SUPREME COURT OF QUEENSLAND

CITATION:	*Mousa & Anor v Vukobratich Enterprises Pty Ltd & Anor* [2019] QSC 49
PARTIES:	**GAMAL MOUSA and MARGARET MOUSA** (Plaintiffs) **v** **VUKOBRATICH ENTERPRISES PTY LTD** **ACN 074 668 161** (First Defendant) and **MARK VUKOBRATICH** (Second Defendant)
FILE NO/S:	Cairns Registry No 130 of 2017
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	11 March 2019
DELIVERED AT:	Cairns
HEARING DATE:	22, 23, 24, 25, 29, 30, 31 October 2018
JUDGE:	Henry J
ORDERS:	**1. The plaintiffs' claim against the second defendant is dismissed.** **2. The first defendant's counterclaims against the plaintiffs are dismissed.** **3. I will hear the parties regarding the course to be taken in determining rectification costs in the plaintiffs' successful claim against the first defendant at 10am 15 March 2019.** **4. I will hear the parties as to interest and costs, if costs are not agreed, on a date to be fixed by mention at 10am 15 March 2019.** **5. The Registrar will forward a copy of these reasons to Mr McGrath of Miller Harris lawyers, solicitors for the first defendant's liquidator.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – STATUTORY WARRANTIES FOR RESIDENTIAL

BUILDING WORK – where the plaintiffs contracted the first defendant to build their dream home – where they claim the work did not meet the statutory standard of expectation – where they plead an entitlement to damages for breach of warranty on the basis that they have suffered or will suffer loss and damage, being the cost of carrying out remedial work to the house – whether the state of each item of work evidenced a breach of statutory warranty so as to require rectification

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGED, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – where the plaintiffs claim damages as against the first defendant for wrongful repudiation of the contract – where the amount claimed includes the cost of remedial work plus the cost of completing construction – whether the first defendant's conduct manifested an intention to fulfil the contract only in a manner substantially inconsistent with their obligations under it and not in any other way

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – where the first defendant was a licensed contractor and the second defendant its appropriately licensed nominee – where there existed a statutory duty for a licensed contractor to ensure building work is personally and adequately supervised – whether the scope of liability for the statutory duty could be extended to infer the second defendant also owed a duty of care in negligence to the plaintiffs

Civil Liability Act 2003 (Qld) s 11
Domestic Building Contracts Act 2000 (Qld) ss 9, 81(3), Part 4
Queensland Building and Construction Commissions Act 1991 (Qld) ss 43, 43A

Brookfield Multiplex Ltd v Owners (2014) 254 CLR 185
Bryan v Maloney (1985) 182 CLR 609
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623
Moorabool SC v Taitapanui (2006) 14 VR 55
Koompahtoo Local Aboriginal Land Council v Sampine Pty Ltd (2007) 233 CLR 115
Shepherd v Felt and Textiles of Australia Ltd (1931) 45 CLR 359

Shevill v Builders Licensing Board (1982) 149 CLR 620
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515

COUNSEL: CD Taylor for the Plaintiffs
MA Jonsson QC for the Second Defendant

SOLICITORS: *WGC Lawyers for the Plaintiffs*
Holding Redlich for the Second Defendant
(No appearance for First Defendant)

[1] The street on the ridgeline of the Cairns suburb of Parkridge is appropriately called The Peak. It provides some of the best views in Cairns across the city to Trinity Inlet and the Coral Sea beyond.

[2] Cairns surgeon Gamal Mousa and his wife Margaret bought a vacant lot on The Peak to build their dream home on. The builder they selected was the first defendant, Vukobratich Enterprises Pty Ltd ("the company"), a company trading as MV Designer Homes, using the slogan "delivering the dream".

[3] The company contracted to build the Mousas' home for $2.1 million. This was a step-up from the kind of residential construction work previously performed by the company and its sole director, licensed builder Mark Vukobratich, the second defendant. It was a step too far. The defendants' construction work and dealings with the Mousas culminated in the Mousas terminating the contract on 7 December 2015. The construction was incomplete and defective. It remains so.

[4] The Mousas filed a claim against the company and Mr Vukobratich on 20 March 2017. The relief sought has been variably articulated but by closing submissions it was:

(a) damages for breach of statutory warranty as against the company in the amount of $1,571,024.40, being the cost attributable to the rectification of alleged defects;

(b) damages as against the company for wrongful repudiation of the contract in the amount of $2,524,254.26, being the cost of the above alleged defects requiring rectification plus the cost to complete the construction in the amount of $953,229.86;

(c) damages as against Mr Vukobratich personally for negligence in the construction, in the alternative amounts of $1,803,529.40 or $1,571,024.40.[1]

[5] The negligence claim against Mr Vukobratich is founded on the argument that Mr Vukobratich can be personally liable in negligence to the Mousas for their economic loss, even though he was not the party with whom they contracted. Whether that argument can succeed is of more than academic interest given that on 2 August 2018 the company went into voluntary administration. The liquidator did not oppose the plaintiffs' successful application for leave to continue the proceeding as against the

[1] Plaintiffs' written submissions p 1. Claims not pressed included a claim for restitution of payments in excess of contractual entitlement and various claims based on alleged misleading and deceptive conduct.

company but elected to play no active role in the trial. This left live a counterclaim by the company.[2] It will be dealt with at the end of these reasons and requires no elaboration presently.

[6] Despite the importance of the Mousas' argument that Mr Vukobratich ought be found personally liable in negligence, it is sensible to deal firstly with the cases against the company of breach of statutory warranty and wrongful repudiation of contract. That exercise will turn in part upon detail of the parties' dealings and of the construction, detail which is also relevant in the case against Mr Vukobratich. Some of that detail is now reviewed by way of background.

Background

[7] On 8 October 2012 Dr Mousa initiated enquiries with the company as a potential builder of their dream home. The company's contracts administrator emailed him documents including the company profile, which included propositions such as:

> "Started by Mark Vukobratich, MV Designer Homes operates under Mark's philosophy 'My team and I hold people's dreams in our hands' … We pride ourselves on delivering superior quality, elegant, imaginative, value for money homes, whatever the budget… Budgets from $100,000 to $10 million … We specialise in split level homes and sloping or difficult block builds."[3]

[8] The document concluded:

> "Thank you for considering MV Designer Homes. We guarantee to provide you with a home – that will not only be a pleasure to live in – but could also be your award winning design.
>
> Mark Vukobratich
> Managing Director/Builder"[4]

[9] The company's contracts administrator emailed Dr Mousa to confirm an appointment "with Mark our builder and our designer Dragan".[5]

[10] The appointment proceeded on 14 October 2012 at the company's office in Mulgrave Road at Cairns with Dr and Mrs Mousa, Mr Vukobratich and Dragan Vukelic, the company's designer.[6] At that meeting Dr Mousa explained he was looking for a house which was elegant but not extravagant. He explained he wanted to build a house for his family in which they would eventually retire and wanted high ceilings, large open spaces and nothing blocking the view from their block of land – a block for which they

---

2 See the second amended defence and counterclaim, the last pleading made before subsequent amendments to that document, by the second defendant only, eventually gave rise to the fourth amended defence of the second defendant.

3 Ex 12.

4 Ex 12.

5 Ex 13.

6 T1-59 L13.

had paid a lot of money to enjoy the view.[7] Dr Mousa sought Mr Vukobratich's assurance that the company could cope with what would be a big house construction on a block with a slope component to it, and Mr Vukobratich so assured him.[8]

[11] Mrs Mousa later had some further general discussions with Mr Vukobratich about the house the Mousas wanted to build, delivering drawings and pictures to him.[9]

[12] Momentum towards engaging a builder developed during 2013 after the Mousas sold their farm. Dr and Mrs Mousa met again with Mr Vukobratich and Mr Vukelic in September 2013.[10] Mr Vukobratich and Mr Vukelic showed the Mousas some drawings of what the house might look like. It showed three columns present on the first floor and one on the ground floor.[11] Dr Mousa indicated he did not want columns, both because he has an architectural dislike of them and because they would tend to obstruct the view outside. Dr Mousa also expressed concern that the plans showed large wall areas and little windows which tended to block the view from inside out.[12] Mr Vukobratich and or Mr Vukelic explained the columns were to provide structural support but that they would look into alternatives.[13] Dr Mousa testified that at a subsequent meeting prior to the finalising of the plans "they" – an apparent reference to Mr Vukobratich and or other company representatives – informed him that, having spoken with an engineer, they could get rid of some columns but one would have to remain and the windows could not be varied.[14] Dr Mousa explained he took the attitude he would "have to live with" that outcome, but only because it was said to be based on the expert advice of an engineer.[15]

[13] In their meeting of September 2013 Mr Vukobratich assured the Mousas they could trust in his experience and competency.[16] Mr Vukobratich caused some concern to Dr Mousa by indicating that he wanted to enter into the high end building market in Cairns by using his construction of the Mousas' house as an example.[17] Dr Mousa explained he did not want his proposed house to be Mr Vukobratich's "guinea pig" and sought further assurance he could build a house of the calibre contemplated.[18]

[14] Mr Vukobratich subsequently drove Dr and Mrs Mousa and their daughter Claire around Cairns, showing three or four residences his company had constructed.[19] None were on the scale of the Mousas' proposed residence.[20] This troubled Dr Mousa but he acquiesced to his wife's attitude, which was that it was desirable to have a builder who was motivated and enthusiastic to construct their desired home rather than one who

---

7 T1-59 LL30 – T1-60 L8.
8 T1-60 L37 – T1-61 L2.
9 T2-91 L24.
10 T1-62 L27; T3-36 L13.
11 T1-63 L3; T1-64 L7.
12 T1-63 LL3-27.
13 T1-63 L39.
14 T1-68 LL5-25.
15 T1-68 LL10-21.
16 T3-38 L27.
17 T1-64 L40.
18 T1-65 LL10-14.
19 T1-65 L31; T3-36 L32; T4-29 L25.
20 T1-66 L21.

regarded it as just a job.[21] They must now rue their decision to favour a company inexperienced in constructing dwellings at the high end of the residential market.

[15] On 30 September 2013 the company procured a soils report by an entity trading as Dirt Professionals in respect of the Mousas' block.[22]

[16] On 16 September 2013 the Mousas and a person signing as "Builder" signed a preliminary agreement said to be between "MV Designer Homes" and the Mousas. That document contained instructions to carry out preliminary works in preparation for building works upon the land.[23] The proforma works descriptions ticked in the agreement were:

> "inspect site
> preparation of building specification and estimate
> arrange a soil test …
> preparation of all working drawings (includes 2 final changes)
> engineering approval …
> sewer jump up plan …"

[17] Page 2 of the document stipulated that money paid pursuant to the agreement would be treated as a preliminary deposit to be deducted from the amount of the building contract, if such a contract was entered into.[24] The total cost of the work specified by the preliminary agreement was $10,550, which was paid by the Mousas to the company on 16 September 2013.[25]

[18] In hindsight it is apparent the cost of the preliminary work, which included soil testing, drawings and engineering work in respect of a significant construction on a hillslope, was too low for what was required to be done properly. The complexity of the site and construction under contemplation required much more detailed soil testing, engineering, design and planning work. [26] This project should not have been approached, as it appears it was, was as a design and construct project. The lack of initial planning had significant ramifications as the project progressed.[27]

[19] The preliminary works proceeded through to about 27 March 2014.[28] In the interim two further payments were made pursuant to the preliminary agreement, as agreed variations to it. The first further payment, of $3,630, was made on about 25 November 2013 for a geotechnical report entitled "Slope stability investigation" by an entity known as ETS, a report which was obtained in December ("the first geotechnical report").[29] The second further payment, of $1,540, was made on about 19 February 2014 for services described as "extra for Dragan changeover".[30]

---

21 T1-66 LL40-47; T3-37 L43.
22 Ex 1 p 208.
23 Ex 1 p 1.
24 Ex 1 p 2.
25 Third amended statement of claim [7] – admitted.
26 Ex 7 p10.
27 Ex 7 p39.
28 Third amended statement of claim [8] – admitted.
29 Third amended statement of claim [9] – admitted.
30 Third amended statement of claim [9] – [13].

[20] When a draft building contract was provided by the company to the Mousas, Dr Mousa became concerned by the risk of prime cost items and provisional sums, which represented a substantial proportion of the overall contract price, drifting materially beyond the allowances made in the contract for them. He informed Mr Vukobratich that he did not want to proceed with the contract in light of that problem, however Mr Vukobratich emphasised that building the house was important to him "to go into this upper niche market" and that he would be able to build the home within budget.[31] Dr Mousa recalled a subsequent draft of the contract lowered the total contract price down by about $80,000,[32] causing him to think he had sufficient financial cushion for variations.[33]

[21] Dr Mousa testified to thinking, in light of that cushion, "Everybody wants me to move on with the house and I seem to be the one blocking it, so let's go".[34] Such evidence reflects a theme, implicit in much of Dr Mousa's testimony, of regret that he was not a more dominant player in his family's dealings with the company and Mr Vukobratich. As it turns out, Dr Mousa's work obligations and his own back ailment meant he did not play a particularly active role in dealings with the company during construction.

[22] The Mousas and the company ultimately executed an undated residential building contract,[35] on about 3 April 2014,[36] The contract price to build the Mousas' house was stipulated to be $2,106,756, to be paid in progress payments for the following stages:

Deposit	5%	$105,337.80
Base stage	10%	$210,675.60
Frame stage	15%	$316,013.40
Enclosed stage	35%	$737,364.60
Fixing stage	20%	$421,351.20
Practical completion stage	15%	$316,013.40[37]

[23] The contract's total allowances for prime cost items was $103,802.96 and its total allowances for provisional sums was $837,566.96. The latter figure is proportionately very high and bespeaks a degree of uncertainty which would not have been present had there been the more detailed design work which a residence of this complexity required.[38] Supporting quotes from various suppliers were included with the contract.[39]

[24] The contract included specifications and plans supplied by the company.[40] The home to be built would present from the west street front as a two-storey house – the first and second levels – with an underlying ground level below natural ground level, deck and

---

31 T1-70 LL5-29.
32 T2-52 L33.
33 T1-70 LL40-47.
34 T1-71 L1.
35 Ex 1 p 3 et seq.
36 Third amended statement of claim [15] – admitted.
37 Ex 1 p 11.
38 Ex 7 p 12.
39 Ex 1 pp 53-121.
40 Ex 1 p 5 per item 5, pp 35-49 specifications, pp 122-129 plans.

pool stepped down the east facing slope at the rear of the property – the side with the excellent view.[41]

[25] The contract also recorded that "foundations data" had been prepared by Dirt Professionals on 30 September 2013.[42] It is not apparent why it did not also refer to the first geotechnical report of about 25 November 2013 by ETS. The contract provided that the foundations data "must be obtained before entering into this contract".[43] It defined foundations data thus:

> "**Foundations Data** – means the information about the **land** needed for the preparation of an appropriate footings design for the **land**, if appropriate a slab design for the **land** and an adequate estimate of the cost of constructing the footings and concrete slab, eg. soil test, contour plan etc."[44]

[26] The contract incorporated various warranties by the company (described as "the contractor" in the contract) under part 4 of the *Domestic Building Contracts Act 2000*, including:

> "10.1 …
>
> (a) **The contractor** will carry out the **works**:
>
> (i) in an appropriate and skilful way;
> (ii) with reasonable care and skill;
> (iii) in accordance with the **plans** and **specifications**; and
> (iv) in accordance with all relevant laws and legal requirements including, for example, the *Building Act 1975* ...
>
> (c) **Prime Cost items** and **Provisional Sums** have been calculated with reasonable care and skill …"[45]

[27] The contract included conditions relating to variations by agreement, variations required by law and variations for latent conditions.[46] A common theme of each was that the parties were to agree in writing to any variations before the carrying out of the work the subject of the variation.

[28] The contract included machinery provisions for termination of the contract, including for the giving of written notice of an intention to terminate, describing any alleged breach and allowing 10 business days for the remedy thereof.[47] A point highlighted on the defendants' case is that in eventually terminating the contract the Mousas did not first afford the company an opportunity to remedy any breach as contemplated in the contract's clause 20.

---

41 Ex 1 p 126.
42 Ex 1 p 5.
43 Ex 1 p 5.
44 Ex 1 p 14.
45 Ex 1 p 17.
46 Ex 1 pp 19-20.
47 Ex 1 pp 22-23.

[29] The construction period was stipulated as 541 days and the date for practical completion was stipulated as 541 days from the date for commencement. The date for commencement was not stipulated by a date, but rather was described as "Earthworks Stage – day of excavation on site/preparation to house pad".

[30] On 20 May 2014 Cairns Regional Council granted a material change of use development permit to the company, subject to a variety of conditions including a geotechnical assessment, further to the report provided by Dirt Professionals of 30 September 2013.[48] The assessment was required to assess the level of risk with special reference to the pool area.

[31] On 27 May 2014 the company evidently submitted the first geotechnical report from ETS in response to the above condition requiring a geotechnical assessment. The requirements of the Council's geotechnical assessment condition were elaborated upon in a letter by Council to the company of 27 June 2014 wherein it was noted that the achievement of a low risk rating in the report from ETS relied upon crest stabilisation and the use of piers, methodology which needed to be properly identified by the further report so as to allow confirmation of its incorporation within the house design.[49]

[32] On 1 July 2014 the company obtained a further geotechnical report from ETS ("the second geotechnical report"), which prompted the company to carry out a number of amendments to its design drawings for the proposed building.[50] In the present proceeding the Mousas assert such post-contract amendments would not have been necessary if the company had gathered appropriate foundations data pre-contract.

[33] Earthworks commenced on site on 7 July 2014.[51] On 9 July 2014 Mrs Mousa attended a meeting on site with Mr Vukobratich, an excavator driver called Mr Bugeja, and possibly Mr Vukelic.[52] The meeting had been arranged by Mr Vukobratich, who informed Mrs Mousa the house needed to be constructed 1.5 metres closer to the street than planned,[53] because of a problem encountered during earthworks.[54] There had been some clearing of the pad site by this time.[55] Mrs Mousa could not recall what specific problem had been encountered to require the change of plan but it appears to have been an unexpected problem with soil stability near the east facing slope at the rear of the property where the ground floor, deck and pool area were to be stepped down the slope.

[34] On 11 August 2014 the company's development application for the carrying out of building work was approved with conditions.[56]

---

48 Ex 1 p 208.
49 Ex 1 p 218.
50 Third amended statement of claim [28] – admitted.
51 T3-56 L29; Ex 3 p 504.
52 T3-55 L20.
53 T3-55 L35.
54 T3-56 L42.
55 T3-56 L35.
56 Ex 1 pp 223-228.

[35] On 17 December 2014 Mrs Mousa attended upon Mr Vukobratich at his request to "go over the current spreadsheet for Earthworks and … Back Area works".[57]

[36] On the same date the company issued the Mousas with invoice MouVA02 in the amount of $85,610.85 for:

> "Variation: Extras over allowance on rear patio works and Earthworks".[58]

The invoice required payment within seven days and was accompanied by a schedule of invoices.[59] The schedule listed 91 invoices for work described under the sub-heading "Invoices received lower level to date", totalling $139,911.10. A "specification/contract allowance" of $100,000.00 was deducted from that subtotal in the schedule to identify part of the variation amount as $39,911.10. The schedule also listed six earthworks invoices, all for "Heath's Backhoe Hire" totalling $125,916.95. From that amount the schedule deducted a "specification/contract allowance" of $88,000.00, to give rise to a variation subtotal of $37,916.95. When combined with the other variation subtotal, this gave rise on the schedule to a total variation payable of $77,828.05 which, with the addition of GST, resulted in a total of $85,610.85 claimed by invoice MouVA02. The contract's list of allowances for provisional sums included the sum of $88,000.00 for earthworks. The source of the other "specification/contract allowance" of $100,000.00 is not apparent. More concerningly, contrary to the requirements of the contract, there had apparently been no documenting of any agreement to the variation before the work, the subject of the variation, had been carried out.

