CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
BUILDING AND PROPERTY LIST VCAT REFERENCE NO D629/2013

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Termination of contract; whether exercise of a contractual right to terminate was effective; Repudiation of contract - whether ineffective contractual termination constitutes a repudiation of the contract - whether defective works constitutes a repudiation of the contract; Damages - whether cost to rectify defects should be calculated on the basis of what it would cost an owner to rectify or alternatively what it would cost the builder to rectify - contractual damages distinguished from *quantum meruit* claim.

APPLICANT	Australian Dream Homes Pty Ltd (ACN 089 782 990)
FIRST RESPONDENT	Ilija Stojanovski
SECOND RESPONDENT	Zagorka Stojanovski
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	28 and 29 April, 1, 2 and 9 May 2014. (Written submissions last filed 20 June 2014)
DATE OF ORDER	7 August 2014
CITATION	Australian Dream Homes Pty Ltd v Stojanovski (Building and Property) [2014] VCAT 975

ORDER

1. The Respondents must pay the Applicant $21,914.85.
2. **Liberty to apply on the question of costs and interest; provided such liberty is exercised on or before 5 September 2014.**

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr D Pumpa of counsel
For the Respondents	Mr B Reid of counsel

REASONS

BACKGROUND

1. The Respondents (**'the Owners**') are the owners of a property located in Reservoir. On 21 August 2011, the Owners entered into a domestic building contract (**'the Contract'**) with the Applicant (**'the Builder'**) for the construction of a new home, pursuant to architectural and engineering drawings which the Owners had prepared on their behalf. The Contract was in the printed form of a *Victorian Master Builders Association New Homes Contract (HC-6 Edition 1-2007).*

2. The design of the home was based upon a design known as *The Monet*, which was depicted in a brochure prepared by another unrelated builder. As the name suggests, the style of the house was French provincial. It comprised a single level, rendered brick veneer residence with attached garage, constructed on a concrete raft slab.

3. The Owners were responsible for preparing the building site, which included demolishing the existing home and clearing the site, in readiness for the construction of the new dwelling. The Owners were also responsible for obtaining a building permit, which was issued to them on 16 October 2011. The building works (**'the Works'**) commenced in late October or early November 2011.

4. The salient terms of the Contract included the following:

   (a) The construction period was 296 days from the commencement date.

   (b) The Builder was required to compensate the Owners in the event that it was late in completing the Works at an agreed rate of $300 per week.

   (c) There was a provisional sum allowance for bulk soil excavation of $8,000, with a *builder's margin* of 20% on any excess amount. As it turned out, there was no bulk soil excavation required. Therefore, the original contract price of $320,000 was reduced by this amount.

   (d) The payment of the Contract price was to be made by way of progress payments commensurate with the Works reaching a particular stage as follows:

      (i) *Deposit*: $16,000

      (ii) *Base Stage*:.....$32,000

      (iii) *Frame Stage*:.....$48,000

      (iv) *Lock up Stage*:.....$112,000

      (v) *Fixing Stage*:.....$80,000

      (vi) *Completion Stage*:.....$32,000

5. In early November 2011, the concrete slab was poured and the Builder issued the *Base Stage* progress claim invoice for $32,000. $24,000 of this amount was paid in December 2011. The *Base Stage* invoice amount was reduced because the Owner's deducted the $8,000 provisional sum allowance for bulk soil excavation, given that none of this allowance was expended in the construction of the Works.

6. On or around 15 November 2011 the Builder received a letter from the Owners' daughter, raising a number of concerns regarding the construction of the Works. On 24 November 2011, a meeting was held on site between the Owners' daughter, Mr Stefanovski of the Builder and David Cheong, a building consultant engaged by the Owners. The purpose of that meeting was to discuss and resolve some of the issues raised by the Owners' daughter in her letter dated 15 November 2011. That meeting culminated in a document entitled *Memorandum of meeting with Builder 24.11.2011* being prepared by Mr Cheong. A number of issues raised during the course of that meeting remain in dispute and form part of the issues raised in this proceeding. In particular, the Builder contends that a variation was effected which increased the contract price by $990. According to the Builder, that variation represented additional work carried out in order to make the site level. It appears, however, that there is some confusion as to the basis of the variation. In particular, according to the *Memorandum of meeting* prepared by Mr Cheong, the variation represented an additional cost for increasing the height of the concrete slab, which on his reckoning, did not occur.

