is to pay or allow to the O**wner** by way of agreed pre-estimated general and liquidated damages' the effect was that it was mandatory for the builder to make the payment of the amount stated at item 3(a) of Schedule 2 of the Contract per calendar week, and that indicated that it was the intention of the parties that the contract excluded any right for the owner to ignore its provisions and make a claim for general damages which exceeded the amount stated in item 3(a) of Schedule 2.

259 As stated by the learned authors of Building and Construction Contracts in Australia, Second Edition at 9.730:

> 'It is very doubtful whether there can be a valid claim for unliquidated damages in the face of a liquidated damages clause: Bruno Zornow (Builders) Ltd v Beachcroft Developments Ltd (1989) 51 BLR 16.'

260 For the reasons provided above, the owners claim for general damages for late completion is dismissed.

**Item 28 Owners have paid for southern retaining wall which does not have council approval amount claimed $12,144.00**

261 This claim is advanced on the basis of an alleged agreement between the parties that if the southern retaining wall did not obtain Council approval the builder agreed to remove the wall and pay the cost to the owners. Mr Mac's evidence to this effect at paragraph 26 of his 1 August 2013 affidavit is accepted.

262 The builder submits that the work was either incomplete or deemed completed by practical completion. I have ruled that the works did not reach deemed practical completion. The work being incomplete is of no relevance in light of my finding that the owners were entitled to terminate the contract.

263 The owners submit that the southern retaining wall did not receive council approval, with the result that the builder's promise to remove the wall and pay the cost to the owners was enlivened.

264 I reject that submission. On 21 January 2013, before the contract was terminated by the owners, the City of Ryde issued Section 96 Consent No MOD2012/0135 dated 21 January 2013 which allowed, inter alia, 'Retaining walls to …southern boundary'. The relevant evidence is at page 350 of exhibit 1.

265 For the reasons set out above, I reject this item of claim.

**Item 29 Owners have bought building materials for use at the Builder's request. Amount claimed - $6,544**

266 The owners submit that there was an agreement between the parties that they would purchase building materials for the works and that the builder would reimburse them. They have produced a schedule of materials that they purchased pursuant to that agreement.

267 The builder submits that there is no evidence to support this head of claim.

268 The owners' evidence of this agreement and the fact that they purchased materials for the owner is contained at paragraph 70 and annexure A8 of Mr Mac's 1 August 2013

affidavit. Since this evidence has not been contradicted by the builder, I will accept it.

269 I find for the owners in the amount claimed of $6,544.00 in connection with this head of claim.

**Item 30 Payments to sub-contractors consultants Amount claimed - $6714**

270 The owners claim the sum of $6,714.00. In connection with payments they allege were made to the builder's sub-contractors. The relevant evidence is in Mrs Mac's affidavit sworn 18 December 2014. Mrs Mac does no more than list the invoices and assert that they were paid.

271 The builder submits that there is no evidence to support this head of claim.

272 The owners are at liberty to make payments to any person they choose. Whether the builder is liable to reimburse them for those payments is another matter.

273 The owners have not identified a cause of action or evidence in support which would entitle them to the payments they seek under this head of claim. Usually an owner may agree with the builder that the owner will pay subcontractors and there will be a deduction from the contract price on account of those payments. Here no such agreement is alleged.

274 On that basis this head of claim is dismissed.

**Item 31 Payment of half of Builder's all risk insurance Amount claimed - $3,171**

275 The owners' evidence is that in late January 2012 the builder had a discussion in which its representative said that he wanted them to pay half of the home warranty insurance and its contractor's all risk premium on the basis that they could use the insurance for a further period of six months that they would need to finish off the work. The owners also assert that they had no obligation to pay the builder's contractor's all risk premium and were misled into doing so because the builder's liability insurance would not have covered another builder. Mrs Mac states in her 5 August 2013 affidavit at paragraphs 16 and 17 that she was not sure of the law at the time and agreed to pay half of the policy in issue.