[37] Shocked at the invoice amount Mrs Mousa discussed the issue with her family. Dr and Mrs Mousa and their son David then met with Mr Vukobratich.[60]

[38] Mr Vukobratich explained the need for the additional works had not been known of at the time of the execution of the contract.[61] Dr Mousa complained of the absence of any documented agreement to vary and Mr Vukobratich asserted the need for the variation had been made known to Mrs Mousa.[62] This was apparently a reference to the meeting of 9 July 2014 at which Mr Vukobratich informed Mrs Mousa they were going to have to move the house forward by a metre and a-half.[63] Mr Vukobratich indicated that if the invoice was not paid, the company would stop progressing the building project.[64] Dr Mousa also challenged Mr Vukobratich about a number of the individual invoices, including surveyor's invoices for five different dates, an individual invoice from Mr Vukobratich as director, and invoices for work by persons likely to have been the company's own employees.[65] In the upshot, another MouVA02 variation invoice was then issued, this time in the amount of $81,619.74, that is, a reduction of about $4,000 from the initial invoice.[66] This amount appears to have been progressively paid by the

---

57 Ex 3 p 511; T3-61 L35.
58 Ex 2 p 375.
59 Ex 2 pp 234-235.
60 T1-76 L35; T3-61 L44.
61 T1-77 L41.
62 T1-77 L4.
63 T1-79 L43.
64 T1-77 L26; T1-80 L24.
65 T1-78 L7 – T1-79 L40; T3-63 L22.
66 Ex 2 p 376.

Mousas between 5 January 2015 and 13 January 2015.[67] These were payments by direct deposits of $17,000, $20,000, $20,000 and $20,000, plus a payment by cheque of $4,649.74[68] with the cheque endorsed as payable to Cairns Coastal Plasterer. Mrs Mousa confirmed the payments were made because if they were not made Mr Vukobratich had indicated the project would not continue.[69]

[39] Mrs Mousa also signed an extension of time form relating to delays said to have been occasioned by the problem encountered during earthworks.[70] That document, dated 16 December 2014, contemplated an extension of time of 105 days for reasons nominated as:

> "Subsidence to unstable soil (ie. unstable for construction work and placement of swimming pool), therefore Engineer and Builder had to re-design pool to suit Structural requirements for support of pool, concrete deck and other structures."[71]

Curiously, the form also referred to a previous extension of time of 154 days, but that alleged extension does not appear to have been evidenced in the tendered materials.

[40] The ensuing construction incorporated two levels of undercroft construction, giving rise, in effect, to a five-storey construction on the eastern side. One undercroft ("undercroft level 1") was to support the ground level deck and the second undercroft ("undercroft level 2") was to support the pool and its wet edge. These were significant additional structural components not present in the plans forming part of the contract.[72] Those plans merely showed supporting earth and some piers where in due course the undercrofts were built.[73] The vertical downwards dimension of the underlying structure as built compared to the plans increased significantly, by a factor of 1.8, and the additional earthworks required to accommodate all of this was considerably more than contemplated by the contract.[74] It all appears to have been work engaged in by the company without proper consultation of the Mousas and without following the contractual requirements for variation.

[41] As the project progressed Mrs Mousa had arranged with the company for its acquisition of extra items for installation not the subject of the contract, such as a Vacu Maid and special brand baths and fans. It was said to have been done through the company this way to preserve application of the builder's insurance cover to the items.[75] The company apparently tracked those items of expenditure in a spreadsheet titled "Margaret's spreadsheet for changes with clients", referred to at trial as "Margaret's spreadsheet". It is not apparent why these expenses were treated differently than expenses arising in consequence of approved variations under the contract occurring during the construction.

---

67 Ex 2 pp 464-471.
68 The payment was actually $30 more than necessary.
69 T3-64 L45.
70 Ex 3 p 512; T3-66 L4.
71 Ex 3 p 512.
72 Ex 7 p 12 [5.7].
73 Ex 1 p 126; Ex 7 p 12.
74 Ex 7 p 14.
75 T3-41 L38.

[42] Mrs Mousa made payments to the company from time to time. The payments did not correspond to specific invoices and rather were made on an ad hoc basis to accumulate credit to be applied when invoices fell due.[76] The payments were often made by delivering cheques to the company's office. Not all such cheques were made payable to the company. Mrs Mousa completed a large number of cheques supplied to the company with the payee section left blank, anticipating, as with her husband's medical practice, that the company would stamp its name as payee on the cheques. Instead, different payee names were later written in by someone else.[77] Mr Vukobratich's name was written in as payee for four cheques in the amounts of $5,000, $5,000, $5,000 and $105,337.80; Cairns Coastal Plasterer (or CCP), likely a business of Mr Vukobratich's,[78] was written in as payee for 15 cheques for $5,000, $5,000, $10,000, $5,000, $5,000, $5,000, $15,000, $10,000, $10,000, $4,649.74, $9,404.12, $5,000, $5,000, $10,000 and $20,000; and other Cleveland Pty Ltd was written in as payee for a cheque for $5,000.[79] Mr Vukobratich was asked about this by Claire Mousa later in 2015 and asserted the wrong deposit book must have been used.[80] That was no explanation for the endorsements of the payee name on the cheques. It was of course a matter for the company how it chose to apply payments by cheque to it but the obviously deliberate endorsement and the use of the cheques to the benefit of other entities demonstrates Mr Vukobratich's controlling hand in the conduct of the company's seemingly chaotic financial affairs.

[43] While Mrs Mousa had taken the lead in communications with the company, the Mousas' son David and daughter Claire each became involved in dealing with the company on their parents' behalf as 2015 progressed.[81]

[44] In about April 2015, when the first floor blockwork to construct the column and walls surrounding the window spaces had been completed, Dr Mousa considered they gave rise to an unacceptable obstruction of the view.[82] He raised the issue with his son David, an architecture student who had been involved in initial design discussions.[83] David spoke with Mr Gianakis, the engineer used by the company, and discovered it was structurally possible for the window space to be larger and for there to be no column.[84] This was contrary to what Dr Mousa and David Mousa had been told the engineer's advice was in the past and Mr Vukobratich castigated Mr Vukelic in David Mousa's presence over what was represented as having been a breakdown in communication.[85] In the end result, the company removed the column and increased the relevant window space.[86]

---

76 T3-50 LL38-44.
77 T3-46 – T3-49.
78 The historical company extract for Cairns Coastal Plasterers Pty Ltd, Ex 3 pp 713-720, reveals Mr Vukobratich to have been a former principal executive officer, director, secretary and shareholder and shows that at the relevant time it had the same principal place of business as the first defendant company (Ex 3 p 706).
79 Ex 2 pp 447-485.
80 T4-44 L28.
81 Eg, Ex 3 pp 569, 600.
82 T1-84 LL15-20; Ex 5 photograph 39.
83 T4-70 L15.
84 T1-86 LL10-22; T4-73 L22.
85 T4-74 L36.
86 T1-88 LL1-12.

[45] Throughout April and more sporadically through May into June there ensued various email exchanges and occasional meetings between David Mousa and Mr Vukobratich and Mr Vukelic regarding those and other design changes and clarifications.[87] This included the selection of a so-called spider window in substitution of an outer wall space on the first level facing east, addressing alignment issues as between the first and second level, additional design for second level bedroom veranda pods and many clarifications associated with windows and doors.[88] It is apparent in hindsight that while there were some design changes to the original plans, some of what was clarified in this era related to design at a level of detail which was not, but would usefully have been, included in the original plans.

[46] A further variation for earthworks was signed by Mrs Mousa on 1 May 2015.[89] The variation, in the amount of $57,445.54, was described as:

> "Continuation of variation number 2 for works done to lower back section; over and above MV allowance of $100,000".

The document recorded the amount was payable at the earthworks progress claim stage. Mrs Mousa did not have a clear recollection as to why she had signed this document.[90]

[47] Mrs Mousa signed another variation on 14 May 2015.[91] It was a variation cost of $37,037 described as being for:

> "Set up suspended ply flooring/base to allow pool builders to start forming pool as per quote #72"

Curiously, the progress claim stage at which the amount was said to be payable was described as "on receipt". Mrs Mousa appeared to have little active memory of how she came to sign this variation, explaining she had been asked on a regular basis to go in and sign piles of documents by the company.[92]

[48] On 3 September 2015 Mrs Mousa signed a variation costing $10,587.50 in respect of pod louvres[93] but that work has not been performed.[94] A similar situation pertains to:

- a variation she signed on 17 September 2015 in the amount of $615.99 for "MR Kitchens ventilation to cabinets in kitchen";[95]
- a variation she signed on an unknown date in the amount of $15,859.47 for lounge room and dining room shelving and a theatre wall cabinet;[96]
- a variation not signed by her in the amount of $8,074.33 regarding changes made on site allegedly by her with MR Kitchens relating to lighting, mirrored surfaces and joinery in the theatre room;[97]

---

87 T4-76 L40 – T4-78 L44; Ex 3 p 531 et seq.
88 Ex 3 pp 531-554, 556-564, 566-570, 572-580.
89 Ex 2 p 243; T3-67 L29.
90 T3-67 L30 – T3-68 L5.
91 Ex 2 pp 249-250; T3-68 L38.
92 T3-69 L5.
93 Ex 2 p 295.
94 T4-4 L11.
95 Ex 2 p 312; T4-4 L24.
96 Ex 2 p 319; T4-4 L38.
97 Ex 2 p 346; T4-4 L38, T4-5 L32.

- a variation not signed by her in the amount of $959.78 for "extra to wedge wire shower grates".[98]

[49] Dr Mousa became concerned at the company's apparently high volume of demands for payments based on variations. He was also troubled that the stress of his wife having to handle such minutiae was aggravating a heart condition for which she required treatment.[99] He arranged for their daughter Claire, an accountant, to look into the financial history of variations.[100]

[50] Claire Mousa met with Mr Vukobratich and Suzie Scoines, an employee of the company on 17 September, ostensibly to discuss variation 23 ("MOUVA23") which had been received recently.[101] That discussion resulted in amendments being made to reduce the cost of the variation.[102] This heralded further, broader inquiries by Claire Mousa for financial information from the company, resulting in the disclosure of some documents to her[103] and then a further meeting, to try better understand the variation and payment history.[104]

[51] On 25 September 2015 Claire and David Mousa met with Mr Vukobratich, Ms Scoines, bookkeeper Peggy Walker (or Jackson) and another employee, Will Barnett.[105] Claire Mousa was supplied with more records from the company, including a copy of Margaret's spreadsheet.[106] In the course of the meeting David Mousa complained about the slow progress of construction[107] and Claire Mousa raised various financial issues. It became apparent the company personnel there present could not reconcile the company's own financial records. Claire Mousa commented on this confusion, pointing out the Mousas had little chance of understanding the records if the company could not reconcile them.[108] When she commented on the confusion, saying "It shouldn't be this hard", Mr Vukobratich responded:

> "Yeah, … this is too hard, and from now on, any jobs over $1 million, we are going to get a QS and an architect".[109]

David Mousa's recollection of what Mr Vukobratich said was similar, namely:

> "From now on, on all projects over $1,000,000, we will utilise both an architect and a quantity surveyor".[110]

[52] Such a comment by Mr Vukobratich tends to confirm the impression arising from the whole of the evidence that a significant source of the problems with constructing and costing this building project was a failure from the outset to have assembled adequately

---

98 Ex 2 p 344; T4-5 L5.
99 T2-4 L43 – T2-5 L28.
100 Ex 3 p 607.
101 T4-30 L37 – T4-32 L31.
102 Ex 2 pp 286-294.
103 Ex 3 pp 600-606.
104 T4-37 L46.
105 T4-38 L17; T4-79 L47; Ex 3 p 607.
106 Ex 2 p 365.
107 T4-80 L34.
108 T4-39 L3.
109 T4-39 LL22-24.
110 T4-81 L38.

detailed plans. Without such detail, the risk of error during construction and unanticipated cost was obviously heightened and unsurprisingly manifested itself as the construction progressed. Against that background it is hardly surprising there was tension and confusion associated with the financial management of the project.

[53] Claire Mousa went on to ask questions of Mr Vukobratich about the making of stage claims including the fact that he had claimed 75% of a stage claim.[111] He commented that he was "bankrolling this job", putting in "much of my own cash".[112] Claire Mousa's email note in relation to topics discussed at the meeting, made later the same day, contained the following, internally inconsistent, proposition:

> "Variations that need revisiting will be dealt with by Mark.
>
> We all agreed that the variations and the cost of the build to date correlated with all parties."[113]

[54] It is self-evident the parties were not satisfied the variations and cost to date correlated. Indeed the same email recorded there were variations to be revisited and went on to list a number of variations that Mr Vukobratich would be revising.

[55] Mrs Mousa had not seen her namesake spreadsheet prior to it being disclosed to her daughter on 25 September 2015. The spreadsheet contained entries for items of expenditure Mrs Mousa had no knowledge of, including an additional cost excluding GST of $81,167.73 described as "Additions to main price" and endorsed "As per agreement with MV".[114] This was (with a difference of one cent) the amount of the disputed earthworks associated variation, MouVA02, discussed above. Margaret's spreadsheet also appeared to include amounts which were for variations rather than mere extra items for installation.

[56] On 2 October 2015 Dr Mousa, Mrs Mousa and Claire Mousa met with Mr Vukobratich and Suzie Scoines. At that meeting Dr Mousa expressed his various concerns including:

- the company charging for additional items, which should have been covered by the fixed price of the contract;[115]
- the inclusion of structural cost items in Margaret's spreadsheet;[116]
- variations not being approved in accordance with the contract;[117]
- variations not being linked to the timing of end stage progress payments;[118]
- the claiming of part payment of progress payments prior to completion of the stage, for example claiming payment for 75% of the enclosed stage

---

111 T4-39 L32.
112 T4-40 L1.
113 Ex 3 p 607.
114 Ex 2 p 365; T3-44 L5.
115 T2-8 L39.
116 T2-9 L3.
117 T2-10 L15.
118 T2-10 L46.

progress claim,[119] claimed at invoice number MOUPC06A of 15 September 2015.[120]

[57] Dr Mousa actually broke down at one point in the meeting when expressing his concerns about the prolonged stress caused to his wife and his desire for the house to be finally finished.[121] He and Claire Mousa requested the provision of an array of information, including about the variations and items included in the fixed price of the house. Dr Mousa reiterated the contents of the information he was seeking in an email of 5 October 2015 to Mr Vukobratich.[122] Dr Mousa completed that email by saying:

> "If you cannot adhere to any of our requests this has to be communicated with me directly. I do not wish to delay the works for any current valid variations that may be due in the next 2 weeks however will not be paying them until this matter is resolved. Hopefully this can be resolved without the need for any further action."

[58] Dr Mousa subsequently received a telephone call from Suzie Scoines indicating a box of papers would be delivered to him. She also advised it would include the documenting of variation 2, documents pertaining to it having been found in archives.[123] The box was delivered and the Mousas later went through its content.[124] It included further, seemingly dated, editions of Margaret's spreadsheet.[125]

[59] The box included a letter of 17 October 2015 to Dr and Mrs Mousa from Mr Vukobratich, addressing various of the concerns raised by Dr Mousa.[126] In respect of variations 2 and 6, regarding the variation to earthworks and the back patio, the letter asserted that when onsite digging began on the slope section of the building site on 9 July 2014, unstable soil, not revealed in the Dirt Professionals' soil test, had been encountered. The letter emphasised that Mrs Mousa had agreed at the on-site meeting to moving the house forward 1.5 metres and that in the ensuing discussion about possible additional cost, Mr Vukobratich had offered and Mrs Mousa had accepted that the additional work would be performed with no builder's margin. It was explained a spreadsheet itemising the additional cost invoices had been provided to Mrs Mousa when she allegedly signed a confirmation of variation on 27 August 2014. In referring to the confirmation of variation document the letter said:

> "Confirmation of Variation dated "27/03/14". This has been signed by Margaret. The date on this form however is a mistake, and should have actually read "27/08/14". Margaret and Kamiila who signed the form will be able to confirm that. The form also attaches the spreadsheet dated 22/08/14 showing the cost of variations to date of $165,488.76."[127]

---

[119] T2-11 L34; Ex 2 p 424.
[120] Ms Mousa's notes of the matters discussed at the meeting became Ex 22.
[121] T4-45 L2.
[122] Ex 3 pp 616-617.
[123] T2-18 L17.
[124] T4-50 L3.
[125] Ex 2 pp 367, 368.
[126] Ex 3 pp 633-635.
[127] Ex 3 p 634.

[60] The apparent photocopy of the confirmation of variation document supplied with the letter identifies a total cost of $165,488.76.[128] The total identified in the spreadsheet is $153,943.03.[129] Neither total appears to coincide immediately with any variation claim totals. That oddity and the anomaly that the confirmation of variation bears the date 27 March 2014 – that is, a date before the building contract was signed – are not the only circumstances casting a cloud over the pedigree of the alleged confirmation of variation document.

[61] Mrs Mousa testified that, while the signature in the "owner's authorisation" section of the document looks like her signature, she did recall ever having seen the document before it arrived in the box and she did not sign the document.[130] Mrs Mousa's evidence that she had not seen the document until it arrived in the box seemed more assured than her assertion it was not her signature on the document. When her evidence is considered in combination with that of a former employee of the company, Kamiila Bielski, it appears likely that the signature is an accurate representation of Mrs Mousa's signature but that it was endorsed on the document as a result of dishonest means.

[62] Ms Bielski, the company contracts administrator who signed the confirmation of variation document, testified she produced it under instructions from Mr Vukobratich. Her testimony on the topic was as follows:

> "Maybe if you could cast your mind back to those instructions. What was it that Mark said to you at the time he gave you those instructions and if you can remember the words spoken?--- I was basically given a spreadsheet at the time. That's how variations were – information was passed on to me to raise a variation. So I did raise this variation, and I did – I signed it, and that's it. There's things that happened after it that I recall about this document. …
>
> What's the things that happened after it that you can recall?--- I was asked to sign the document falsely as the client.
>
> And who asked you to do that?--- Mark Vukobratich.
>
> And what did you say in response to that?--- Without swearing, I said I would not sign it, and it was – he said that we are losing money and need to recover money. So once I produced the document, I was then, later on, asked to – to forge the signature, which I flat out refused to.
>
> Sorry. And which signature are you talking about?--- The client."[131] (emphasis added)

[63] Ms Bielski's evidence appeared credible and reliable. She had worked for the company from November 2013 to January 2015.[132] Although her evidence seemed to assume the relevant events occurred as at the date on the document, namely 27 March 2014, or within a few months after that,[133] they likely occurred later in the year once it had

---

[128] Ex 2 p 229; T4-52 L3.
[129] Ex 2 p 230.
[130] T3-59 L27 – T3-60 L10.
[131] T3-26 LL1-20.
[132] T3-23 L1.
[133] T3-31 L17.

become apparent the earthworks were going to be more expensive than contemplated under the contract. However, the explanation in Mr Vukobratich's letter that the document should have been dated 27 August 2014 – an explanation implying a mere misnumbering of the month ("03" rather than '08") – is implausible. For instance, a month after that date, on 25 September 2014, Ms Bielski emailed Margaret Mousa at Mr Vukobratich's instruction,[134] saying:

> "Mark has asked me to send you a courtesy email advising that your earthworks are currently over the allowance by $16,307.56.
>
> This is due to hitting rock and having to go further in depth. Please feel free to contact me if you would like to further discuss this."[135]

The description of and explanation for the earthworks being "currently over the allowance" does not rest comfortably with the notion that Mrs Mousa had agreed to a variation involving a budgetary blow-out of $165,488.76 just one month earlier.