7. Another issue related to the concrete slab itself. It is common ground that the rebate in the concrete slab was exposed above the specified finished ground level and, in some parts, did not accurately follow the building line. Agreement was reached between the parties that the rebate could be saw cut to achieve uniformity with the brickwork and additional soil brought onto site in order to cover the rebate.

8. A further issue related to the specified windows. In that regard, the parties agreed to vary the window specification such that all timber windows would be changed to aluminium windows. As part of that agreement, the Builder was to advise the Owners of recommended manufacturers and the Owners were then to notify the Builder of their nominated supplier. According to the Builder, the Owners were to communicate directly with the window supplier to have the window frames installed. To that end, the Builder met with the Mr Stojanovski at the factory of *Techmart Architectural Glazing Systems* in late January 2012 to discuss the supply of the aluminium windows. At the conclusion of that meeting, the Builder paid $10,000 directly to *Techmart Architectural Glazing Systems*, by way of a deposit for the manufacture, supply and installation of the aluminium windows.

9. According to the Owners, the Builder advised them that they had to pay an extra $8,500 as a result of the windows being aluminium and that this had to be paid directly to the manufacturer in order for the windows to be delivered to site. The Builder's account of this arrangement differs slightly. Mr

Stefanovski, the director of the Builder, said that an agreement was reached with the Owners that they would pay part of the additional cost of the window variation in the amount of $8,500 and that this amount would be paid directly to the manufacturer.

10. According to the Mr Stojanovski, he attended *Techmart Architectural Glazing Systems* on the following day to pay $8,500 directly to that firm. However, he was told that as the Builder had already paid the deposit, the Owners should pay the balance to the Builder directly. He said that *Techmart Architectural Glazing Systems* would not accept payment from him and, in any event, payment of the balance was not due until after the windows were installed.

11. This dispute as to who was to pay the $8,500 is of some significance because as it turned out, neither the Builder nor the Owners paid the $8,500, with the result that, according to the Builder, *Techmart Architectural Glazing Systems* would only supply the aluminium frames but no glazing. As a result, the Builder contends that the Works were completed to *Lock-Up Stage*, save and except that none of the windows had any glazing. Nevertheless, the Builder says that the absence of glazing resulted from the Owners failure to make payment of the $8,500 and in those circumstances; it should not be deprived of payment for the *Lock-up Stage* progress claim of $112,000, which it gave to the Owners on 13 April 2012.

12. It is fair to say that by the time the Builder had issued its *Lock-up Stage* progress claim; there were a number of issues in dispute between the parties concerning the Works performed by the Builder. This culminated in the Owners serving the Builder with a *Notice of Intention to Terminate the Contract* dated 17 April 2012 (**'the Default Notice'**). The Default Notice stated that it was served pursuant to Clause 20.2 of the Contract. The particulars of default were set out in a building inspection report from David Cheong, the building consultant assisting the Owners, which was attached to the Default Notice.

13. The Default Notice further specified that the Builder had 14 days in which to rectify the items of defective work described in Mr Cheong's report. That report listed 21 items of defective work. Most notably, it stated that as a result of numerous defects in the brickwork completed by the Builder, that brickwork should be demolished and rebuilt. The brickwork defects noted in Mr Cheong's report included matters such as insufficient number of wall ties, incorrect positioning of expansion joints (even though they were positioned largely in accordance with the architectural drawings) and some areas of brickwork being out of plum or not level.

14. Not surprisingly, there was a flurry of correspondence passing between the parties following the service of the Default Notice. In that regard, the Builder indicated that it intended to engage its own building consultant to obtain advice in relation to the matters raised in the report of Mr Cheong, in order to properly respond to that report. However, prior to that occurring,

the Owners served the Builder with a *Notice Terminating the Contract* dated 4 May 2012.