276 I do not accept that the owners were misled. Their evidence does not assert that they were. Their evidence does not assert that they paid the premium because they thought that they would have the benefit of the policy after the builder left site. Their evidence was when they made the payment they were unsure of the law at the time. Their evidence also indicates that they did not take the time to read their contract. Clause 17(e)(i) states that if the builder failed to take out works insurance, they were entitled to do so and to deduct the cost from money due to the builder.

277 The owners unwisely agreed to pay half of the builder's insurance liability. It was a voluntary agreement on their behalf. I find that there is no basis on the grounds advanced to order the builder to repay the amount claimed.

278 It is on this basis that I dismiss this head of the owners' claim.

**Item 32 Payment for change to foundations Amount claimed - $6,120**

279 The basis for this head of claim is an agreement alleged to have been reached between the parties concerning a change from a raft slab foundation to a foundation system based on piers. In response the builder states that there is no evidence.

280 The relevant facts are set out in the affidavit of Mr Mac in his affidavit dated 1 August 2013 where he states that in a conversation with Mr Lee of the builder concerning the change in the foundations from a raft slab to a pier and beam system, he objected to paying any extra for concrete piers, and the builder agreed stating 'I won't charge you any extra'. Nonetheless, on 6 March 2012 in variation 003, the builder did charge $6,120 00 plus GST for the piers which amount was paid by the owners on 13 March 2012.

281 The evidence thus far establishes that despite the builder's agreement not to charge for the piers, the owners did pay for them when asked to do so by the builder. The owners offer no explanation about why they paid variation 003 given that the builder said that he would not charge for the piers.

282 The owners' cause of action for the repayment of the sum of $6,120.00 has not been identified.

283 The High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 considered, among other things, the remedy of restitution when there had been a mistake of fact or a mistake of law. If a plaintiff could establish either, restitution was available. The case is authority for the proposition that the owners will be entitled to recover the amount of $6,120.00 if it 'appears that the moneys were paid in the mistaken belief by the payer that he was under a legal obligation to pay them or that the payee was legally entitled to payment'

284 In these proceedings there is no evidence that the amount of $6,120.00 was paid by the owners under a mistake of fact and/or law.

285 I dismiss this aspect of the owners claim on the basis that they have not disclosed a cause of action that would entitle them to recover the amount of $6,120.00. Moreover, there is no basis upon which to make an order for the payment of that amount under section 48O(1)(a) of the Act, as submitted by the owners, without anything more. I find that an order under that section must be underpinned by an entitlement at law to the amount ordered. Section 48O(1)(a) of the Act does not in my view permit 'palm tree justice' as is the case with the former Consumer Claims Act per Yeldham J, in *Fairey Australasia Pty Ltd v Joyce and Anor* [1981] 2 NSWLR, 314 at 321. Approved by the Court of Appeal in *SRA v Consumer Claims Tribunal* 14 NSWLR at 473.

**Item 33 Payment to compact backfill Amount claimed $1,300**

286 This item of claim relates to the payment by the owners of an invoice in the sum of $1,300.00.

287 This item of claim is dismissed for the same reasons as are applicable to the preceding

item of claim.

**Item 34 Keys Amount claimed $968**

288 The owners state that the builder has not provided various keys for windows, sliding doors, security doors and 2 x doors and that a quote has been obtained to supply these keys at a total cost of $968.00.

289 I will allow the owners the amount claimed on the basis that their evidence has not been contradicted.

290 The amount found in the owners' favour is $968.00.

**Item 35 Other expenses - Amount claimed $25,268**

291 This item of claim relates to a number of items where the owners submit they have paid various invoices and expenses and are entitled to a refund. They submit that their right arises under section 48O(1)(a) of the Act. As stated above, I find that section 48O(1)(a) of the Act must be underpinned by an entitlement at law to the amount ordered.

292 This item of claim is rejected on the same basis as the claims 'Payment for change to foundations'. This claim is not supported by an adequate cause of action. As stated above section 48O(1)(a) of the Act is, without anything more an inadequate basis upon which to obtain an order in the owners favour.