[64] Claire and David Mousa met again with Mr Vukobratich and some of his staff on 29 October 2015. They discussed amounts in Margaret's spreadsheet, particularly the $81,167.73 described as "Additions to main price" and endorsed "As per agreement with MV". Mr Vukobratich indicated he would refund that money or part of it.[136] A credit adjustment note, dated 30 October 2015 and described as "Sub-contractors builders margin and overcharge of insurances on pool", for -$74,507.48 was issued but did not actually result in the physical receipt of a cheque as had been sought by Ms Mousa.[137]

[65] Dr Mousa and his daughter Claire met with Mr Vukobratich on 6 November 2015, further discussing the points of difference between them.[138] Mr Vukobratich generally maintained the position he had taken in his letter of 17 October. Of the additional earthworks said to have been occasioned by a latent condition Dr Mousa complained no opportunity had been extended for the Mousas to reconsider the project or change the design so as to avoid incurring such a large additional cost.[139] On the specific topic of the aforementioned confirmation of variation document for $165,488.76 Mr Vukobratich denied Dr Mousa's suggestion that the document was a fraudulent piece of paper,[140] volunteering that he did not "cut and paste".[141] Mr Vukobratich offered to provide duplicate copies of the document to demonstrate it was genuine but he did not make good on that offer and such duplicates have never been forthcoming.[142] Dr Mousa also complained that ceiling heights were lower than specifications, despite his emphasis at the outset of his desire for high ceilings.[143]

---

134 T3-24 L27.
135 Ex 3 p 507.
136 T4-54 L28.
137 Ex 2 p 435; T4-56 L31; T4-67 L44.
138 Noted upon Ex 23.
139 T4-58 L45 – T4-59 L3.
140 T2-32 L18.
141 T2-32 L5; T4-59 L38.
142 T2-33 L11.
143 T4-60 LL24-30.

[66] On 11 November 2015 the company emailed Mrs Mousa and David Mousa noting it was awaiting responses from them about various design selections and decisions and that the delayed responses from the Mousas were "beginning to cause time delays".[144]

[67] On 12 November 2015 Dr Mousa emailed the company, complaining that they had been to the house many times in the preceding week and it did not appear that any material work was being progressed, apart from some gyprocking.[145] The email particularly highlighted the lack of progress with waterproofing and tiling. The company provided a response on the same date, asserting the work was progressing but explaining how the progress of some work was sequentially dependent upon the completion of other work. The response noted the completion of such other work was being delayed because the company was waiting for responses from David Mousa about design configuration.[146]

[68] On 13 November 2015 the Mousas had a without prejudice meeting with Mr Vukobratich.[147] On 16 November 2015 a solicitor of Preston Law wrote to the Mousas, explaining that firm had been instructed to act regarding their construction dispute and was seeking instructions regarding the matters in dispute.[148]

[69] Another controversy arising in this era related to a suspended ceiling which had been installed beneath the concrete slab above the ground floor theatre room to leave space for cabling for the home theatre system.[149] Dr Mousa expressed concern that inadequate allowance had been made for the downstairs ceiling height, having the consequence that, with the addition of the suspended ceiling, the ceiling was too low. He demanded an allowance of $50,000 as compensation for the problem.[150] On 21 November 2015 Dr Mousa and his sons David, Paul and James, met on site with Mr Vukobratich and others to discuss the issue.[151] By the time of the meeting the company had begun removing the suspended ceiling, a source of surprise to Dr Mousa when he and his sons arrived there. When he asked what was going on he was informed the company was going to drill holes in the slab above in order to accommodate the cabling and other concealed theatre installations.[152] Dr Mousa expressed his dismay that they had initiated that process without consultation. Nothing was resolved. The ceiling height is about half a metre (514mm) lower than it should have been according to the specifications.[153]

[70] On 24 November 2015 Suzie Scoines of the company emailed the Mousas a quotation of $14,672.83 for extra tile labour, seeking the Mousas' approval for the variation "asap to enable tiling to commence".[154] The need for the variation appears to have arisen because of changes sought by the Mousas, for example changing the proposed timber kitchen floor to concrete and tiles and the ground floor from Axolotl to tiles, although

---

144 Ex 3 p 644.
145 Ex 3 pp 674-675.
146 Ex 3 p 654.
147 T2-39 L30.
148 Ex 3 p 660.
149 Ex 3 pp 661-662B.
150 T2-73 LL30-43.
151 T2-40 LL20-45.
152 T2-43 L18; T4-85 L21.
153 Ex 7 p 19.
154 Ex 3 pp 663-665.

Mrs Mousa did not accept some of those changes were material.[155] David Mousa responded on his parents' behalf on the same date, indicating new variations or quotes would not be considered "as there is currently a matter being handled between two lawyers".[156] The company responded to the effect a stalemate had been reached because without the approval tiling could not commence and work would come to a standstill.[157] The Mousas were not obliged to agree to the proposed variation so their absence of agreement was not a legitimate reason to assert the works would stop.

[71] On 4 December 2015 the company's solicitor wrote to the Mousas' solicitor, referring to recent events, asserting that the Mousas' recent statements and actions were acts of repudiation and asserting their client was entitled to terminate the building contract.[158] The letter included a complaint that on the afternoon of 24 November 2015 David and James Mousa had abused and intimidated staff at the company's office and defamed Mr Vukobratich.[159] It was alleged that on the same date David Mousa had told the company's Mr Barnett that they would close the job down and wanted him to take over construction. While David Mousa agreed in his testimony at trial that there had, around that era, been an argument when he and his brother had attended the office,[160] none of the testimony at trial supported the allegations made about that occasion in the solicitor's letter of 4 December 2015.[161]

[72] On 7 December 2015 the Mousas' solicitors wrote to the company's solicitors, outlining various complaints culminating in the following summary:

> "Your client has failed to calculate prime cost items and provisional sum items with reasonable care and skill (clause 10 of the general conditions of contract).
>
> Your client has failed to comply with the variations procedure (clause 12 of the general conditions of contract).
>
> Your client has failed to comply with the procedure for variations for latent conditions (clause 14 of the general conditions of contract).
>
> Your client has failed to construct the dwelling in an appropriate and skilful way, with reasonable care and skill and in accordance with plans and specifications or in a competent manner (clauses 10 and 20 of the general conditions of contract).
>
> Your client has repeatedly engaged in dishonest and deceitful conduct.
>
> Your client has engaged in fraudulent conduct."[162]

[73] The letter denied the Mousas had breached or repudiated the contract. The letter gave notice that the Mousas elected to terminate the contract at common law on grounds including breach of implied conditions of performance of the contract by legal means

---

[155] Ex 3 p 664; T2-78 L47 – T2-79 L23; T4-25 LL25-33.
[156] Ex 3 p 666B; T4-87 LL19-38.
[157] Ex 3 p 666.
[158] Ex 3 pp 668-670.
[159] Ex 3 pp 669-670.
[160] T4-85 L30 – T4-86 L33.
[161] T4-94 L18 – T4-95 L22.
[162] Ex 3 p 676.

and in good faith, and repudiation, due to the seriousness and totality of the company's breaches of the contract.[163]

Claim for breach of statutory warranty

Nature of the claim

[74] The Mousas claim damages for breach of statutory warranty as against the company in the amount of $1,571,024.40, being the cost allegedly attributable to the rectification of alleged defects.

[75] The building contract was a regulated contract under the *Domestic Building Contract Act 2000* (Qld).[164] At the time of the parties entering into both the preliminary agreement and the contract that Act relevantly provided:

> "**Part 4 Warranties**
>
> **Division 1 Incorporation of warranties**
>
> **41 Implied warranties**
>
> (1) The warranties mentioned in division 2 are part of every regulated contract.
>
> (2) A warranty mentioned in a section of division 3 is part of each regulated contract that is a contract of the type to which the section applies.
>
> **Division 2 Implied warranties for all contracts**
>
> …
>
> **43 Compliance with legal requirements**
>
> The building contractor warrants the subject work will be carried out in accordance with all relevant laws and legal requirements, including, for example, the *Building Act 1975*.
>
> **44 Standard of work and exercise of care and skill**
>
> The building contractor warrants the subject work will be carried out—
>
> (a) in an appropriate and skilful way; and
>
> (b) with reasonable care and skill.
>
> **Division 3 Implied warranties for particular contracts**
>
> **45 Adherence to plans and specifications**
>
> (1) This section applies to a regulated contract if plans and specifications form part of the contract.
>
> (2) The building contractor warrants the subject work will be carried out in accordance with the plans and specifications.
>
> …
>
> **48 Calculation of provisional sums**
>
> (1) This section applies to a regulated contract providing for a provisional sum.

---

[163] Ex 3 pp 676-677.

[164] Per s 9.

> (2) The building contractor warrants the provisional sum has been calculated with reasonable care and skill, having regard to all the information reasonably available when the contract is entered into (including information about the nature and location of the building site)."[165]

[76] The wording of the aforementioned warranties does not qualify their longevity by reference to whether the regulated contract terminates. The only qualification on their longevity in the Act is s 51's six and a half year limitation period on the right to institute proceedings for breach.

[77] The Mousas plead an entitlement to damages for breach of warranty on the basis that they have suffered or will suffer loss and damage, being the cost of carrying out and completing remedial work to the house.[166] The pleaded premises in support of that pleading are that the company breached the statutory warranties and, because of the termination of the building contract, the Mousas will be required to engage an alternative builder to carry out and complete the works to the standard that was required under the building contract.[167]

[78] As to the nature of the breach of statutory warranties the Mousas plead:

> "64. The work performed by the first defendant in construction of the house is
>
> (a) Defective, and requires rectification by way of remediation work …; and/or
>
> (b) below the reasonable standard of expectation of quality of work and level of finishes ordinarily associated with a prestige high-end dwelling…"[168]

[79] The above pleading's reference to a "quality of work and level of finishes ordinarily associated with a prestige high-end dwelling" introduces a form of words (an "inaccurate shorthand descriptor") not found in either the contract or the statutory warranties. The relevant statutory standard of expectation is that dictated by the words of the statutory warranties – the most obvious of which is that work will be carried out "in an appropriate and skilful way" and "with reasonable care and skill". The use of the inaccurate shorthand descriptor created a false distraction at trial because it or similar phrases, such as "quality high-value dwelling", were adopted in some of the expert evidence. This prompted a submission that the expert opinion was valueless because it applied the wrong test.

---

[165] On the repeal of the *Domestic Building Contracts Act* on 1 July 2015 like warranty provisions were incorporated into Schedule 1B of the *Queensland Building and Construction Commission Act 1991* (Qld). Reliance upon the warranties was pleaded at paragraph 32 of the third amended statement of claim (the particulars of that paragraph failed to specifically mention s 48 but the terms of s 48 are nonetheless included within the words of the pleaded paragraph).

[166] Third amended statement of claim [79]-[80].

[167] Third amended statement of claim [65], [69].

[168] The pleading included particulars referred to in annexures to the third amended statement of claim and in the expert reports of George Thirkell and John Palmer.

[80] It is as well to dispense with that distraction now. The use of the inaccurate shorthand descriptor appears to have been an unnecessary attempt to give context to the company's obligation, pursuant to the statutory warranty, to carry out work in an appropriate and skilful way with reasonable care and skill. The author of the pleading presumably inferred that matters of degree might be involved in assessing expectations of what might be appropriate or reasonable in the context of a home being built for over two million dollars, as compared say to a project home being built for several hundred thousand dollars. That may be so but only by reason of the probability that some of the work required to construct the former may be more demanding than that required to construct the latter.

[81] It is the specific nature of the work to be performed, not the intended salubriousness of the house, which provides the context in which the expected standards of appropriateness and reasonableness are applied. Despite their use of an inaccurate shorthand descriptor it is apparent from the nature of the below discussed defects and poor quality work singled out for criticism by the experts that it was work which was not performed in an appropriate and skilful way with reasonable care and skill, that is, it was work which did not meet the statutory expectation. Counsel for Mr Vukobratich was invited to make good his complaint by identifying, amidst the various works criticised by expert evidence using the shorthand descriptor, any work which he submitted did meet the statutory expectation. He did not take up that invitation.

The expert evidence generally

[82] The only expert evidence in the case was adduced by the plaintiffs. The defendants did not go into evidence.

[83] The three expert witnesses were:

1. George Thirkell, an experienced civil and structural engineer;
2. John Palmer, an expert in construction waterproofing;
3. Scott Pearson, a quantity surveyor.

[84] Mr Thirkell's reports[169] identified wide ranging defects, detailing the ways in which the defective works failed to comply with the National Construction Code's ("NCC") Building Code of Australia ("BCA"), a code given force in the *Building Act 1975* (Qld)[170], and Australian Standards ("AS"), which are captured in the BCA.[171] He also explained the nature of rectification and completion works required.[172]

[85] Mr Palmer's evidence elaborated upon the serious waterproofing problems at the premises, including the water penetration into the ground level and into the surrounds of windows and doors in the dwelling. He also costed the rectification of defects he had found.

---

[169] Ex 7, 8, 9, 24.
[170] See, eg, s 30.
[171] Ex 24, the updated Appendix A to his first report tracks these in summary; they are elaborated upon in his reports.
[172] Again, summarised in Ex 24.

[86] Mr Pearson costed the items of work identified from the evidence of Mr Thirkell and Mr Palmer as requiring rectification and completion.

[87] Each of the experts was well qualified and experienced and provided apparently credible and reliable evidence. Further to the professional analysis of the rectification and completion requirements the supporting photographic evidence also demonstrated the experts' opinions were well founded.

[88] There was, inevitably, variation as between the costings of Mr Palmer and Mr Pearson regarding waterproofing rectification. Little argument was advanced by the Mousas as to why I ought to prefer the opinion of one to the other.[173] At best it was that Mr Palmer's costings ought be favoured over Mr Pearson's on the basis Mr Palmer performs the type of work referred to.[174] However, it is Mr Pearson whose primary expertise is in costing. I favour his costings. That is not to suggest Mr Palmer lacks expertise in his field and merely reflects my preference for the costings of an expert whose field of primary expertise lies in costing.

[89] I accept Mr Pearson's costing of required works is reasonable and accords with costs norms in the building industry for performing work of the kind identified.

[90] It is convenient to approach the evidence by reference to each of the items which the Mousas complain require rectification. In each instance that will require determination of whether the state of the works associated with each item evidences a breach of warranty so as to require rectification and what the reasonable cost of that rectification ought be. I will, for simplicity, adopt the same work item subsets as adopted by Mr Pearson.

[91] Mr Pearson divided some of his descriptions of those works into one group, described as "defect 1", "defect 2", et cetera, and divided the rest into another group, described as "reasonable expectation A", "reasonable expectation B", et cetera.[175] His use of numbered defects was for work which he regarded as defective or non-compliant, and his use of lettered reasonable expectations was for work which he considered fell below a reasonable expectation for work ordinarily associated with a high-end dwelling. To avoid creating more confusion I will use his system of numbering and lettering works, except that I will refer to all as defects (use of the term "reasonable expectation" might perpetuate the distraction already caused by the aforementioned inaccurate shorthand descriptor).

[92] In turning to each numbered or lettered defect what will be considered is whether the state of the allegedly defective work evidences a breach of statutory warranty, for instance whether the state of the work compels the inference it was not carried out in an appropriate and skilful way with reasonable care and skill. As part of that process it is necessary to bear in mind that on-site work ceased prior to completion, that is, the apparently defective state of some work may merely be because it was incomplete and not because such work as was performed was in breach of the statutory warranty. This

---

[173] Plaintiff's written submissions p 37 [189].
[174] T7-33 L32 – T7-35 L2.
[175] Ex 10. Also see Ex 25 which added defects 17 and 18.

is not a realistic possibility in respect of many of the defects discussed below but will be referred to where it does arise as a realistic possibility.

[93] The accumulation of monetary amounts identified below is recorded in Appendix A to these reasons.

Defect 1 – Groundwater seepage

[94] Much of the ground level was cut into the slope with the consequence that all of its western side and much of its northern and southern sides serve as retaining walls. A substantial and convincing body of evidence shows that groundwater seeps through those walls, impacting their structural integrity,[176] damaging the plasterboard lining on their interior and leaving the ground level uninhabitable.[177] The prospect that a material source of that ingress is the incomplete state of the construction project, such as the unsealed atrium glass wall upstairs, is untenable on the whole of the evidence.[178] The conclusion is inescapable that water is penetrating from outside through the earth facing ground level retaining walls.

[95] It is elementary that the walls of a dwelling should not leak. Where the walls of a dwelling are at or below ground level, it is self-evident that they must be constructed, treated, drained and backfilled in such a way as to ensure the groundwater does not penetrate the walls. The fact that the ground level walls of this dwelling leak makes it self-evident there has been a failure to carry out the construction work connected with it in an appropriate and skilful way with reasonable care and skill. Further, the waterproofing and groundwater diversion measures were inadequate and there was a failure to conform with the NCC's BCA Part 2.2 Damp and Waterproofing.

[96] There was a substantial body of evidence adduced regarding the manner, location and adequacy of waterproofing applied to the earth facing side of the retaining walls. This included evidence from the Mr Palmer, who considered a waterproofing membrane must not have been installed or installed properly behind the ground level retaining walls and or that such agricultural drainage as was installed to the rear of the walls must have been poorly constructed and ineffective. The importance of properly draining the rear of the walls was heightened by a structural configuration in the middle of the wall which is inset to the east and would tend to trap water.[179]

[97] Mr Brett Holgerson, the waterproofing contractor who performed work during construction, testified he applied waterproofing coatings and membrane and corflute board – to protect the surface from breach by stones in backfill – in various locations as directed. It is tolerably clear he performed waterproofing work on the ground level retaining walls,[180] not the undercroft retaining walls. Photographic evidence of the latter during the construction era suggests no waterproofing.[181] Significantly, the

---

[176] Ex 7 p 34.
[177] Ex 7 p 21.
[178] Eg T5-40 L30 – T5-43 L5.
[179] Eg Ex 6 p 35.
[180] Marked by him in Ex 15.
[181] Ex 7 pp 33-34.

waterproofing work at ground level was not applied to the side walls abutting earth under both sets of concrete stairs.[182] This left the stairs and the undrained earth under them as ready sources of water ingress.[183]

[98] It was difficult, given the lapse of time, for Mr Holgerson to relate the location of all of his work with precision. He was not to know whether the height at which he on instruction ceased the waterproofing matched the height at which wall surface would ultimately be above ground and not vulnerable to groundwater. Photographic evidence suggests that in the end result the waterproofing did not reach high enough.[184] Even assuming such waterproofing as was applied was applied with reasonable skill, a possible explanation for water ingress is that the retaining walls were not waterproofed far enough towards and past the edge of their reach of eventual contact against earth.