15. The Builder contends that the Owners' purported termination of the Contract was contrary to the terms of the Contract and therefore unlawful. It contends that the Owners' action in terminating the Builder's employment constitutes a repudiation of the Contract on their part, which the Builder has accepted, thereby bringing the Contract to an end at common law.

16. By contrast, the Owners contended that the contractual termination was effective and as a result, they are entitled to claim damages against the Builder for the cost of repairing defects and any cost overrun in having to complete the Works themselves.

THE CLAIMS

17. The question as to how the Contract came to an end is central to the issues to be determined in this proceeding. In that regard, most of the defects described in the report of Mr Cheong have now been accepted by Mr Ian Johnson, the building consultant engaged by the Builder and who gave evidence on its behalf, with the result that only six items of defective work remain in dispute. However, quantum remains unresolved. According to the Builder, the cost of rectifying defective work should be assessed on the basis of what it would cost it, rather than what it would cost the Owners to engage another builder to undertake the rectification work.

18. The Builder claims that it is entitled to payment of the *Lock-up Stage* progress claim in the amount of $112,000, less its cost of rectifying defects quantified at $46,101, leaving a balance payable to the builder of $65,899. Alternatively, the Builder claims on a *quantum meruit* basis. In that regard, Mr Johnson has assessed the value of the as-constructed Works at $177,381.32. Of this amount, $88,000 has been paid by the Owners under the Contract, leaving a shortfall of $89,381.32.

19. The Owner's counterclaim against the Builder in the sum of $208,933.24, made up follows:

Description	Amount
Rectification and completion costs:	$393,442
Less outstanding contract balance:	($232,000)
Sub-total:	**$161,442**
Loss of amenity, use and enjoyment of home:	$5,000
Plus credit for excavation:	$8,000
Sub-total:	$174,442
Plus interest accrued on the Owner's loan calculated from 7 August 2012:	$34,491.24

DID THE WORKS REACH LOCK-UP STAGE?

20. Both the Contract and s 40 of the *Domestic Building Contracts Act 1995* (**'the Act'**) use the same language in defining *Lock-up Stage*:

> **Lock up Stage** - means when the homes external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary).[1]

21. As indicated above, it is common ground that none of the glazing was ever installed into the window frames. Moreover, it is also uncontested that the external laundry door and garage door were not installed at the time the Contract came to an end.

22. Mr Pumpa of counsel, who appeared on behalf of the Builder, contended that, for all intents and purposes, *Lock-up Stage* has been reached. He submitted that the only reason the windows had not been installed was because the Owners had failed to pay the $8,500 to *Techmart Architectural Glazing Systems*. Moreover, he submitted that the failure to install the rear laundry door is of minor consequence and should not prevent the Works from having reached *Lock-up Stage*.

23. Mr Reid of counsel, who appeared on behalf of the Owners, referred me to the decision of the Victorian Supreme Court of Appeal in *Cardona & Anor v Brown & Anor*,[2] where the joint judgment of Bongiorno, Tate and Osborn JJA stated:

> Moreover, it is unlikely that the expression 'lock-up stage', as chosen by Parliament under s 40, and as adopted by the parties to the contract, is no more than a label; the very expression conveys the achievement of some degree of security. Indeed, the reference in the definition of 'lock-up stage' to 'temporary doors or windows' suggests that there may be a need for interim works to be done for the purpose of ensuring that the home is completely enclosed. This suggests that some minor temporary construction may indeed be required beyond the specifications in the plans. While the definition does not make reference to temporary external wall cladding, it remains the case that the cladding had to be fixed in some form over the entire wall between the master suite in the garage, from the foundations to the roof, before lock-up stage was completed.[3]

24. Even if I accept the evidence of Mr Stefanovski for the Builder, that there was an agreement for the Owners to pay *Techmart Architectural Glazing Systems* $8,500 and that the failure to make that payment resulted in there being no glazing, that does not, in my view, obviate the need for the dwelling to be completely enclosed in order to reach *Lock-up Stage*. As pointed out in the judgment referred to above and in submissions made by

[1] Clause 1.0 of the Contract.
[2] [2012] VSCA 174.
[3] Ibid at [85].