293 This claim is not underpinned by a proper entitlement to the amount claimed.

## DEDUCTIONS FROM THE CONTRACT SUM TO WHICH THE OWNERS ARE ENTITLED

**Item 36 Owners paid half of Home Owners Warranty Insurance - amount claimed $2,143**

294 Under the heading 'Payment of half of Builder's all risk insurance Amount claimed' I dealt with a similar claim where the owners paid half of an insurance premium when they were not obliged by the contract to do so. Similar considerations apply to this item of claim. The owners submit that they were misled into paying half of the Home Owners Warranty Insurance. The evidence of Mrs Mac is relied on. However Mrs Mac states no more than she was not sure of the law at the time so she paid the amount requested. Mrs Mac does not say that she was misled.

295 The owners unwisely agreed to pay half of the builder's Home Owners Warranty Insurance. It was a voluntary agreement on their behalf. I find that there is no basis on the grounds advanced to order the builder to repay the amount claimed.

**Item 37 Change to foundations amount claimed $6,120**

296 The owners have made a claim for $6,120.00 to recover that amount paid for the piers at paragraph 104 of their submissions. That claim has been dealt with.

297 This claim appears to be for a deletion from the contract price to reflect the cost of the raft slab that was not constructed, since a pier system was adopted. However this claim

is not for the cost of raft slab. The claim is for the cost paid in connection with the piers which has been dealt with.

298 I dismiss this claim since it is no more than a duplication of a claim that has already been made and disposed of.

**Item 38 Change to gutters amount claimed $5,800**

299 This claim relates to the administration of the variations provisions of the contract.

300 The evidence of the owners is that they agreed to vary the works by the provision of stainless steel guttering in lieu of what was shown on the drawings. The builder agreed they say to give them a credit for the original guttering and that they would pay the additional costs relating to the provision of the stainless steel guttering. I accept their evidence which has not been contradicted. However the builder states that this variation, variation 008 has not been paid. I find that the owners have not established that they actually paid for the stainless steel guttering.

301 The owners claim in submissions that the builder did not give a credit. There is no evidence cited to support this submission. The owners were entitled to have their expert provide an estimate of what the credit should be. However he has not provided evidence of the credit. The builder's expert declined to give a costing, which is not surprising since he was engaged by the builder not the owners.

302 The owners claim that there should be an order that the builder should refund the owners $5,800.00 paid for the variation because of the alleged lack of a credit.

303 Section 48O(1)(a) of the Act is relied upon in connection with this claim. As stated above the section does not in my view permit 'palm tree justice'. It must be underpinned by a proper claim which in this case would have been an estimate of the cost of the guttering which was deleted by the variation.

304 Since the owners have not provided an estimate of the cost of the guttering which was deleted, or established that they actually paid variation 008, I dismiss this claim on the basis that the owners have failed to establish the quantum of the credit they should receive. Such quantum is ascertainable and should have been provided.

**Item 39 Retaining walls not cement rendered and six piers and lights not installed amount claimed $1,700**

305 The experts agree that an amount of $1,700.00 is payable in respect of this item.

306 Since this item is claimed under deductions from the contract sum it would be necessary in my view to establish the basis of the right to a deduction.

307 I have found in favour of the owners on the termination issue which entitles them to the cost to complete, including this item.

308 I will make an order in the owners' favour in connection with this item in the sum of $1,700.00.

**Item 40 Change in roof plans Amount claimed $1,273**

309 This claim is advanced on the basis that this item relates to work which was deleted, or not carried out by the builder with the owners entitled to a reduction in the contract sum.

310 The builder's expert agrees that the section of the roof referred to by the builder's expert has not been constructed. Other than that the experts are unable to agree.

311 The owners' expert has costed the value of the deleted work at $1,273.00 at page 686 of Exhibit 1. I accept his evidence which is un-contradicted so far as quantum is concerned.

312 The owners will be entitled to an order in their favour in connection with this item of claim in the sum of $1,273.00.