[99] Other explanations for the apparent failure of waterproofing are that it may have been compromised by the presence of rain water and puddling prior to drying and that the corfluting and membrane may have been penetrated by stones or other rubble if the backfill process was not performed with proper care and skill. There is also evidence suggesting the backfill may have been applied before there was time for the waterproofing to fully cure.[185]

[100] The location of the water ingress on the earth side of the retaining walls is largely inaccessible, having the consequence that it is impossible to look and see precisely what combination of the possible causes is in play. Nonetheless the severe nature of the water ingress speaks for itself. Whichever way the individual aspects of the waterproofing, drainage installation and backfilling were performed it must be that their overall execution and co-ordination was not performed in an appropriate and skilful way with reasonable care and skill.

[101] The rectification works required to remedy this defect[186] are:

- removal of existing plasterboard linings on the interior of the retaining walls;
- demolition of concrete stairs to enable access to apply waterproof membrane to otherwise inaccessible walls and demolish ground level floor slab to enable drainage trenches to be formed and provide for satisfactory waterproof details;
- the installation of additional drainage and connection to a new detention tank in the undercroft level, so as to allow groundwater to be dispersed appropriately;
- application of a waterproof membrane system internally to all retaining walls, installation of new interior plasterboard linings, and creation of a drainage cavity between the block wall and the plasterboard lining;

---

[182] Ex 15 suggests he waterproofed the stair walls on the stair sides furthest from the house.
[183] T3-15 L45; Ex 7 p 31.
[184] Eg Ex 6 p73.
[185] Ex 14 p 7.
[186] See, eg, Ex 7 p 29 et seq.

- installation of a drain in the abovementioned cavity to divert any wall that may enter through the rectified waterproofed wall;
- the amendment of door and window openings in consequence of building the cavity wall and reinstating the ground level slab at a lower level;
- installation of the new concrete stairs and ground level slab;
- alteration of pavement and trench drains to ensure surface water collection is diverted rather than entering behind the retaining wall.

Mr Pearson opines the cost of such rectification works would be $223,642 exclusive of GST.

Defect 2 – Retaining wall structural design life insufficient at undercroft levels 1 and 2

[102] Water also seeps through the retaining walls of undercroft levels 1 and 2.[187]

[103] The undercroft retaining walls were not protected by a waterproofing membrane or correctly placed drainage of groundwater.[188] It is a requirement of AS4678 Earth Retaining Structures that the undercroft should have had a design life of at least 60 years. While there are no residential spaces abutting the retaining walls, the undercrofts serve as structural support beneath the dwelling. In the absence of further structural support, the undercroft masonry blockwork and reinforcement will quickly deteriorate and corrode.[189] Quite apart from the requirement of the Standards, it is elementary that the integrity of the structural foundations of a dwelling built on a slope should be adequately protected. That this did not occur here bespeaks a failure to carry out the work in an appropriate and skilful way with reasonable care and skill.

[104] The rectification of this defect requires the strengthening of the undercroft level 1 and 2 retaining walls with new buttress columns, essentially providing a further structural support to provide the design longevity required. Mr Pearson opines the cost of this rectification will be $42,268 exclusive of GST.

Defect 3 – Defect number not used

Defect 4 – Groundwater collection at undercroft levels

[105] This defect is really a component of defect 2 above in that the water seepage there mentioned is causing groundwater to collect in the undercrofts. As already discussed, the undercroft retaining walls should have been protected by a waterproofing membrane and correctly placed drainage of groundwater. The groundwater collection is a product of the same failure to carry out the works in an appropriate and skilful way with reasonable care and skill discussed in respect of defect 2. It needs to be rectified to avoid the health hazards occasioned by pooling of water on the concrete floors of the undercrofts.

---

[187] Ex 7 p 21.
[188] Eg Ex 6 p 75.
[189] Ex 7 p 34.

[106] The rectification work required is the provision of screeds to provide surface falls to the undercroft levels, the cutting of a hole for ventilation and drainage in order to allow water to collect in a gutter on the outside of the undercroft level 1 wall, and the provision of plumbing in turn to the detention tank.

[107] Mr Pearson opines the cost of this rectification work will be $19,511 exclusive of GST.

Defect 5 – External doors and windows not weathertight

[108] Rainwater seeps through the external windows and doors, causing water damage to the plasterboard linings.

[109] The external doors and windows were not installed in accordance with the manufacturer's details and industry standards. Door thresholds are not flush. Fully sealed rebates have not been provided. The installations do not conform with BCA Part 2.2 Damp and Waterproofing. They are not weathertight.[190] These are all manifestations of warranty breaches. Such extensive failings make it obvious the work could not have been performed in an appropriate and skilful way with reasonable care and skill.

[110] The rectification works required are the removal of aluminium framed doors and windows, the cutting of rebates into the masonry wall, the provision of a waterproof membrane as nominated by the glazing contractor and the installation of new doors and windows including the application of appropriate seals and water stops. Mr Pearson opined the cost of this rectification work, if the existing doors and windows are replaced rather than re-used, will be $323,116 exclusive of GST. If they are re-used the cost would reduce to $160,000 exclusive of GST.[191] No evidence has been advanced to suggest they cannot be re-used so I will allow the cost based on such re-use.

Defect 6 – Level 1 and 2 walls damaged by rainwater ingress

[111] The walls have been damaged by the ingress of rainwater in connection with defect 5 discussed above. The need for rectification is a consequence of the warranty breaches identified in connection with that defect. Mr Vukobratich's counsel contended it was a consequence of the works being incomplete. It is conceivable a proportion of the damage may not have occurred so quickly if the works had been completed. However, in the long run, even if the company completed the construction, I am satisfied the deficiencies above were of such a nature as to have made all of the damage inevitable in time.

[112] The rectification work required is the removal of the water damaged plasterboard lining on levels 1 and 2, and replacement of it with new plasterboard. Mr Pearson opines the cost of this rectification work will be $2,130 exclusive of GST.

Defect 7 – Atrium glass wall glazing cracked and not sealed

---

[190] Ex 7 p 22.
[191] T5-19 L32; compare Ex 10 defect 5 to Ex 25.

[113] The glazed curtain glass wall spanning the middle-eastern side wall of levels 1 and 2 – the atrium wall – is not sealed. Further, one of its panels is cracked where it appears the spider fixings have not been tightened correctly.[192] Water penetrates through the glass wall.

[114] The fact that the glass wall is not sealed and thus leaks water constitutes a failure to comply with NCC BCA Part 2.2 Damp and Waterproofing. Moreover, it is elementary that windows of a residence should not leak water and instead should be properly sealed. It is self-evident that the builder of a new building ought ensure window panels are not cracked. That having been said, it is conceivable that in the building of a residence some accidents may occur, for example, with an installed window being cracked. Whether this defect and the failure to seal constitutes a breach of the statutory warranty depends upon timing. That is, the failure to have installed sealant and the failure to have replaced the cracked window might merely be a symptom of the works having been interrupted and thus be a consequence of the works being incomplete, as distinct from them having been completed without reasonable care and skill. The evidence of the relevant timing is insufficient on this point and thus inadequate to conclude a breach of warranty.

[115] Accordingly, I will not allow the required work, which Pearson opined cost $10,178 exclusive of GST as rectification work. I will however allow it later in these reasons as required completion work.

Defect 8 – No movement joints in walls at undercroft level 1

[116] The undercroft level 1 slab does not have a movement joint between the 200 and 300 series blockwork.

[117] The absence of such a movement joint constitutes a failure to conform with Australian Standard 3700 Masonry Structures. This constitutes a breach of the warranty to carry out the works in accordance with the legal requirements. As earlier mentioned, the standards are captured by the BCA which is in turn applied by the *Building Act 1975*.

[118] The rectification work required is cutting and sealing movement joints. Mr Pearson opines the cost of this rectification work would be $1,650 exclusive of GST.

Defect 9 – Concrete pool cracking

[119] Crack lines are apparent underneath the pool and water is leaking through the pool.

[120] It is self-evident that the base of a pool of a domestic premises should be watertight. The very fact of the crack line and leaking bespeaks a failure to have carried out the works in an appropriate and skilful way with reasonable care and skill. Further, it appears there was non-compliance with AS 2783 Use of Reinforced Concrete for Small

[192] Ex 7 p 23.

Swimming Pools and its application of AS 23600 and AS 3735 Concrete Structures Retaining Liquids.[193]

[121] The rectification work required is the installation of a waterproof membrane to the inside of the pool and to the wet edge so as to provide a watertight base sufficient to undertake the pool lining works. Mr Pearson opines the cost of the rectification work will be $21,195 exclusive of GST.

Defect 10 – Roof not compliant with Building Code

[122] Roof cladding has not been installed in accordance with NCC BCA 3.5.1 and AS1562.1.[194] The roof batons have not been sufficiently lapped. Roof beams are not adequately fixed at columns. The roof sheeting overhangs. The roof insulation has been installed upside down.[195] There are insufficient rainwater heads and downpipes and the box gutter is doglegged. The box gutters and downpipes do not comply with NCC BCA part 3.5.2 or AS3500.5 and are defective.[196]

[123] Such an array of shortcomings in performing the core task of properly roofing a dwelling compels the conclusion the works were not carried out in an appropriate and skilful way with reasonable care and skill.

[124] The rectification work required is:

- removal of all roofing sheeting, box gutters and insulation;
- the making of alterations and reinforcements to the roof structural members;
- the installation of new batons, insulation, roof decking, box gutter and additional rainwater heads and downpipes.

Mr Pearson opines the cost of the rectification work will be $116,025 exclusive of GST.

Defect 11 – Slab founded on inadequate material

[125] Insufficient footings have been provided at the front western side of the level 1 slab, resulting in undermining of the slab and footing, leaving the slab not bearing on its foundation.

[126] This represents a failure to conform with NCC BCA Part 2.1 Structure. That this newly built home does bear upon its foundation bespeaks a failure to carry out the footing work in this location in an appropriate and skilful way with reasonable care and skill.

[127] The rectification work required is the provision of reinforced concrete footing under that part of the slab. Mr Pearson opines the cost of that works would be $3,680 exclusive of GST.

---

[193] Ex 7 p 28.
[194] Ex 7 p 37.
[195] Ex 7 p 25.
[196] Ex 7 pp 22, 25.

Defect 12 – Adequate drainage to balconies has not been provided

[128] The ground, level 1 and level 2 balconies have surfaces which do not fall in such a way that water drains away from the building, nor has appropriate drainage been provided to collect the water.

[129] This defect represents a non-conformance with NCC BCA Part 2.2 Damp and Waterproofing. It also evidences a failure to have carried out the terrace and balcony work in an appropriate and skilful way with reasonable care and skill, it being obvious that a residence's balconies and terraces should drain properly.

[130] The rectification work required is the provision of screed for appropriate falls, trench grates, rainwater heads and drainage pipework to defer and collect water to avoid it entering the building and or pooling on the balcony or terrace areas. Mr Pearson opines the cost of the rectification work will be $16,688 exclusive of GST.

Defect 13 – Exposed reinforcement

[131] Reinforced starter bars protrude from the concrete wall in undercroft level 1. In light of the duration of construction and the fact that these protrusions must have been created at an early stage of construction it is apparent this was not merely incomplete work. Leaving the exposed bars in situ has the consequence that they are exposed to the elements and rust will in due course penetrate the concrete, decreasing the life and structural integrity of the concrete. For the work associated with those reinforcement bars to have left them protruding as described it must not have been carried out in an appropriate and skilful way with reasonable care and skill. That is because leaving them exposed to the elements like that would eventually compromise the structural integrity of the concrete.

[132] The rectification work required is the cutting and removal of the protruding bars and then sealing the cut to ensure that part of the bar that is within the concrete is not exposed to the elements. Mr Pearson opines the cost of this rectification work will be $582 exclusive of GST.

Defect 14 – Planter boxes not drained or membraned

[133] The planter boxes which form part of the balcony structure have no interior waterproof membrane or drainage outlets. This results in water collection and seepage.

[134] Such work does not conform with NCC BCA Part 2.2 Damp and Waterproofing.

[135] The rectification work required is the provision of a waterproof membrane to line the planter boxes and the provision of outlets inside the planter boxes with drainage to collect and direct water to the retention tank. Mr Pearson opines the cost of the rectification work would be $6,043 exclusive of GST.

[136] Again, it is necessary to consider whether this was work that had been completed and was defective or whether it was work which was yet to be completed. Waterproofing the planter boxes was a task which could have been tended to in the later more cosmetic stages of construction. Drainage outlets would have been cost effectively installed during construction of the planter boxes but it is conceivable it was thought more practicable to drill in outlets later. I cannot conclude this was a breach of warranty but will take it into account in considering the apportionment of the relevant provisional sum in considering completion costs below.

Defect 15 – Lack of bracing of level 2 internal walls

[137] The internal walls on level 2 are lightweight partition walls without internal lateral bracing.

[138] This represents a failure to conform with Australian Standard 1684.3 from which it follows it is a breach of warranty. It is hardly surprising the absence of internal lateral bracing breached the standard.

[139] The rectification work required is the removal of the existing plasterboard lining to the relevant walls and the installation of plywood bracing with tie-downs, followed by the replacement of the plasterboard linings. Mr Pearson opines the cost of this rectification work would be $8,634 exclusive of GST.

Defect 16 – Mass concrete without reinforcement or joints

[140] Pavement against some edges of the dwelling consists of mass concrete, installed without any reinforcement or construction joints. There is some cracking in it. It will continue to quickly deteriorate, permitting further water ingress against the building.

[141] This constitutes a failure to conform with AS2678 Earth Retaining Structures and 60 year life requirements. The failure to use reinforcing when installing a concrete pavement of itself bespeaks a failure to carry out the work in an appropriate and skilful manner.

[142] The rectification work required is the provision of a watertight reinforced concrete pavement over the defective pavements. Mr Pearson opines the cost of such rectification work would be $16,600 exclusive of GST.

Defect 17 – Inadequate steel support for feature window

[143] Both ends of the blockwork in which the atrium glass wall is set have been found to be hollow.

[144] Mr Thirkell opined this has compromised the structural integrity of the wall.[197] The wall not only carries downward weight, it must also be strong enough to withstand

[197] Ex 9.

cyclonic wind loads against it.[198] The atrium glass wall is self-evidently a point of such potential vulnerability it should have been obvious it was not appropriate or skilled to hold it using hollow blockwork. If reasonable care and skill had been applied the blockwork would have been strengthened.

[145] Mt Thirkell considers each end requires strengthening by the addition of steel work. Mr Pearson opined that work would cost in the order of $22,500.[199] I infer, based on his usual methodology, that figure is exclusive of GST.

Defect 18 – Ground floor southern block wall spalling

[146] A section of the level 2 undercroft southern blockwork is separating from the concrete masonry and spalling around the concrete reinforcement. If the section of wall is not repaired the spalling will continue and broader repair will be required.

[147] Mr Thirkell opined the failure is likely a result of poorly laid blockwork, inferior quality blockwork, using damaged blockwork and or poor technique in concrete filling of blockwork.[200] In any event it is self-evidently the product of the work not being carried out in an appropriate and skilful way with reasonable care and skill.

[148] Mr Pearson opines the cost of rectifying the section of wall is in the order of $18,500.[201] I infer, based on his usual methodology, that figure is exclusive of GST.

Defect A – Low ceiling heights

[149] The level 1 ceiling heights are less than the heights stipulated in the contract specifications.[202]

[150] This constitutes a breach of the company's warranty to carry out work in accordance with the plans and specifications. In light of the contractually specified heights and the company's awareness of Dr Mousa's strong desire for high ceilings, the failure to deliver planned ceiling heights shows a failure to carry out the works in an appropriate and skilful way with reasonable care and skill.

[151] The rectification work required is the removal of the existing level 1 ceilings and the installation of new ceilings at correct heights. This will also require the insertion of plasterboard infill to the top of wall linings where required, as well as the rework of lintels/infills as required above existing door and window openings. Mr Pearson opines the cost of such rectification works would be $44,348 exclusive of GST.

Defect B – Bedroom 3 door too narrow

---

[198] Ex 9 p 4.
[199] Ex 25.
[200] Ex 9 p 15.
[201] Ex 25.
[202] Ex 7 p 20.

[152] The doorway to bedroom 3 on the first floor is only 720 mm wide.

[153] The contract plans contemplate a width of 820 mm.[203] This appears to also be consistent with the size of the relevant doors in the Corinthian quote that was incorporated in the contract. The door opening of 720 mm is not only materially smaller than that specified in the contract, it looks like an unusually small door width for a conventional bedroom (appearing so in both the exhibited photographs and on the occasion of the Court's view of the building). If the company was carrying out this work in an appropriate and skilful way with reasonable care and skill, it is difficult to understand not only how such a significant error was made but also why it was not promptly realised and rectified.

[154] The rectification of this defect will require the demolition of the corridor partition adjacent to the door, with it to be reconstructed at a 100 mm setback so as to allow for the installation of an 820 mm door. The plumbing to the shower will also require some reconfiguration as a result. Mr Pearson opines the cost of this rectification work will be $14,099 exclusive of GST.

Defect C – Access not provided to lower levels

[155] No access over ground has been provided to the undercroft levels. They can only be accessed by clambering down steep slopes.

[156] The cheapest means of access over ground to the undercroft levels would be the construction of stairs from the ground level downwards to the undercroft levels. Mr Pearson opines the cost of such works would be $9,775 excluding GST, consisting of a cost of $5,750 to provide stairs from ground level to undercroft level 1, and $4,025 to provide stairs from undercroft level 1 to undercroft level 2.

[157] Such construction was not contemplated by the contracts plans, but then again the contract plans made no provision at all for the undercroft levels installed by the company. The contract's specifications do contemplate the provision of a pool pump house.[204] In the end result, it appears the pool pump was installed at undercroft level 1. Given the company evidently decided to utilise the undercroft as the pool pump house it was contractually obliged to provide, the need for stairway access to that level, so as to be able to access the pump, should have been self-evident. Putting it slightly differently, it was implicit in the contractual obligation to provide a pool pump house that access to it would also be provided. I do not infer stair access ought to have been provided to the other undercroft level under the contract in that the sole purpose of that level is structural support.

[158] Failure to have provided stair access to undercroft level 1 represents a failure to carry out work implicitly required under the contract. However, such stairs need not have been installed as an integral part of the installation of the undercroft structure and could

---

[203] Ex 7 p 21.
[204] Ex 1 p 44.

have been added at a later time. The absence of stairs to level 1 is an instance of incomplete work, considered later, but not breach of warranty.

Defect D – Walls and ceilings do not align

[159] The ceiling, bulkhead and a wall on level 1 do not align.

[160] The contract drawings unsurprisingly contemplate alignment as between walls and ceiling bulkhead. The fact that they do not align in actuality bespeaks a failure to carry out the work in an appropriate and skilful way with reasonable care and skill.

[161] The rectification work required is the cutting back of the level 2 slab edge to achieve an alignment. Mr Pearson opines the cost of the rectification is $1,052 excluding GST.

Defect E – Spalling concrete

[162] The concrete to undercroft level 2 is spalling, leaving reinforcement susceptible to the elements and thus shortening the life expectancy of the structure.

[163] As already mentioned, the integrity of the structure should be sufficient to provide a 60 year life span. Spalling in concrete plainly compromises the integrity of the structure and, in turn, its life span. Moreover, the very fact that spalling is evident in such a new construction bespeaks a failure to have carried out the work in an appropriate and skilful way with reasonable care and skill.