Mr Reid, it was open for the Builder to have installed temporary closures over the open windows and install the rear door, even if only a temporary rear door. Mr Stefanovski's evidence provides no explanation as to why these temporary measures were not adopted by the Builder. In those circumstances, I find that the Works were not at *Lock-up Stage* at the time when the Builder submitted its *Lock-up Stage* progress payment invoice. That being the case, there was no obligation on the Owners to make payment of that invoice at that time.

DID THE OWNERS TERMINATE THE CONTRACT?

25. On 17 April 2012, the Builder was served with the Default Notice. It was stated to be a notice pursuant to Clause 20.1 of the Contract, which states, in part:

> If the **Builder**:
> - …
> - fails to proceed with the **Works** with due diligence or in a competent manner; or
> - unreasonably suspends the carrying out of the **Works**; or
> - refuses or persistently neglects to remove or remedy defective work or improper **Materials**, so that by the refusal or persistent neglect the **Works** are adversely affected; or
> - refuses or persistently neglects to comply with this **Contract** (including the requirements of municipal or other authorities); or
> - is unable or unwilling to complete the **Works** or abandons the **Contract**; or
> - is in substantial breach of this **Contract**;
>
> THEN
>
> the **Owner** may give written notice by registered post to the **Builder**:
> - describing the breach or breaches of the **Contract** by the **Builder**; AND
> - stating the **Owner's** intention to terminate the **Contract** unless the **Builder** remedies the breach or breaches of this **Contract** within a period of fourteen (14) **Days** after the **Builder's** receipt of the above notice.

26. The Default Notice alleged that the Builder was in *substantial breach* of the Contract because it:

    (a) failed to carry out the Works in a proper and workmanlike manner and in accordance with the plans and specifications set out in the Contract;

    (b) failed to carry out the works in accordance with all laws and legal requirements; and

    (c) failed to carry out the works with reasonable care and skill.

27. The Default Notice gave particulars in respect of each of the elements of the alleged *substantial breach*; namely, that the Works were defective as detailed in the building inspection report prepared by Mr Cheong.

28. Interestingly, the Default Notice did not allege that the Builder:

(a) unreasonably suspended the works, or

(b) had refused or neglected to remedy defective work; or

(c) was either unable or unwilling to complete the Works.

29. Two questions arise for consideration in determining whether the Owner is entitled to rely upon the Default Notice in order to contractually terminate the Contract. First, can it be said that by reason of the Works being defective, the Builder was in *substantial breach* of the Contract? Second, is it open for the Owners to rely upon the Default Notice in circumstances where the period of time to remedy the substantial breach is insufficient?

Was there a substantial breach?

30. The term *substantial breach* is not defined in the Contract. In *Serong v Dependable Developments Pty Ltd*,[4] Deputy President Macnamara (as he then was) analysed the phrase in the following terms:

> [77] Neither party made any submissions as to what sort of a breach or breaches would constitute alone or singly a substantial breach. The word substantial is protean and quite ambiguous. It refers to a concept which one might think is pre-eminently in the eye of the beholder. Building defects which may seem very serious and very annoying to a proprietor may seem to a builder to be matters of relative triviality. One of the best known and most frequently quoted expositions of what the word '*substantial*' means is to be found in the judgment of Deane J, then a judge of the Federal Court of Australia, in the context of Section 45D of the *Trade Practices Act* 1974 which prohibited secondary boycotts which would have the effect of causing substantial loss or damage to a third person. His Honour's exposition was as follows:
>
> > The word 'substantial' is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase 'substantial loss or damage', it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size. The difficulties and uncertainties which the use of the word is liable to cause are well illustrated by the guidance given by Viscount Simon in *Palser v. Grinling* ([1948] 1 All ER 1 at 11; [1948] AC 291 at 317) where, after holding that, in the context there under consideration, the meaning of the word was equivalent to 'considerable, solid or big', he said: 'Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances of each case …' (See also *Terry's Motors Ltd. v. Rinder* [1948] SR (SA) 167 at 180 and *Granada Theatres Ltd. v. Freehold Investment (Leytonstone)*

[4] [2009] VCAT 760 at [77].