**Item 41 Other credits as set out in the evidence $16,740**

313 The owners rely on the evidence of Mr Mac in connection with this head of claim. Mr Mac states very briefly that he discussed various credits which he stated were promised to him by the builder. The builder has not contradicted this evidence. Mr Mac has listed these credits in annexure A9 to his affidavit. They total $16,740.00.

314 A number of the credits listed are referred to above. He has listed a pitch roof above the study room with an estimated value of $6,000.00. I will not take this item into account as it appears to be identical to the item which is 'change in roof plans'. There is also a reference to 'cement rendering of retaining walls and 6 x posts' which has an estimated value of $1000.00. I note that the parties' experts have agreed that the value of this item is $1,700.00.

315 Because the builder's witness Mr Lee did not deny that he had agreed to give the owners the credits that they have referred to, I will allow this deduction from the contract sum. However I will deduct $6,000.00 from the amount claimed on the basis that the owners' expert has calculated the credit to be given in connection with the roof above the study room. I will also deduct the sum of $1,000.00 which has already been allowed for, but in the sum of $1,700.00.

316 The amount of the credit is therefore $16,740.00 - $6,000.00 - $1,000.00 = $9,740.00.00.

The total amount found in favour of the owners in connection with the credits to be allowed against the contract price is _____

**Provision of certificates**

317 I agree with the owners' submissions that orders should be made in the terms sought regarding the relevant certificates.

**Conclusion**

318 The owner has been successful in the following items of claim. I have included GST and Margin in those items where it is warranted.

| Item Number | Item Description | Amount found |
|---|---|---|
| 1. | Plumbing drainage and gas | $18,299.25 |
| 2. | Retaining walls and ground levels | $12,304.71 |
| 3. | Electrical works | $9,500.00 |
| 4. | Eaves gutters and downpipes | $2,547.60. |
| 5. | Front fence | $10,142.88 |
| 8. | Garage door | $6,900.00 |
| 9. | Sewer and stormwater drainage | $8,070.48 |
| 10. | Waterproofing to planter boxes | $3,265.68 |
| 11 | Concrete patio | $3,162.72 |
| 12. | Falls to drainage points on balcony | $3,597.00 |
| 13. | Broken swimming pool filter cover | $2,125.20 |
| 14. | Other plumbing issues | $349.80 |
| 16. | Hot water unit | $1,805.76 |
| 17. | Box gutter | $1,452.00 |
| 18. | Steps | $1,147.08 |
| 19. | Garage facade | $1,069.20 |
| 20. | Builders clean | $950.40 |
| 22. | Skylights | $726.00 |
| 23. | Damage to footpath | $528.00 |

| | | |
|---|---|---|
| 24. | Glass panels | $396.00 |
| 25. | Glass bricks | $110.88 |
| 26. | Letterbox | $99.00 |
| 29. | Owners have bought building materials for use at the Builder's request | $6,544.00 |
| 34. | Keys | $968.00 |
| 39. | Retaining walls not cement rendered and six piers and lights not installed | $1,700.00 |
| 40. | Change in roof plans | $1,273.00 |
| 41. | Other credits | $9,740.00.00 |
| **Total** | | **$108,774.64** |

**Costs**

319 The parties are at liberty to make a costs application in these proceedings.

320 Any costs application pursuant to section 53 of the *Consumer, Trader and Tenancy Tribunal Act* 2001 must be lodged in the Tribunal and served on the costs respondent within 21 days of the date of this order either attaching or referring to the documents relied upon in support of the application.

321 The costs respondent will have 21 days after the date it receives the application referred to lodge in the Tribunal and serve on the costs applicant its submissions, if any, in response to the cost applicant's costs application, such submissions either attaching or referring to the documents relied upon.

322 The cost applicant will have 14 days after the date it receives the cost respondent's submissions to lodge in the Tribunal and serve on the costs respondent its submissions, if any, in reply, such submissions either attaching or referring to the documents relied upon.

323 The Tribunal will determine any costs application on the basis of the papers lodged in the Tribunal.

**D Goldstein**

**Senior Member**

**Civil and Administrative Tribunal of New South Wales**

**28 September 2016**

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

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Decision last updated: 18 November 2016