[164] The rectification work required is the removal of the spalling concrete and infilling with protective high strength grout for protection against the elements. Mr Pearson opines the cost of this rectification work would be $515 exclusive of GST.

Defect F – Poor external painting

[165] The external painting of the dwelling is inconsistent in colour and, in areas, has runs that have continued into glazing.

[166] Mr Thirkell opined this constituted a failure to paint in accordance with QBCC standards and tolerances. His photographs illustrate an obvious lack of appropriate care. The state of the painting demonstrates it was not carried out in an appropriate and skilful way with reasonable care and skill.

[167] The rectification work required is the repainting of the external walls, a process which also requires the provision of extensive scaffolding. Mr Pearson opines the cost of the rectification works would be $65,494 exclusive of GST.

Defect G – Level 2 pod soffits not concreted

[168] The soffits of the level 2 pods have been framed and lined with fibre cement sheeting. This appears to have been done to conceal a sagging pod slab.[205]

[169] According to the contract plans they should have been painted white set concrete.

[170] The rectification work required is the demolition of the framing and fibre cement sheet linings and replacing that area with white set concrete and a painted finish. Mr Pearson opines the cost of such rectification work would be $7,470 exclusive of GST.

Defect H – Poor mastic seal between blockwork and acrylic panels

[171] The sealant applied to the pool wall acrylic panels was poorly applied and requires cutting back that enabled the adherence of adjacent pool finishes.

[172] It is readily apparent from photographs that the sealant has not been applied in an appropriate and skilful way with reasonable care and skill.

[173] The rectification work required is the cutting back, removal and making good of the mastic to allow blockwork to be neatly finished. Mr Pearson opines the cost of such rectification work would be $1,150 exclusive of GST.

Defect I – Hose taps wrongly located

[174] External hose taps are located midway up both of the external stairs.

[175] The taps are in an obviously unsafe position,[206] particularly in that they are a potential obstacle and injury hazard to persons using the stairs. They are also in a demonstrably impractical position and the placement of a hose reel mount and a hose next to the tap in such a location would increase the hazard. Further, any person manipulating such equipment or the tap itself will be required to do so inconveniently positioned on stairs as opposed to on a broad, flat surface. This all should have been obvious at the time of the works and the stupidity of the taps' locations bespeaks a failure to carry the work out in an appropriate and skilful way with reasonable care and skill.

[176] The rectification work required is the cutting off and disconnecting of the taps from their current location and the provision of pipework and taps to practical and safe positions at the bottom of the stairs. Mr Pearson opines such rectification work would cost $1,610 exclusive of GST.

Defect J – Unrendered and unpainted undercroft walls

[177] Walls to the undercroft levels are not rendered or painted.

---

[205] Ex 7 p 20.
[206] Ex 7 p 21.

[178] The need for them to be rendered and painted is not well explained by the expert evidence. Mr Thirkell considers that painting might be required for development approval, seemingly because Council may consider front-facing walls hill slope walls need to be painted. Mr Thirkell also opines rendering and painting will increase the life of the wall but it is not suggested that is a legal compliance issue or that structural integrity is at serious risk because of the absence of such work.

[179] The more pertinent evidence to take into account is that the undercrofts were an addition to the contracted design and that they form part of the built house, taking on the appearance from the east of lower storeys. I readily infer from the contract's plans and specifications that the whole of the external above ground walls of the built structure were to be rendered and painted. That was obviously the approach taken with the balance of the dwelling. It is thus apparent the non-rendering and non-painting of these walls was a deliberate choice and not merely work postponed for performance prior to completion. The implied requirement of the specifications and plans that external above ground walls of the built structure were to be rendered and painted did not fall away merely because the undercrofts which became part of the external walls were not initially planned for. This failure was a breach of the warranty to build in accordance with the plans and specifications.

[180] The rectification work required is explained ambiguously. It is said to be the rendering and painting of the external face of the undercroft walls and columns that would be seen from the hillside. Mr Pearson opines the cost of such rectification would be $8,079 exclusive of GST (the provision of scaffolding to access the soffit at undercroft level 2 represents $3,500 of that total). His details speak of paint to rendered walls but not the rendering of the walls, which begs the question whether he actually means that the work costed is only painting. In any event that ambiguity favours the company's position so I will not depart form Mr Pearson's costing.

Defect K – Pool stepping stones inconsistently sized

[181] The pool stepping stones are inconsistent sizes.

[182] The inconsistency, in what are obviously supposed to be linear (not free form) raised paver steps, is quite obvious to the naked eye. It bespeaks a failure to have carried out the stepping stone work in an appropriate and skilful way with reasonable care and skill.

[183] The rectification work required is the cutting back of the concrete stepping stones so that they become consistent in size. Mr Pearson opines the cost of such rectification work would be $805 exclusive of GST.

Conclusions re rectification

[184] Subject to what follows, the combined total of Mr Pearson's costing of the rectification work, made necessary by reason of the various breaches of warranty progressively explained above is, as Appendix A[207] shows, $900,049.70, inclusive of GST.

[185] There are two further considerations bearing upon the assessment of the amount to be awarded for that allowed work. Firstly, Mr Pearson opined that the amount ought to be increased by a 6% escalation rate to allow for increases in market rates since his assessment was carried out and reported on in late 2016.[208] That is the approach submitted for by the Mousas' counsel and I accept such an escalation rate should be applied, subject to the response to the next consideration.

[186] Secondly, each of the items of rectification were costed by Mr Pearson as work to be performed in isolation, that is, on a stand-alone basis. That qualification, evident in his report, was confirmed in evidence. He explained his separate costings each allowed for individual site set up, management and scope of work.[209] He agreed the costs might be materially reduced if performed in a co-ordinated fashion, for instance by a single contractor,[210] there being efficiencies in a concurrent approach to the rectification process.[211] He referred to the shared use of scaffolding as an example.[212]

[187] That evidence creates a dilemma in that the cost of such rectification works as I have found are required ought be assessed on the reasonable basis that they could likely be performed, and in any event co-ordinated, by a single building contractor. Such a single contractor would have greater set up and administrative costs than one performing single item rectification work but the cost efficiencies introduced by use of single contractor should result in less overall cost. In acknowledging that to be so Mr Pearson was reluctant to estimate the likely extent of the reduction by reference to an across the board percentage range, apparently because of the variability of the individual work required.[213]

[188] The parties submitted in light of that evidence that it would be appropriate to make my findings regarding the rectification works I would allow, as I now have, and then give the parties an opportunity to adduce discrete evidence and submissions regarding the costing of the allowed rectification work. I am provisionally prepared to do so. In the first instance I will hear the parties as to whether they adhere to those submissions and, if so, how that process ought be approached. Issues to be considered in that regard include:

- There are many variables already in play in my assessment of loss and of course the age and cost of this case. Against that background it might be thought the precision of another set of detailed costings would be overkill and it would sufficient, if practicable, to obtain a brief professional opinion generally estimating the likely range of total saving if the allowed

[207] Items not found to have been breaches of warranty appear in the table but have been endorsed "(not a breach)" and "$0".
[208] T5-29 L22.
[209] T5-25 L37.
[210] T5-25 L43.
[211] T5-26 L7.
[212] T5-27 L22.
[213] T5-27 L20.

rectification works as already costed by Mr Pearson were undertaken, or at least co-ordinated, by a single building contractor.

- If the aforementioned 6% escalation is to apply it would be necessary for that opinion to be premised on likely costs in the era of Mr Pearson's initial report.
- It is reasonable to infer the rectification and completion works would be undertaken collectively. Any revision of the cost of allowed rectification work on the basis it will undertaken, or at least co-ordinated, by a single building contractor, should take into account that such a contractor would be the same contractor charged with undertaking or at least co-ordinating the completion works.

[189] It follows from all of the above that the Mousas have succeeded in their case for breach of warranty and that their loss and damage should be quantified as the cost of the rectification work I have found to be allowed in an amount which remains to be determined.

Wrongful repudiation of contract?

[190] The Mousas claim damages as against the company for wrongful repudiation of the contract in the amount of $2,524,254.26, being the cost of the alleged defects requiring rectification plus the cost to complete the construction in the amount of $953,229.86.

[191] The third amended statement of claim pleads a list of different conduct by the company relied upon as constituting, whether "individually or alternatively together", a repudiation of the building contract.[214] It was recognised by the High Court in *Shevill v Builders Licensing Board*[215] and in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*[216] that breach of contract by repudiation only occurs if a party evinces an intention no longer to be bound by the contract or the party shows an intention to fulfil the contract only in a manner substantially inconsistent with the party's obligations under it and not in any other way. It is not seriously suggested the former applies. The critical question, one of degree, is whether the various conduct complained of manifested an intention by the company to fulfil the contract only in a manner substantially inconsistent with the company's obligations and not in any other way. As was emphasised in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*[217] the question is answered by reference to objective conduct, not subjective intention.

[192] The pleaded conduct complained of is:

(a) unjustified earthworks and pool base variations;[218]
(b) unjustified column, kitchen and upper floor variations;[219]

---

214 Third amended statement of claim [67].
215 (1982) 149 CLR 620, 625-626.
216 (1989) 166 CLR 623, 634, 643, 658, 664-667.
217 (1989) 166 CLR 623, 657-658.
218 Third amended statement of claim [35]-[39].
219 Third amended statement of claim [40]-[41].

(c) an unjustified additional tile variation;[220]
(d) non-compliant progress claims;
(e) non-compliant claims for variations;
(f) unfounded claims for sundries; and
(g) any one or more of the items of defective work.

[193] The conduct complained of in (d), (e) and (f) was not pressed at trial as constituting repudiation. Without wishing to minimise the significance of the conduct in (a) through (c) above, particularly (a), it as well to cut straight to (g) and make an inevitable finding of the obvious. The conduct in (g), the defective work already discussed, provides overwhelming evidence of repudiation. It involved breaches so serious as to suggest this construction was beyond the company's level of competence.

[194] Counsel for Mr Vukobratich emphasised the contract's clause 20.1 conferred a means by which the Mousas could give notice of an intention to terminate should the company not remedy its breaches within 10 days. He relied on that clause to argue the breaches of warranty were not of such seriousness as to justify termination. It was also submitted the existence of clause 20.1 meant the company was given a "right" to a clause 20.1 notice and the opportunity to remedy or mitigate before termination. Clause 20.1 conferred no such right on the company. Nor did its existence suggest breaches of the kind alluded to in clause 20.1, which included if the company was "in substantial breach", could not be of such a character as to justify termination without first being given a chance to rectify.

[195] It is unnecessary to descend into an analysis of whether the breach here was of an essential or non-essential term for, as was explained by the High Court in *Koompahtoo Local Aboriginal Land Council v Sampine Pty Ltd*,[221] even a breach of a non-essential term may justify termination if sufficiently serious. The High Court there referred to *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[222]where it was noted breaches of a stipulation as to seaworthiness could vary widely in importance. The same may be said of breaches of appropriate care and skill in building a dwelling. In the present case those breaches were very serious.

[196] The nature and extent of the defective works went well beyond the superficial and readily remedied flaws which might occur in progressing an otherwise competent construction process. For instance, one of the elementary purposes of a house is protection from the elements. The company constructed a house which leaked, including through the roof and structural walls. This was not merely the result of minor error. Such a pervasive and high level of ineptitude exhibits an obvious ongoing preparedness, even if unintended, to perform the works inappropriately, without reasonable care and skill.

[197] It should be appreciated the above discussed statutory warranties were also reflected in clause 10.1 of the contract.[223] It is difficult to think of a more fundamental requirement

---

[220] Third statement of claim [42]-[43].
[221] (2007) 233 CLR 115.
[222] [1962] 2 QB 26.
[223] Ex 1 p 17.

of a construction contract than that the works are to be performed in an appropriate and skilful way, with reasonable care and skill, in accordance with the plans and specifications and in accordance with relevant law. The nature and magnitude of the above discussed rectification work, required because the company did not perform the works to the standard required by the contract demonstrates the fundamental gravity of the company's breaches of warranty. Those breaches were so serious as to have manifested an intention to perform the works in a manner substantially inconsistent with the company's obligations pursuant to the contract.

[198] I therefore readily conclude the Mousas were entitled to terminate because the company had repudiated the contract. It follows it is unnecessary to consider whether the other conduct complained of also constituted repudiation.

[199] I acknowledge for completeness that at the time of termination the Mousas were not aware of the full extent of the company's failure to perform the works with reasonable care and skill however, as was explained in *Shepherd v Felt and Textiles of Australia Ltd*,[224] termination may be justified by proof of prior existing circumstances which the terminating party only became aware of later.

Assessing damages for wrongful repudiation

[200] What was the Mousas' loss resulting from the company's repudiation of the contract? The already discussed cost of rectifying the existing works was necessarily part of that loss because what had been built so far should have, had the company complied with the contract, been built properly. What else did the Mousas lose because of repudiation?

[201] They lost the continued benefit of the contract. Mr Vukobratich's counsel contended that loss was the Mousas' own fault and that they disentitled themselves from the continued benefit of the contract by wrongfully renouncing it. That argument focussed upon some aspects of the Mousas' conduct during their final collapse in confidence in the company, none of which was of such a character or at such a level as to justify an inference of repudiation on their part.[225]

[202] Reliance was placed on Dr Mousa's email of 5 October in which he indicated he would not be paying for any further variations "until the matter is resolved".[226] However, the matters to which that email referred were a mix of issues that were crystallising as part of the Mousas' exercise in trying to clarify the chaotic financial processes in play. The company could have been in no doubt of that context and the email was plainly not intended to be interpreted as involving any finality in the Mousas' position regarding the performance of the contract.

---

[224] (1931) 45 CLR 359.

[225] Repudiation of a contract being "a serious matter, not to be lightly found or inferred" – per Lord Wright *Ross T Smyth & Co Ltd v T D Bailey Son & Co* [1940] 3 All ER 60, 71; cited in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1988) 166 CLR 623, 657.

[226] Ex 3 pp 616-617.

[203] Emphasis was also placed upon David Mousa's email of 24 November 2015 responding to the company's request for approval of a tiling labour variation, in which he wrote:

> "As pointed out to Mark on the phone today this is not something that can be addressed as there is currently a matter being handled beteween two lawyers. Until this matter is resolved it is unfair to ask us to consider new variations or quotes. This also goes for all other work that is yet to be finalised."[227]

This was nothing more than a request to temporarily refrain from asking for responses from the Mousas regarding works related requests. The final sentence quoted above is ambiguous and in the context of what was occurring I do not infer it was a direction to cease the construction. The company's email in response does not suggest such a meaning was given to it.[228] As earlier discussed, that response focussed upon a proposed tiling variation, wrongly relying on the absence of approval of it as a premise for works to have to "come to a stand still".

[204] More broadly, the above argument of Mr Vukobratich's counsel did not acknowledge the reality that for a prolonged period the company had been manifesting an intention to perform the works in a manner substantially inconsistent with its company's obligations under the contract.

[205] Mr Vukobratich's counsel additionally argued the contract's clause 20 impliedly excluded a general law right to terminate but clause 20.1's language, particularly its reference to "may", renders that argument unsustainable. Deployment of that clause's mechanism was not essential to the accrual of a right to damages for breach. True it is clause 20.3 precluded the owner from terminating if in "substantial breach" of the contract. However none of the Mousas' conduct in the closing stages referred to above was remotely close to constituting a substantial breach.

[206] Mr Vukobratich's counsel also emphasised the fact the Mousas did not deploy the contract's mechanism by which they could by notice have sought the remedy of any breaches before electing to terminate as suggesting an absence of the essential requirement[229] that the Mousas were willing to complete their obligations under the contract. The Mousas' unsurprising decision not to use those provisions before terminating does not support a conclusion that, absent the company's repudiatory conduct, the Mousas would not have continued with the contract. Until their final collapse in confidence in the company the Mousas had been willingly paying the company, indeed so willingly they paid more than necessary. That is a pattern powerfully in the Mousas' favour. I am satisfied that, but for the company's repudiation, the Mousas were willing and able to complete the contract. They would have paid for the properly built house which was supposed to have been built pursuant to the contract.

[207] If the cost of now completing the house they were contractually entitled to exceeds the amount which they remained to pay to complete the contract, then the difference in

---

[227] Ex 3 p 666B.
[228] Ex 3 p 666.
[229] *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, 433.

those amounts also represents a loss they have suffered in consequence of the repudiation.

[208] These reasons accordingly turn to a determination of each of those amounts; firstly, the cost of completion and, secondly, the balance which would have been payable to the company if it had completed the contract.

Cost of completion

Methodology

[209] Mr Pearson authored a report[230] outlining his opinion of the fair and reasonable cost to complete the construction of the Mousas' house, taking into account the expert evidence as to the state of the construction and the works required to complete it. The nature of those works is described in reference to the individual works canvassed below.

[210] Appendix A of Mr Pearson's report estimated the cost of completion in respect of various items of work expressly or impliedly contemplated by the contract but which were not items contemplated by the contract's allowances for prime cost items and provisional items, the so-called "measured works".

[211] As to the prime cost and provisional sums items, Mr Pearson's Appendix A identified the extent, according to the expert evidence, to which works covered by those items were or were not complete. He identified the amount outstanding by reference to the relevant contractual allowances, but in some instances allowed for an increase of the contractual allowance on the basis it was "deemed inadequate". I will not allow for such an increase in my determination of the cost to complete. To do so would be to impose an arbitrary judgment based not on contractual requirements but on what may be regarded as apt for a dwelling of this scale. The Mousas' entitlement to damages arising from the repudiation must necessarily be calculated by reference to what their entitlement was pursuant to the contract. The practical effect of the contract was that if the allowances allowed for in the contract for prime cost items and provisional sums turned out to be inadequate, then the extra costs would be additional to the contracted price and would have to be paid for by the Mousas. It follows that the cost to complete identified by these reasons will be determined by reference to the contract's allowances for prime cost items and provisional sums, notwithstanding that some of those allowances may presently seem inadequate.

[212] Mr Pearson calculated the estimated cost of completion based on the original contract's scope of works including allowed variations and also a "standard reasonably expected of a high-end dwelling". I will not repeat what has already been said about the use of such an inaccurate shorthand descriptor. It is once again a distraction in that the detail of the cost to complete items, dealt with in Appendix A to Mr Pearson's report, appears to be a fair reflection of costs identified by reference to the scope of actual works required pursuant to the contract. To the extent the fact that the dwelling is a so-called "high-end" dwelling may have impacted the estimated cost, it appears only likely to

[230] Ex 11.

have borne upon estimated cost in the sense that Mr Pearson made the following assumption:

> "The contract to complete the house is assumed to be undertaken by a competent 'high-end' residential builder able and willing to take over the added responsibility and risk of an incomplete design and built contract that could have latent defects and design warranty issues. It is assumed contractor selection will be undertaken by selective list competitive tendering."[231]

[213] That assumption is reasonable. The relevance to cost of this being a so-called high-end dwelling is that it is a challenging construction project, made more challenging by it being partly completed. Such construction projects require a high level of competency and expertise, inevitably reflected in the costs charged by building contractors capable of performing such work.

[214] In addition to the cost of completion of specific items canvassed in Appendix A to his report, Mr Pearson opined that there ought additionally be allowed, on the overall cost of completion sum, a further 6%[232] to cater for likely escalation of the cost of building work by completion, as well as a construction contingency of 15%, which he explained was the contingency of unexpected or unknown completion associated costs. I accept his evidence that both are consistent with industry standards.

[215] It is reasonable that the 6% per annum escalation cost should apply to the cost of completing both the measured works and the incomplete prime cost and provisional sum items. But for the breach of contract, the completion of the house's construction should have occurred long ago and the Mousas would not now be exposed to the escalated costs of construction.

[216] The construction contingency of 15% should also apply to the measured works and the incomplete prime cost and provisional sum items. I do not overlook that from the company's point of view, to the extent it allowed for such a contingency, it would implicitly have been allowed for within the contract price, the contingency of unexpected construction costs being part and parcel of what must be allowed for in setting a contract price. If the company made inadequate allowance for that contingency, then that was a loss it would have to bear as the cost of doing business in this field. However, the company will not be the building company which completes construction. The building company which does complete the construction will be unlikely to agree to do so without arriving at a quoted price which incorporates a construction contingency and it is reasonable to anticipate it will be at or about the industry standard of 15%. Such a cost overlay does not represent a windfall in the Mousas' damages entitlement. It needs to be allowed for as a direct consequence of the fact that, by reason of the company's repudiation, a different builder will need to be paid to complete the construction.

---

[231] Ex 11 p 6.

[232] His report factored in an escalation cost of 3% but by the time of trial, well over a year and a half later, he testified the proper amount was 6% – T5-29 L20.

[217] In arriving at these conclusions, I am conscious the incomplete prime cost and provisional sum items are costed not by reference to measured cost but rather the measured proportion of completion of the relevant items. Applying that apportionment to the prime cost or provisional sum allowance amount effectively capped by the contract provides the amount it would have cost, absent variation, had the company completed the contract. The amount so calculated represents the unexpended amount of the allowance. It is reasonable, in order to accord proper benefit to the unexpended monetary amount of the allowances which would have been available for completion, to increase it to allow for escalation and contingency. Failure to do so would deprive the Mousas of the notional worth of the unexpended amount they were entitled to have had applied in completion of the work.

[218] Before applying the escalation and contingency percentages it is first necessary to cost the completion of the measured works and of items for which prime cost and provisional sum allowances were made in the contract. I will refer to those items by reference to the numbering system adopted by Mr Pearson. The costs listed in the first instance below are exclusive of GST. The accumulation of amounts is recorded in Appendix B to these reasons.

1a Superstructure – External Walls

[219] The rendering of the pods' fibre cement wall band and painting thereof remains to be done. It will cost $510. The final coat painting to external plastered walls needs to be applied along with additional finishing in certain areas. This will cost $16,140.

[220] Further to these costs, Mr Pearson would allow $1,500 for the painting of the block concrete undercroft areas and their retaining walls. I infer that does not include painting the undercrofts' exterior walls, for which allowance has been made as rectification work, and must relate to the interior of the undercrofts. It will be recalled that at the time of the contract the undercrofts did not form part of the design and were added consequent on the post-contract discovery of their stability issues. I have earlier inferred that the undercroft exterior walls should have been painted as an implied requirement of the contracts plans and specifications, but that is because of their visibility as part of the external walls of the built structure. The undercrofts are open structures but their interior walls not obviously visible beyond a short distance outside. I cannot identify sufficient foundation to infer a contractual requirement that the interior walls of the undercrofts were to be painted. I will not allow that cost component.

[221] This leaves a subtotal completion cost of $16,140.

1b Superstructure – External Soffits

[222] The concrete soffit requires rendering and painting which I accept should be costed at $5,865. In the vicinity of the pods there are needed soffit linings to the existing press steel batons at a cost of $900 and the soffit linings require painting at a cost of $700.

[223] This gives rise to a subtotal completion cost of $7,465.

1c Superstructure – External Doors

[224] Mr Pearson has allowed $5,000 for a front entry door and sidelight complete with finish and associated hardware. That allowance appears reasonable. It appears the front entry door and sidelight was not included in the prime cost items "doors, locks and assemble and trims". An amount of $1,500 should be allowed for the installation of a garage door, the supply (but not installation) of which was a prime cost item under the contract.

[225] This gives rise to a subtotal completion cost of $6,500.

1d Superstructure – Internal Walls

[226] Lining to internal block walls in the vicinity of the laundry, pantry and fish tank are required at a cost of $2,698. Lining to the wall framing in the vicinity of the laundry and pantry is required at a cost of $595. Water-resistant plasterboard is required in the laundry and pantry at a cost of $560. The stopping to existing wall linings requires completion at a cost of $2,090. There should also be an allowance for completion of square-top plaster in the amount of $3,000 consistently with variation VA29.

[227] This gives rise to a subtotal completion cost of $8,943.

1e Superstructure – Internal Ceilings

[228] The completion of ceiling linings including batons will cost $6,930. The provision of ceiling linings to existing press steel batons in the vicinity of the laundry, pantry and garage will cost $2,700. Curved bulkhead linings on existing framing are required in the foyer stairwell at a cost of $1,300.

[229] This gives rise to a subtotal completion cost of $10,930.

1f Superstructure – Internal Doors

[230] It will cost $5,000 to install internal doors and frames and $1,400 to paint them. I infer it was their supply, not their installation, which was contemplated by the relevant prime cost item.

[231] This gives rise to a subtotal completion cost of $6,400.

2a Finishes – Wall

[232] Mr Pearson has made a reasonable allowance of $15,180 for the painting of plasterboard lined walls. A final coat of painting to the plastered wall in the garage is required at a cost of $915.

[233] This gives rise to a subtotal completion cost of $16,095.

2b Finishes – Floor

[234] Mr Pearson opines the cost of providing an Axolotl concrete floor finish to the guest, wine cellar and rumpus rooms will be $15,750. He has assumed such finishes are included in the contract. The specifications contain an express inclusion to that effect in respect of the wine cellar[233] and whilst the specifications are ambiguous about the guest and rumpus rooms, the contract's plans each are endorsed with "Axolotl concrete" in respect of those rooms. However, the contract at appendix part E specifically provided that "Axolotl Product Finishes" as "shown on the plans and specifications" were "not included in the Contract Price".[234] I therefore will not allow this cost.

[235] Mr Pearson also allows $9,000 for the making good of the concrete floor finishes in the store, studio, showroom and garage. It is unclear on what basis he considers that is required other than an entry by him reading "Finish unclear". However, the specification inclusions[235] refer to broom finish concrete for the lower storeroom, the studio and the showroom. The specifications are silent on the internal garage floor area, although its surface is described as "concrete" in the plans, consistently with the plans' description of the store, studio and showroom. The photographic evidence suggests that those rooms already have the finish required, so I also decline to allow this cost.

2c Finishes – Ceiling

[236] The cost of painting all plasterboard ceilings will be $10,540, which should be allowed.

3a Fittings – Joinery

[237] Mr Pearson opines an allowance ought be made for shelving to the walk-in robes and linen cupboards and associated painting in the amount of $7,500. This did not form part of the cabinetry provisional sum allowance[236] and should be allowed.

3b Fittings – Sundries

[238] Mr Pearson allows $7,500 for shower screens which he assumed were included in the contract, however the contract specifications specifically excluded shower screens from the contract.[237]

[239] Mr Pearson allows a sum of $20,000 for the glass fish tank which he also assumed was included in the contract. The contract specifications appear to be silent as to whether or not it was included or excluded. However, it clearly features in the contract's plans as a substantial structural component[238] and was not listed in the exclusions in the contract's

---

[233] Ex 1 p 42.
[234] Ex 1 p 12.
[235] Ex 1 p 42.
[236] Ex 1 p 40.
[237] Ex 1 p 41.
[238] Ex 1 p 125.

appendix part E. I accordingly infer its cost was included in the contract price and allow it.

[240] Mr Pearson also allows a sum of $10,000 for "general sundries". I decline to make such an allowance in circumstances where I will also be allowing an uplift of 15% for contingencies.

[241] This gives rise to an allowed subtotal completion cost of $20,000.

4a Building Services – Hydraulics

[242] I agree with Mr Pearson's completion allowances of $5,250 for vanity basins, $4,000 for WC suites, $1,500 for the bath, $2,250 for shower fittings, $2,250 for sinks, $3,750 for floor waste installations, $2,250 for shower waste installations, $300 for the fish tank tap, $250 for the fish tank drain, $3,500 for the ZIP tap, $500 for the dishwasher connections, $500 for the washing machine connections and $1,250 for the external taps. Further, I agree with his allowance of $1,000 for the installation of the hot water system (the supply of which was a prime cost item) and $6,000 for the completion of the solar heating system which was allowed for under variation VA3.

[243] This gives rise to a subtotal completion cost of $34,550.

4b Building Services – Mechanical

[244] Mr Pearson allows $15,000 for six Fujitsu split air-conditioning units (9,000 BTU), $3,000 for one Ditto air-conditioning unit (12,000 BTU), $12,000 for three ditto air-conditioning units (18,000 BTU) and $18,000 for four ditto air-conditioning units (28,000 BTU). I agree with these allowances which are for remaining air-conditioning installations included in the specifications.[239] I also agree with his allowances of $500 for rangehood installation, $1,500 for pizza oven installation and $2,100 for completion of toilet/bathroom/laundry ventilation.

[245] This gives rise to a subtotal completion cost of $52,100.

4c Building Services – Electrical

[246] Mr Pearson has allowed $5,000 by way of allowance for electrical builders work in connection ("BWIC") and it is reasonable to infer that consequential works to that value will be required. An amount of $2,500 should be allowed for completion of the ducted vacuum system consistently with variation VA9A.

[247] Mr Pearson also allows $4,500 for a security system, noting it is unclear if it is part of the electrical provisional sum. In fact, the quote contained within the contract in support of the electrical provisional sum allowance of $147,879.60 lists, amongst its exclusions, "supply, wire and install a security system". There does not appear to be

[239] Ex 1 p 40.

any other reference in the contract or its annexures to the provision of a security system and I would therefore make no allowance for it.

[248] This gives rise to a subtotal completion cost of $7,500.

4b Building Services – Drainage

[249] An amount of $3,000 should be allowed for completion of stormwater drainage and an amount of $3,000 allowed for completion of sewer drainage.

[250] This gives rise to a subtotal completion cost of $6,000.

5 External Works

[251] An amount of $5,100 should be allowed for timber decking to the barbecue area, including additional joists and bearers as necessary and a stained finish.

[252] Mr Pearson has allowed $3,000 allowance for an automatic irrigation system on the basis it is unclear whether it forms part of the contract's provisional sum allowance of $27,500 for landscaping. However, it appears to be included within the contract's specifications as part of that allowance.[240] Given the cost of completion will include that allowance, considered below, it is unnecessary to include an extra allowance as a separate component here.

[253] Mr Pearson has allowed $10,000 for an Axolotl concrete floor finish to the patio on the assumption that is included in the contract. The specifications certainly contemplate that the lower patio will be finished with Axolotl concrete materials,[241] however, as earlier explained Appendix Part E to the contract's conditions specifically excludes Axolotl product finishes from the contract price notwithstanding that they are shown on the plans and specifications.[242]

[254] Mr Pearson has also allowed $3,000 as an allowance for "finish to concrete stair flights (2 No.)". He notes it is unclear whether that is included in the contract. On the face of the contract's specifications' references to concrete stairs, it is not contemplated that they would receive any additional finish.

[255] It follows that of the various external work costs of completion opined by Mr Pearson I would only allow that associated with the timber decking of $5,100.

6 Preliminaries and Margin

[256] Mr Pearson's Appendix A of various costs to complete estimates includes "6 PRELIMINARIES & MARGIN (Measured Works) (22%)". Against that entry there

---

[240] Ex 1 p 44.
[241] Ex 1 p 43.
[242] Ex 1 p 12.

appears the amount $62,045, which is 22% of the total cost of measured works opined by Mr Pearson. It evidently relates to the cost of setting up work preliminary to the performance of the above costed work and a margin added for profit and additional overhead costs. Bearing in mind the challenges inherent in taking over the completion of a part-built home of this kind and Mr Pearson's expertise and knowledge of industry trends, I will allow the amount of 22% for preliminaries and margin upon his costings of the measured works.

[257] It is implicit in his allowance for preliminaries and margin that he did not approach the measured works costings in the same way as he approached the individual costings of the rectification works, that is, as if they may each be performed as a stand-alone exercise.

Measured works sub-total

[258] The subtotal of the above discussed measured works, as tracked in appendix B hereto, is $215,763. With the application of the preliminaries and margin percentage of 22%, the subtotal of the cost of measured works to complete is $263,230.86.

7 PC Sums

[259] The contract's allowances for prime cost items totalled $103,802.96 inclusive of GST. The below table lists the items, the amount inclusive of GST allowed by the contract, the amount which Mr Pearson opines should be allowed and the amount which I conclude should be allowed. In determining the amounts allowed hereunder I have disregarded Mr Pearson's opinion that the allowance amounts should be "deemed inadequate" and increased, for reasons already given. Where the amount opined by Mr Pearson is less than the contract amount of the allowance, by reason of a proportion of it relating to completed works as explained by the expert evidence, I have allowed the amount as adjusted down by Mr Pearson.

	Description	**Contract Amount**	**Pearson Amount**	**Amount Allowed**
1.	Doors, locks and trims	$6,338.45	$16,500.00	$6,338.45
2.	Tile labour	$55,980.00	$50,000.00	$50,000.00
3.	Sanitary wares	$22,784.51	$22,500.00	$22,500.00
4.	Hot water system	$5,500.00	$5,500.00	$5,500.00
5.	Garage door	$13,200.00	$12,500.00	$12,500.00
	Total:			**$96,838.45**

8 Provisional Sums

[260] My approach to the allowances for provisional sums is the same as that I have taken in respect of the prime cost sums. The below table sets out the description of the provisional sum items, the amount allowed for them in the contract, the amount opined by Mr Pearson and the amount allowed by me. In some instances, the works have been completed and therefore no amount need be allowed. As with the prime cost items, all amounts are inclusive of GST.

[261] One of the items requires some additional explanation. It will be recalled Mr Pearson costed the rectification of the undrained and non-membraned planter boxes at $6,043 exclusive of GST, which is $6,647.3 inclusive of GST. I concluded that was a completion cost. The planter boxes are a provisional sum item in the amount of $9,185 inclusive of GST. The measured cost of the further work required represent 72% of that figure. I infer the costing of the planter box work for the purposes of ascribing an allowance would have been reasonably reliable. Conscious however that the measured work items were costed as stand-alone items I have rounded down the proportionate cost of the remaining work from 72% to 65%, a figure of $5,970.25. It the apportionment adopted in the relevant entry in the table below.

Description	Contract Amount	Pearson Amount	Amount Allowed
1. Earthworks	$88,000.00	-	-
2. Foyer stairs	$77,000.00	$80,000.00	$77,000.00
3. Floating internal stairs	$33,000.00	$35,000.00	$33,000.00
4. Balustrading foyer stairs	$7,000.00	$12,500.00	$7,000.00
5. Finish top of balustrade	$1,000.00	$1,500.00	$1,000.00
6. Scaffolding	$10,000.00	$10,000.00	$2,000.00[243]
7. Windows & doors	$70,642.00	-	-
8. Mirrors	$3,333.00	$3,500.00	$3,333.00
9. Cabinetmaking	$75,554.60	$110,000.00	$75,554.60
10. Stone benchtops	$26,755.00	$26,500.00	$26,500.00
11. Wine cellar	$3,850.00	$4,000.00	$3,850.00
12. Electrical	$147,879.60	$100,000.00	$100,000.00
13. Carpet	$4,180.00	$8,000.00	$4,180.00
14. Timber flooring (kitchen)	$6,000.00	$6,000.00	$6,000.00
15. Driveway	$5,527.00	$10,000.00	$10,000.00
16. Balustrading remainder	$29,685.00	$30,000.00	$29,685.00
17. Lower deck/trellis	$8,915.83	$10,000.00	$8,915.83
18. Timber seating – lower pool area	$4,493.93	$5,000.00	$4,493.93
19. Planter boxes – lower pool	$9,185.00	$10,000.00	$5,970.25
20. Landscaping	$27,500.00	$35,000.00	$27,500.00
21. Front entry deck	$3,630.00	$5,000.00	$3,630.00
22. Synthetic grass & gym tiles	$5,500.00	$6,500.00	$5,500.00
23. Pool	$172,526.00	$80,000.00	$80,000.00
24. Pool fencing	$5,300.00	$5,500.00	$5,300.00
25. Pond front entry structure	$5,610.00	-	-[244]
26. Labour – owner unique finishes	$5,500.00	$5,500.00	$5,500.00
Total:			**$525,912.61**

Further calculations

[243] Mr Pearson opines the work is 80% complete which would leave $2,000 remaining. He allowed $10,000 on the basis the contractual allowance was inadequate but I have ruled against that approach.

[244] Deleted per variation VA13.

[262] The total of the aforementioned allowed PC sums and provisional sums is $622,751.06. Given the measured costs did not include GST I will reduce that total for the moment to a GST exclusive figure of $566,137.33.

[263] The addition of that figure to the measured works cost of $263,230.86, gives a sub-total of $829,368.19.

[264] Addition of 6% for escalation to that sub-total gives a running total of $879,130.28.

[265] Now including GST to that figure gives a running total of $967,043.31.

[266] Application in turn of 15% construction contingency gives a qualified total of $1,112,099.81.

Addition of completion costs re atrium glass wall and stairs to undercroft

[267] That total is qualified because a final addition is required. Mr Pearson costed the rectification of the atrium glass wall at $10,178 and the installation of stairs to undercroft level 1 at $5,750, each exclusive of GST. I did not allow those works, totalling $15,928 on the basis they were really costs of completion. I would accordingly allow them now.

[268] There are two rival considerations bearing upon this cost. On the one hand it will be recalled Mr Pearson costed his proposed rectifications individually and acknowledged they would cost less if provided or co-ordinated by a single contractor. On the other hand the cost of completion calculation has assumed the single contractor approach, factoring in a 15% construction contingency. It is impossible to be precise but I conclude those rival considerations likely cancel each other out to a substantial extent and accordingly will neither increase or decrease on account of them.

[269] It remains necessary to adjust the figure of $15,928 by applying the aforementioned 6% escalation to $16,883.68. The addition of GST, in turn gives a total of $18,572.05.

Insurance

[270] Finally, it is necessary to make allowance for the cost of insuring the incomplete project. Mousas have paid that insurance for two years from 22 September 2017 to 22 September 2019, in an amount totalling $14,989.81.[245] It is unclear what occurred regarding insurance earlier but in any event the known cost of insuring the incomplete project site pending its completion ought be allowed as part of the cost of completion. The amount covers a period ending on 22 September this year, a little over five months away. That is a reasonable period to allow for the point by which a builder carrying insurance for the project site will have embarked upon rectification and completion works, so I will allow the amount in full.

[245] Ex 19, 20; T4-15 L45 – T4-17 L16.

Total cost of completion

[271] Adding the aforementioned figures of $18,572.05 and $14,989.81 to the qualified total of $1,112,099.81 gives a grand total cost of completion of $1,145,661.67.

Calculation of the unpaid balance

Introduction

[272] Having completed the cost of completion it is necessary, in determining loss, to deduct from that figure the unpaid balance which would have remained for payment by the Mousas had the contract not terminated and instead been completed.

[273] Calculation of the unpaid balance is complicated by a number of factors. The legitimacy of some purported variations by the company is in issue. Some items in Margaret's spreadsheet should properly be regarded as having been payable under the contract rather than as requiring payments separate to it. In respect of amounts paid and payable the company's pleading did not plead in neat response to the Mousas' and some aspects of financial detail pleaded by the company are obscure and confusing without elaboration.[246] That is particularly unhelpful in a case where the company's financial processes appear to have been chaotic and remained unexplained before me by the company, which has not participated in the trial, or by the company's principal Mr Vukobratich, who was present but did not adduce evidence at the trial. Such company records as were exhibited by consent permit of some factual conclusions but do not detract from the apparent overall force of the Mousas position regarding conclusions of fact to be reached in calculating the unpaid balance of the contract.

[274] It will be recalled the contract price was $2,106,756. The preliminary agreement deemed the amount paid under it to be part payment of the contract price in the event a contract eventuated. The amount paid under the preliminary agreement was $10,550. It will need to be taken into account in counting payments made pursuant to the contract. It will be recalled there were subsequently payments made of $3,630 for the first geotechnical report and $1,540 for services described as extra for Dragan changeover. The Mousas contend those two payments should also be treated as payments under the preliminary agreement and thus under the subsequent contract. I reject that argument. The evidence does not reveal those two payments were made as part of an amendment to the amount stipulated in the preliminary agreement or pursuant to some other agreement by the company that it would set the two amounts off against the contract price.

[275] The Mousas made payments to the company or on the company's behalf, pursuant to the contract. Those payments included:

- the aforementioned payment of $10,550 under the preliminary agreement;

[246] See, eg, schedule B to the second amended defence and counterclaim.

- four payments of the first four stages of the contract, totalling $1,369,391.40, namely $105,337.80 deposit, $210,675.60 for base stage, $316,013.40 for frame stage and $737,364.60 for enclosed stage;
- 17 sundry payments totalling $130,000; and
- amounts totalling $102,505 paid directly to the company's suppliers or sub-contractors for work performed or supplies provided as part of the company's performance of the contract, namely totals of $12,100 to Arden Architectural, $37,000 to M&R Kitchens and $53,405 to Aquaplex.[247]

The evidence that such payments, totalling $1,612,446.40, were made is uncontradicted. Other payment were made. They are identified progressively below.

[276] The amount payable pursuant to the contract increased by reason of variations. The Mousas pleaded the company is entitled to $173,102.88 worth of variations, describing them as allowed variations.[248] This included some payments recorded by the company in Margaret's spreadsheet. The company denied the above variation figure, pleading it was actually entitled to variations totalling $339,940.02[249] and that $134,603.62 of variations remain unpaid.

[277] It is helpful to deal with the so-called allowed variations before then progressing to the disputed variations. The accumulation of relevant amounts is recorded in Annexure C to these reasons. To remove doubt the amounts alluded to are inclusive of GST.

Allowed variations

[278] The so-called allowed variations and issues arising in respect of them are set out hereunder. It will be noted that some variations involve no issue in this financial context but do relate to work in issue in the discussion of rectifications above.

[279] *VA3 Supply and fix solar including plumbing and electrical for $9,404.12*: No issue arises and the amount was paid.

[280] *VA4A Cutting of lower floor wall for $1,320*: No issue arises and the amount was paid.

[281] *VA4B Lopping of trees at rear to allow view for $726*: No issue arises and the amount was paid.[250]

[282] *VA5 Increase in joinery PS allowance for $17,599.45*: An entitlement to payment of provisional sum allowances, even increases in them, arises under the contract as part of the entitlement to staged progress payments. An increase in a provisional sum allowance increases the overall contract price to be paid in stages so that the amount of any increase would be apportioned across each stage payment. However, that is not to

---

[247] There was also a payment of $14,050 to Everett Stone but it was repaid through insurance and is not included in the present exercise.
[248] Third amended statement of claim [33], table 4.
[249] Second amended defence and counterclaim [8] (the last pleading version involving the company).
[250] Also claimed as MMOU10.

the point in the present exercise which is determining what would have been payable if the contract had continued on to be completed. The full amount should be treated as having been payable.

[283] *VA9 Changes to slab for ducted vacuum system for $550:* No issue arises and the amount was paid.[251]

[284] *VA9A Supply and fix ducted vacuum system for $11,259.05*: No issue arises and the amount was payable.[252]

[285] *VA10 Adjustment to stone benchtop PS allowance for -$135*: The company expressly chose to vary downwards by this amount.[253] In the current exercise this represents an acceptance the amount would not have been payable and full rather than apportioned allowance should be made for it.

[286] *VA11 Increase in roof size for $7848.50*:[254] The amount was paid.[255] The company later agreed that it would credit half the payment back.[256] Only $3,924.25 should be regarded as having been payable.

[287] *VA13 Delete PS allowance for pond front entry structure for -$6,171*:[257] The company expressly chose to vary downwards by this amount. For reasons explained at VA10 full allowance should be made for it.

[288] *VA16 Render internal garage walls for $1,996.50*: No issue arises and the amount was payable.[258]

[289] *VA17 Glass spider window wall (atrium glass wall) for $45,012.07*: No issue arises and the amount was payable.

[290] *VA18 Boral flush mounted door frames for $4,435.05*: No issue arises and the amount was paid.

[291] *VA19 Steel beams required to pods for $2,269.54*: No issue arises and the amount was paid.

[292] *VA20 Change glass to W34 for -$121*: The company expressly chose to vary downwards by this amount.[259] No issue arises and the amount is a reduction.

---

[251] Also claimed as MMOU8.
[252] Pleaded dispute re incomplete works not pressed.
[253] Ex 2 p 316.
[254] Ex 2 p 259.
[255] Ex 2 p 484.
[256] Ex 3 p 632.
[257] Pleaded in error as $5610 – see Ex 2 p 262.
[258] Pleaded dispute re incomplete works not pressed.
[259] Ex 2 p 280.

[293] *VA21 Install sliding glass doors to pods for $6,413*: No issue arises and the amount was paid.

[294] *VA22 Delete crimsafe to upper floor for -$198*: The company expressly chose to vary downwards by this amount.[260] No issue arises and the amount is a reduction.

[295] *VA23 Various variations for $6,901.84*: No issue arises and the amount was payable.[261]

[296] *VA24 Install louvres to pods for $10,587.50*: The variation was endorsed as payable at the enclosed stage but the work was not performed by then or ever (and is apparently not contemplated for the completion works). Payment was not claimed other than via the company's pleading. Nothing is payable.

[297] *VA25 Pipework to top storey vertical wall garden for $1,294.70*: No issue arises and the amount was payable.[262]

[298] *VA26 Ventilation to cabinets in kitchen for $615.99*: The variation was silent as to when it was payable but in any event the work was not performed (and is apparently not contemplated for the completion works). Payment was not claimed other than via the company's pleading. Nothing is payable.

[299] *VA28 Lounge and dining shelves/theatre wall cabinet/bar credit for $15,859.47*: The variation was endorsed as payable at the fixing stage, which was not reached by termination. The work was not performed (and is apparently not contemplated for the completion works). Payment was not claimed other than via the company's pleading. Nothing is payable.

[300] *VA29 Square set plaster for $9,875.39*: No issue arises and the amount was payable.[263]

[301] *VA32 Power to motorised overhead cupboards for $145.20*: No issue arises and the amount was payable.[264]

[302] *VA33 Extra to CBUS electrical for $8,076.26*: No issue arises and the amount was payable.[265]

[303] *VA34 Shower grates for $959.78*: The variation was endorsed as payable at the fixing stage, which was not reached by termination. The work was not performed (and is apparently not contemplated for the completion works). Payment was not claimed other than via the company's pleading. Nothing is payable.

---

[260] Ex 2 p 284.
[261] Pleaded dispute re incomplete works not pressed.
[262] Pleaded dispute re incomplete works not pressed.
[263] Pleaded dispute re incomplete works not pressed.
[264] Pleaded dispute re incomplete works not pressed.
[265] Pleaded dispute re incomplete works not pressed.

[304] *VA35 Theatre wall for $8,074.33*: The variation was endorsed as payable at the fixing stage, which was not reached by termination. The work was not performed (and is apparently not contemplated for the completion works). Payment was not claimed other than via the company's pleading. Nothing is payable.

[305] *VA36 Additional power to theatre wall unit for $544.50*: No issue arises and the amount was payable.[266]

[306] *VA37 Move pipework for rainwater shower head for $338.80*: No issue arises and the amount was payable.[267]

[307] *MMOU2 supply of Big Ass Fans for $18,015.51*: No issue arises and the amount was payable.

[308] *MMOU6 Extra electrical to home theatre for $2,093.30*: No issue arises and the amount was payable.[268]

[309] *MMOU7 Add 5 external taps for $1,197.90*: No issue arises and the amount was payable.

[310] *MMOU9 Additional electrical work for fish tanks for $2,579.72*: No issue arises and the amount was payable.[269]

[311] *MMOU11 Changes to electrical and additional robe for $3,315.16*: No issue arises and the amount was payable.[270]

[312] *Other 1 Reduction in PS Allowance for pool to final quote of -$67,626*: The Mousas assert this variation on the basis the company by email sought[271] and were given the Mousas' approval for the Placid Pools quote of $172,526, reflected in the contract's provisional allowance, to be reduced by $67,626 to $104,900, to allow for the exclusion of the formwork, steelwork and glass window installation from the work to be performed by Placid Pools as work to be performed by some others. I am unprepared to infer those circumstances manifested any agreement by the company to lower its quoted provisional sum allowance for the pool or lower its overall contract price. This change merely meant the company would have to cover the cost, hopefully within the limits of the provisional sum allowed, of the excluded work being performed by others.

[313] *Other 2 Supply Aquaplex to pool wall in lieu of glass for $53,405*: In the end result the planned glass pool wall was altered to Aquaplex and Mrs Mousa paid Aquaplex directly for its supply. Once again, I do not accept this involved a variation. The payment to Aquaplex has already been counted above as a payment on the company's behalf

---

[266] Pleaded dispute re incomplete works not pressed.
[267] Pleaded dispute re incomplete works not pressed.
[268] Pleaded dispute re incomplete works not pressed.
[269] Pleaded dispute re incomplete works not pressed.
[270] Pleaded dispute re incomplete works not pressed.
[271] Ex 3 p 589.

pursuant to the contract. The Mousas' interests in the present process are safeguarded because the payment will have the practical effect of increasing the amount paid pursuant to the contract and thus reducing the notional balance payable.

[314] The above conclusions are tracked in Appendix C. Of the so-called allowed variations contended for by the Mousas the total amount payable was $152,662.31. Payments capable of being attributed specifically to those payable amounts (as distinct from the substantial sundry payments referred to earlier) totalled $32,966.21.

[315] I turn next to various disputed variations.

The disputed variations

[316] *The earthworks and pool base variations*:

- VA2 Excavation and lower pool area for $81,619.74;[272]
- VA6 Continuation of VA2 for $57,445.54;[273]
- VA14 Credit re lower section part 1 for -$6,545.99;[274]
- VA15 Credit re lower section part 2 for -$2,743.53;[275]
- VA30 Credit re margin charged on earthworks section of VA2 for -$3,791.69;[276]
- VA31 Credit re GST charged twice on VA6 for -$522.31;
- VA7 Suspend ply flooring for pool base construct for $37,037.[277]

[317] Allowing for the credits these variations aggregate $162,498.76. VA2 and VA6 were paid (as earlier noted with an overpayment of $30 on VA2). The works to which the variations related were the additional earthworks and suspension off the ground of the pool needed where the footings of the house were stepped down the hillslope. It will be recalled the company started works before finalising a building approval process which had prompted it to seek the second geotechnical report. It realised only belatedly that there was a need for very significant post-contract design changes to plans it had made as well as very significant additional works.

[318] Some of the concerning circumstances associated with the company's earthworks and pool base variations have been discussed above at [36]-[39], [46]-[47], [54], [58]-[64]. Notwithstanding that the variations were signed by Mrs Mousa, and indeed payments were made, it is readily apparent from those circumstances that the Mousas disputed the company's entitlement to such variations and that the issue remained in debate until termination. The company's variable and at one point apparently dishonest behaviour

[272] Ex 2 p 376.
[273] Ex 2 p 243.
[274] Ex 2 p 266.
[275] Ex 2 p 267.
[276] Ex 2 p 433.
[277] Ex 2 p 245.

in handling the issue with the Mousas suggests it was well aware of how tenuous its position was.

[319] The company's position, in effect, was that the need for the additional work could not have been foreseen and arose from a latent condition. Its position was unsustainable. Clause 14.5 of the contract precluded the company from recovering additional payment for a latent condition where the need arose because of a failure to obtain foundations data or where the need was ascertainable from foundations data. Section 53 *Domestic Building Contracts Act 2000* (Qld) was of similar effect. The company assumed the responsibility pursuant to the preliminary agreement for work including "arrange a soil test", "preparation of full working drawings" and "engineering approval".[278] It was the company which, as item 5(e) of the contract recorded, obtained the foundations data which the contract required "must" be obtained before entering into the contract.

[320] It will be recalled foundations data means the information about the land needed for the preparation of an appropriate footings or slab design and an adequate estimate of the cost of constructing the footings or slab. In light of the breathtaking extent of footing design change and additional works later needed it is obvious either that what was obtained by the company was not foundations data because it did not give the information needed, or alternatively, that if it was foundations data it should have been obvious from it that more work was required. It follows the company was contractually precluded from recovering payment for the variations in question. None should be taken into account in determining what was payable under the contract.

[321] *VA8 Changes to column to kitchen and upper floor for $28,096.20*:[279] The dispute associated with this variation is not pressed. The amount was paid.

[322] *VA12 Drop ceiling in garage for $2,274.80*: The amount was paid but the variation was later reversed.

[323] *VA27 Credit for drop ceiling in garage for -$2,274.80*: This reversed the above variation with the net result nothing was payable but $2274.80 had been paid.

[324] *VA39 Increase in tile labour allowance for $14,672*.83:[280] It is now apparent this was not actually a variation and it is not the subject of dispute. No amount is payable in respect of it.

[325] *MMOU1/12 Tradelink extras for $16,385*: This only arises from line items recorded in the company's so-called Margaret's spreadsheet. There is no evidence of any entitlement to payment. On the face of it such cost was inherent in the cost of works under the contract. No amount was payable.

[326] *MMOU4 Additions to kitchen quote – slide out drawers for $4,516*: This was not payable for the same reasons as MMOU1/12 above. It is work of a kind which

---

[278] Ex 1 p 1.
[279] Ex 2 p 257.
[280] Ex 3 p 663.

obviously fell within the designation of cabinetmaking for which provisional sum allowance was made in the contract.

[327] *MMOU3 Additions to main price on construction for $81,167.73*: This was not payable for the same reasons as MMOU1/12 above. It is obviously an entry related to work to be performed under the contract, not a record of some incidental acquisition.

[328] The disputed variations therefore involve a total of payments made of $169,476.28 and a payable total of $28,096.20.

The unpaid balance

[329] The above exercise is tracked in Appendix C. As it shows, the total amount paid was $1,814,888.89 and the total amount which would have been payable had the company completed the contract was $2,390,019.51. The difference between those amounts represents the amount the Mousas would have to have paid if the contract completed, namely, $575,130.62. That amount should be deducted from the cost of completion in assessing the Mousas' loss in consequence of the repudiation because they could not have acquired the building they contracted for without paying in full for it.

Damages for repudiation

[330] Setting aside the issue of interest, the Mousas' damages payable for repudiation will consist of:

(a)	Completion costs of	$1,145,661.67
(b)	Less the unpaid balance of	$575,130.62
	(A sub-total of	$570,531.05)

(c) Plus rectification costs in an amount which remains to be decided (the unadjusted rectification costs being $900,049.70).

[331] In addition to needing to hear the parties further as to the adjusted rectification costs it will also be necessary to hear from them as to whether there should be any award of interest bearing in mind the application of an escalation rate in the above calculations.

Is Mr Vukobratich liable in negligence to the plaintiffs?

[332] The foundation for the Mousas' purported case in negligence against Mr Vukobratich is the duty imposed upon him by statute to ensure that the building work was personally supervised and adequately supervised. The source of that obligation is said to be ss 43 and 43A of the *Queensland Building and Construction Commission Act 1991* (Qld), which relevantly provide:

> "**43 Licensed contractor must ensure building work is personally supervised**
>
> (1) For a licensed contractor that is a company, the company and the company's nominee must each ensure that building work carried out by the contractor is personally supervised by—

(a) the company's nominee; or
(b) an officer or employee of the contractor who holds one of the following licences of the relevant class authorising supervision of the building work—
(i) a nominee supervisor's licence;
(ii) a site supervisor's licence;
(iii) a fire protection occupational licence;
(iv) an occupational licence; or
(c) an individual who holds a contractor's licence of the relevant class.

Maximum penalty—
(a) for an individual—200 penalty units; or
(b) for a company—1,000 penalty units. **…**

43A Licensed contractor must ensure building work is adequately supervised

(1) For a licensed contractor that is a company, the company and the company's nominee must each ensure that building work carried out by the contractor is adequately supervised.

Maximum penalty—
(a) for an individual—200 penalty units; or
(b) for a company—1,000 penalty units.

…

(3) In deciding whether building work is adequately supervised, regard must be had to the following—
(a) whether the licensed contractor has a system for the supervision of the work and, if so, how the system has been implemented;
(b) whether the building work is in accordance with the plans and specifications set out in the contract for the work;
(c) whether the work is of a standard expected of a competent holder of a contractor's licence of the relevant class;
(d) whether, having regard to the size and complexity of the building work, the following are sufficient—
(i) the level of control, oversight and direction exercised by a person authorised to supervise the work;
(ii) the number, timing and quality of inspections carried out by a person authorised to supervise the work;
(e) whether the building work is checked on its completion and before final payment by a person authorised to supervise the work. **…**"

[333] It is not in issue that the company was a licensed contractor and that its appropriately licensed nominee was its sole director, Mr Vukobratich. It follows that, pursuant to s 43, he had a duty to ensure that the building work was personally supervised by him or another relevantly licenced person and, pursuant to s 43A, a duty to ensure that the building work was adequately supervised. The company had the same statutory duties.

[334] The Mousas contend Mr Vukobratich failed in his statutory duties. On the face of the above quoted sections, if there were such a failing it would only expose Mr Vukobratich to a fine. The Mousas' case, however, founded in this statutory duty to ensure personal and adequate supervision, is that Mr Vukobratich owed a duty of care in negligence to the Mousas, which he breached.

[335] There was little informative evidence on the issue of whether the building works were personally supervised by Mr Vukobratich or a relevantly licenced person. However, the above discussed evidence of the extensive and significant defective building work compels the inference that such supervision of the building work as did occur must have been inadequate. If there had been adequate supervision there would not have been such defective work, that is, the failure was a necessary condition of the occurrence of the harm, per s 11 *Civil Liability Act 2003* (Qld). It follows that, if Mr Vukobratich owed a duty of adequate supervision in negligence to the Mousas, I would hold that he breached that duty and that such breach was causative of a loss likely equating to that already assessed in respect of the company's breach of statutory warranty. However, as will become apparent, I am unable to conclude it is appropriate to extend the scope of Mr Vukobratich's liability for a breach of his statutory duty so as to impose a duty upon him in negligence to the Mousas.

[336] It ought be noted at the outset that the creation of the aforementioned statutory duty merely reflects a policy choice of the Legislature and does not of itself extend the scope of the duty so as to also ground in negligence.[281] As to whether its scope should be so extended, something the Legislature refrained from doing, s 11 *Civil Liability Act 2003* (Qld) deals so generally with deciding scope of liability as to be of no present assistance and the parties' submissions necessarily drew upon case law.

[337] None of the cases referred to were analogous to the Mousas', heralding the novel nature of the Mousas' claim against Mr Vukobratich.

[338] Particular reliance was placed upon a line of High Court authority culminating in *Brookfield Multiplex Ltd v Owners*.[282] In that matter the appellant company, Brookfield, built a mixed-use retail and residential building pursuant to a contract with a property developer. The developer sold lots in the building under a strata scheme. An owners' corporation had been created on registration of the strata plan by the property developer and held the building's common property as agent for the lot owners. Latent defects in the common property later became apparent and the owners' corporation sued Brookfield, seeking recovery of its loss and damage in negligence. At issue was whether Brookfield owed the owners' corporation a duty of care to avoid loss to it, resulting from latent defects. The High Court concluded it did not.

[339] The earlier relevant High Court cases discussed in *Brookfield Multiplex* were *Bryan v Maloney*[283] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.[284] They were even less analogous than *Brookfield Multiplex* to the present case. Their focus was

---

[281] *Brookfield Multiplex Ltd v Owners* (2014) 254 CLR 185, 230.
[282] (2014) 254 CLR 185.
[283] (1985) 182 CLR 609.
[284] (2004) 216 CLR 515.

upon whether a company contracted to build a building owed a duty in negligence to avoid economic loss to subsequent purchasers of the property. Here the focus is upon what, if any, duty is owed to avoid economic loss to the contracting owner, not a subsequent purchaser, by an individual who is not the contracting building company.

[340] In *Brookfield Multiplex*, French CJ explained there has been a shift of emphasis from proximity to vulnerability as the most material determinant of the existence of a duty of care for pure economic loss. His Honour explained the relevant vulnerability was "the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct".[285] He reiterated the authorities' emphasis on considering the salient features in the individual case under consideration:

> "Consistently with the approach taken in *Woolcock* and, before that, in *Bryan v Maloney*, the determination of this appeal requires consideration of the salient features of the relationship between the Corporation and Brookfield, including whether Brookfield owed Chelsea a relevant duty of care and whether the Corporation was vulnerable in the sense discussed above."[286]

[341] In the present case Mr Vukobratich was not a party to the building contract but that does not of itself preclude the existence of a duty of care owed by him to the Mousas under the law of tort.[287] For instance, in concluding there was no duty of care in *Brookfield Multiplex*, Hayne and Keiffel JJ observed:

> "The conclusion does not depend, however, upon making any a priori assumption about the proper provinces of the law of contract and the law of tort. As McHugh J pointed out in *Woolcock Street*, "[t]he decisions in *Hedley Byrne*, *Donahue*, *White* and *Hill* make it difficult to argue that claims in negligence for pure economic loss should be excluded merely because such claims may outflank or undermine fundamental doctrines of the law of contract". And as McHugh J also observed, this court rejected in *Bryan v Maloney* "the notion that in Australia contract and tort was so nearly compartmentalised that it would be an error to give a remedy in tort for economic loss"."[288] (citations omitted)

[342] However, the fact that the construction and warranties regarding its quality were the subject of a contract entered into by the Mousas is a very important salient feature to consider in weighing up their vulnerability. The extent of the Mousas' vulnerability to economic loss arising from defective construction is materially less than that of a plaintiff buying a building sold after its construction.

[343] The latter class of plaintiff has sometimes succeeded in claiming economic loss negligence. For instance, the successful plaintiff in *Bryan v Maloney*[289] was the third owner of what turned out to have been a house built with inadequate footings.

---

[285] (2014) 254 CLR 185, 201.
[286] Ibid 203-204.
[287] *Bryan v Maloney* (1985) 182 CLR 609, 619-620.
[288] *Brookfield Multiplex Ltd v Owners* (2014) 254 CLR 185, 211; also see the observations of McHugh J on this point in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 227-228.
[289] (1985) 182 CLR 609.

Similarly, the successful plaintiffs in the Victorian Court of Appeal case of *Moorabool SC v Taitapanui* [290] were the third owners of a house which turned out to have serious structural deficiencies resulting from design inadequacies which ought to have been apparent to the defendant building surveyor who issued the building permit.

[344] The Mousas' counsel seemingly relied upon *Moorabool SC v Taitapanui* because it was an instance of success in negligence against a defendant who, like Mr Vukobratich, was not the contracting builder. The point in common between that defendant and Mr Vukobratich is that each had formal obligations they were relied upon to properly discharge in connection with the relevant building and neither was a contracting party. An important point of difference though is that the Taitapanuis did not have the protection of a construction contract and were thus materially more vulnerable than the Mousas.

[345] The Mousas' counsel highlighted that in *Moorabool SC v Taitapanui* Maxwell P seemingly did not think it controversial that the original building owner, who presumably would have had contractual protection regarding the quality of construction, would also have been owed a duty of care by the surveyor who approved the building permit despite the building's obvious design inadequacies.[291] However, that appears to have been the subject of a concession and required no determination (and if it had been, such determination would only have been obiter).[292]

[346] In any event the present case is also different from *Moorabool SC v Taitapanui* because Mr Vukobratich's statutory obligations coincided with the obligations of the contracting builder. Moreover, those supervisory obligations are obviously safeguards calculated at achieving the proper construction of the building, the very process which was the subject of the Mousas' contractual protection.

[347] The latter point exposes as illusory a submission by the Mousas' counsel that the Mousas could not protect themselves against a failure of adequate supervision by Mr Vukobratich who, as it happens, was the sole director of the company. A failure of adequate supervision, whoever it was by, would only be relevant here if it was adverse to the Mousas, that is, causally connected with a failure to perform the building work properly, resulting in economic loss to them. Adequate supervision is inherently part of the broader process of achieving the proper construction of a building. The Mousas were able to safeguard the proper construction of their building by the mechanism of a building contract. They were not vulnerable to the adverse consequences of a failure of adequate supervision because, regardless of who was specifically responsible for that failure, they could protect themselves from such adverse consequences via the contract.

[348] It is noteworthy that in *Brookfield Multiplex* the unsuccessful plaintiff owners' corporation did have the benefit of contractual protection. The Court's discussion of that feature exposes the determinative difficulty with the argument now advanced for the Mousas. For example, in explaining vulnerability did not turn upon reliance alone Hayne and Keiffel JJ observed:

---

[290] (2006) 14 VR 55.
[291] T6-67 L40.
[292] *Moorabool SC v Taitapanui* (2006) 14 VR 55, 63.

> "The owners corporation was in no better position to check the quality of the builder's work as it was being done than the original purchaser of the lot. Because these parties could not check the quality of what the builder was doing, it can easily be said that each relied on the builder to do its work properly.
>
> Reliance, in the sense just described, may be a necessary element in demonstrating vulnerability, but it is not a sufficient element. As noted earlier, vulnerability is concerned with the plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant.
>
> It is neither necessary nor profitable to attempt to define what would or would not constitute vulnerability. It is enough to observe that both the developer and the original purchasers made contracts, including the standard contracts, which gave rights to have remedied defects in the common property vested in the owners corporation. The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to any lack of care by the builder in performance of its contractual obligations. It was not suggested that the parties could not protect their own interests."[293] (emphasis added)

[349] The latter observations resound in the present case. Admittedly *Brookfield Multiplex* involved the consideration of vulnerability in a commercial rather than domestic building setting. However it is elementary, even in the domestic building setting, that the building contract is a means by which owners are well able to protect themselves against economic loss.

[350] Importantly, the authorities do not suggest vulnerability is assessed by reference to whether the steps actually taken to protect against economic loss have in hindsight been effective. If that were so the determination of the existence of an action in negligence would be a lottery. The focus in assessing vulnerability is necessarily upon whether a plaintiff was able to take protective steps. As Crennan, Bell and Keane JJ observed in *Brookfield Multiplex*:

> "Vulnerability, in this field of discourse, is concerned not only with the reasonable foreseeability of loss if reasonable care is not taken by the defendant, but also, and importantly, with the inability of the plaintiff to take steps to protect itself from the risk of loss."[294] (emphasis added)

[351] After then citing passages from *Woolcock Street Investments*, their Honours noted:

> "These passages accord with the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the particular harm consists of disappointed expectations under a contract. The common law has not developed with a view to altering the allocation of economic risks between parties to a

---

[293] Ibid 210, 211.
[294] Ibid 229.

> contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort."[295]

[352] Crennan, Bell and Keane JJ went on to observe that the purchasers of units in *Brookfield Multiplex* were protected by reason of the developer's promises in the sales contracts against the risk of economic loss because of defects of quality. They observed:

> "It is true that these provisions did not protect purchasers or the respondent against the possibilities that the developer would not be of sufficient substance to meet the liability or that any defect would not be discovered within time to make a claim under the warranty. But as to these possibilities, the appellant had nothing to do with the purchaser's decision to accept the value of the developer's warranty or the decision by the purchaser not to investigate for defects. Had a purchaser not been satisfied that its investment was adequately protected in this way, it could have avoided the risk of loss by taking its capital and investing elsewhere."[296] (emphasis added)

Again, those observations resound here.

[353] The unfortunate reality for the Mousas is that they were well able to take steps to protect themselves financially from disappointed expectations. Despite being aware of the apparent inexperience of the company in constructing high end dwellings they made a considered choice to contract with it. They negotiated aspects of the building contract before contenting themselves and deciding to enter into it. They could have but did not insist upon additional contractual protection such as a Director's guarantee. They could have but chose not to go elsewhere and contract with some other builder. They did as a matter of fact have ample opportunity to protect themselves from the risk of economic loss from inept building work and elected to do so by negotiating and entering into a building contract with the defendant. Their entry into a building contract which expressly provided for, indeed warranted, the quality of promised work demonstrates their ability to protect against and denies their vulnerability to a lack of care in the oversight and execution of the promised work.

[354] It follows the duty in negligence propounded by the Mousas against Mr Vukobratich should not be accepted. The Mousas' claim as against Mr Vukobratich must be dismissed.

The counterclaim

[355] The company pleaded a counterclaim, seeking payment for unpaid work and loss of profits.

[356] The evidence of what was paid and payable, discussed above and summarised in appendix C, demonstrates that the Mousas had paid more than what was owing when the contract was terminated. No evidence of a loss of profits has been advanced.

---

[295] Ibid 229.
[296] Ibid 232.

[357] Quite apart from the absence of evidence of loss, the premise of the counterclaim has failed.

[358] The pleading of the counterclaim relied upon the company's denial it had repudiated the contract, characterising the Mousas' termination letter of 7 December 2015 as a renunciation of the contract entitling the company to have elected to accept that renunciation and bring the contract to an end.

[359] It will be recalled the letter of the Mousas' solicitor of 7 December complained inter alia that the company had "failed to construct the dwelling in an appropriate and skilful way, with reasonable care and skill and in accordance with plans and specifications or in a competent manner". I have found the company did so fail. The letter terminated the contract for a variety of reasons including the company's repudiation of the contract. I have found the company did repudiate the contract.

[360] It follows the counterclaim should be dismissed.

Orders

[361] It will be necessary to hear the parties as to interest and as to costs if they are not agreed. I will not determine interest and costs, if costs are not agreed, until the determination of rectification costs.

[362] A copy of these reasons should be forwarded to the liquidator's solicitor to ensure the liquidator is aware of them and arrangements regarding the further conduct of the matter.

[363] My orders are:

1. The plaintiffs' claim against the second defendant is dismissed.

2. The first defendant's counterclaims against the plaintiffs are dismissed.

3. I will hear the parties regarding the course to be taken in determining rectification costs in the plaintiffs' successful claim against the first defendant at 10am 15 March 2019.

4. I will hear the parties as to interest and costs, if costs are not agreed, on a date to be fixed by mention at 10am 15 March 2019.

5. The Registrar will forward a copy of these reasons to Mr McGrath of Miller Harris lawyers, solicitors for the first defendant's liquidator.

APPENDIX A
COST OF RECTIFICATION

	DEFECT DESCRIPTION	COST OF RECTIFICATION
1	Groundwater seepage	$223,642
2	Retaining wall structural design life insufficient at undercroft levels 1 and 2	$42,268
3	*Defect number not issued*	
4	Groundwater collection at undercroft levels	$19,511
5	External doors and windows not weathertight	$160,000
6	Level 1 and 2 walls damaged by rainwater ingress	$2,130
7	Atrium glass wall glazing cracked and not sealed (not a breach)	$0
8	No movement joints in walls at undercroft level 1	$1,650
9	Concrete pool cracking	$21,195
10	Roof not compliant with Building Code	$116,025
11	Slab founded on inadequate material	$3,680
12	Adequate drainage to balconies has not been provided	$16,688
13	Exposed reinforcement	$582
14	Planter boxes not drained or membraned (not a breach)	$0
15	Lack of bracing of level 2 internal walls	$8,634
16	Mass concrete without reinforcement or joints	$16,600
17	Inadequate steel support for feature window	$22,500
18	Ground floor southern block wall spalling	$18,500
A	Low ceiling heights	$44,348
B	Bedroom 3 door too narrow	$14,099
C	Access not provided to lower levels (not a breach)	$0
D	Walls and ceiling do not align	$1,052
E	Spalling concrete	$515
F	Poor external painting	$65,494
G	Level 2 pod soffits not concreted	$7,470
H	Poor mastic seal between blockwork and acrylic panels	$1,150
I	Hose taps wrongly located	$1,610
J	Unrendered and unpainted undercroft level walls	$8,079
K	Pool stepping stones inconsistently sized	$805
	Estimated cost of rectification (GST exclusive)	**$818,227**
	Total estimated cost of rectification (GST inclusive)	**$900,049.70**

APPENDIX B
COST OF COMPLETION

	ITEM	COST
1a	Superstructure – External Walls	$16,140
1b	Superstructure – External Soffits	$7,465
1c	Superstructure – External Doors	$6,500
1d	Superstructure – Internal Walls	$8,943
1e	Superstructure – Internal Ceilings	$10,930
1f	Superstructure – Internal Doors	$6,400
2a	Finishes – Wall	$16,095
2b	Finishes – Floor	$0
2c	Finishes – Ceiling	$10,540
3a	Fittings – Joinery	$7,500
3b	Fittings – Sundries	$20,000
4a	Building Services – Hydraulics	$34,550
4b	Building Services – Mechanical	$52,100
4c	Building Services – Electrical	$7,500
4d	Building Services – Drainage	$6,000
5	External Works	$5,100
	Running total of measure works	= **$215,763**
6	Preliminaries and Margin of 22% to be applied	+ $47,467.86
	GST exclusive sub-total of measured works	= **$263,230.86**
7	PC Sums (inclusive of GST)	$96,838.45
8	Provisional Sums (inclusive of GST)	+ $525,912.61
	Sub-total of PC & Provisional sums	= **$622,751.06**
	Minus GST	- $56,613.73
	GST exclusive sub-total of PC & Provisional sums	= **$566,137.33**
	GST exclusive sub-total of measured works	$263,230.86
	GST exclusive sub-total of PC & Provisional sums	+ $566,137.33
	Sub-total	= $829,368.19
	Plus 6% escalation	+ $49,762.09
	Sub-total	= $879,130.28
	Plus GST	+ $87,913.03
	Sub-total	= $967,043.31
	Plus 15% construction contingency	+ $145,056.50
	Qualified total	= **$1,112,099.81**
	GST exclusive costs re atrium glass wall and stairs to undercroft	$15,928
	Plus 6% escalation	+ $955.68
	Sub-total	=$16,883.68
	Plus GST	+ $1,688.37

	Sub-total	= $18,572.05
	Plus insurance	+ $14,989.81
	Plus qualified total	+$1,112,099.81
	Total cost of completion	= **$1,145,661.67**

APPENDIX C
BALANCE OWING

ITEM		PAID	PAYABLE
	Payments		
	Credit the preliminary agreement amount	$10,550	$0
	4 x payments of the first four stages of the contract	$1,369,391.40	$1,369,391.40
	17 x sundry payments	$130,000	$0
	Various payments to three suppliers/sub-contractors	$102,505	$102,505
	Sub-total	**$1,612,446.40**	**$1,471,896.40**
	So-called allowed variations		
VA3	Supply and fix solar including plumbing and electrical	$9,404.12	$9,404.12
VA4A	Cutting of lower floor wall	$1,320	$1,320
VA4B	Lopping of trees at rear to allow view	$726	$726
VA5	Increase in joinery PS allowance		$17,599.45
VA9	Changes to slab for ducted vacuum system	$550	$550
VA9A	Supply and fix ducted vacuum system		$11,259.05
VA10	Adjustment to stone benchtop PS allowance		-$135
VA11	Increase in roof size	$7,848.50	$3,924.25
VA13	Delete PS allowance for pond front entry structure		-$6,171
VA16	Render internal garage walls		$1,996.50
VA17	Glass spider window wall (atrium glass wall)		$45,012.07
VA18	Boral flush mounted door frames	$4,435.05	$4,435.05
VA19	Steel beams required to pods	$2,269.54	$2,269.54
VA20	Change glass to W34		-$121
VA21	Install sliding glass doors to pods	$6,413	$6,413
VA22	Delete Crimsafe to upper floor		-$198
VA23	Various variations		$6,901.84
VA24	Install louvres to pods		$0
VA25	Pipework to top storey vertical wall garden		$1,294.70
VA26	Ventilation to cabinets in kitchen		$0
VA28	Lounge and dining shelves/theatre wall cabinet/bar credit		$0
VA29	Square set plaster		$9,875.39
VA32	Power to motorised overhead cupboards		$145.20
VA33	Extra to CBUS electrical		$8,076.26
VA34	Shower grates		$0
VA35	Theatre wall		$0
VA36	Additional power to theatre wall unit		$544.50
VA37	Move pipework for rainwater shower head		$338.80
MMOU2	Big ass fans		$18,015.51
MMOU6	Extra electrical to home theatre		$2,093.30
MMOU7	Add 5 x external taps		$1,197.90
MMOU9	Additional electrical work for fishtanks		$2,579.72
MMOU11	Changes to electrical and additional robe		$3,315.16

Other 1	Reduction in PS Allowance for pool		$0
Other 2	Other 2 Supply Aquaplex to pool wall in lieu of glass		$0
	Sub-total	**$32,966.21**	**$152,662.31**
	Disputed variations		
VA2	Excavation and lower pool	$81,649.74	$0
VA6	Continuation of VA2	$57,455.54	$0
VA14	Credit re lower section part 1		$0
VA15	Credit re lower section part 2		$0
VA30	Credit re margin charged on earthworks section of VA2		$0
VA31	Credit re GST charged twice on VA6		$0
VA7	Suspend ply flooring for pool base		$0
VA8	Changes to column to kitchen and upper floor	$28,096.20	$28,096.20
VA12	Drop ceiling in garage	$2,274.80	$2,274.80
VA27	Credit for drop ceiling in garage		-$2,274.80
VA39	Increase in tile labour allowance		$0
MMOU1/12	Tradelink extras		$0
MMOU4	Additions to kitchen quote – slide out drawers		$0
	Sub-total	**$169,476.28**	**$28,096.20**
	Remaining stage payments		
	Fixing stage		$421,351.20
	Practical completion stage		$316,013.40
	Sub-total		**$737,364.60**
	Total (Paid, Payable)	**$1,814,888.89**	**$2,390,019.51**
	Balance owing assuming completion (Payable less Paid)		**$575,130.62**