> *Ltd.* [1958] 1 WLR 845 at 848). In the context of s.45D(1) of the Act, the word 'substantial' is used in a relative sense in that, regardless of whether it means large or weighty on the one hand or real or of substance as distinct from ephemeral or nominal on the other, it would be necessary to know something of the nature and scope of the relevant business before one could say that particular actual or potential loss or damage was substantial. As at present advised, I incline to the view that the phrase, substantial loss or damage, in s.45D(1) includes loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal. It is, however, unnecessary that I form or express any concluded view in that regard since the ultimate conclusion which I have reached is the same regardless of which of the alternative meanings to which reference has been made is given to the word 'substantial' in s.45D(1). *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, 382.

[78] His Honour's analysis refers to a number of interpretations which have been applied to the word substantial over the years in different contexts. In broad terms the two strands of meaning are on the one hand '*of substance as distinct from ephemeral or nominal*'. If applied in the present context this would mean that any breach going beyond the *de minimis* would be a substantial breach. The view which I think was espoused by Mr Gurr, counsel for the Serongs and the view adopted by Viscount Simon in the case referred to by Deane J in the passage quoted above, namely '*considerable, solid or big*' in the context of a building contract would mean that only really important breaches would count. In my view, in the context of a building contract, the latter meaning is the one which should be given to the word '*substantial*' or the phrase '*substantial breach'*.

[79] Experience sitting in the Domestic Building List and a reading of judgments in building disputes demonstrates that building is a complex process and this complexity and human frailty mean that defects in a structure are common and sometimes, at least on a temporary basis, unavoidable. The evidence before me in this case was for instance that the existence of defects in a building frame would not render it inappropriate for a builder to claim payment for the frame stage. Given that it is difficult to avoid some defects and that the process of rectification may take some time it seems inherently unlikely that a standard form building contract prepared by a builders' association (The Master Builders' Association of Victoria) would intend to leave a builder at risk of contract cancellation for failure to rectify within 14 days of a notice any defect which was more than ephemeral or *de minimis*.

31. In the present case, Mr Reid submitted that the defects in the Works are so serious so as to constitute a substantial breach. In that regard, Mr Reid points to the evidence of both Mr Cheong and Mr Johnson who both agreed that the most economical and efficient way to remedy defects in the brickwork completed by the Builder is to completely demolish the

brickwork and rebuild it. I accept that the defective brickwork constitutes a significant defect in the Works undertaken by the Builder. However, as at the date of termination, the works were not complete. The Works had only been completed to a stage nearing *Lock-up Stage*, whereas the Contract required the Builder to complete the construction of the Works. Moreover, as at the date of termination, there was significant time left under the Contract. In particular, assuming the Works commenced on the day that the building permit issued being 16 October 2011, the contractual completion date was 7 August 2012. As at the date of termination, the Contract still had more than three months to run.

32. In those circumstances, how can it be said that the Builder was in substantial breach? The situation may well be different if the Builder had completed the dwelling and then purported to proffer up the Works as having been completed in accordance with the Contract. Similarly, the situation may well be different if the Builder had evinced an intention that the condition of the brickwork was not to be rectified. In the latter case, one might argue that the Builder's conduct amounted to an anticipatory breach.

33. However, the evidence in this proceeding does not, in my view, support a finding that the Builder's conduct amounted to an anticipatory breach. Correspondence passing between the parties following receipt by the Builder of the Default Notice is relevant.

34. By letter dated 17 April 2012 from the Builder's previous solicitors addressed to the Owners' solicitors, the Builder states:

> We refer to the above matter and to your letter of even date enclosing the Notice of Intention to Terminate the Contract with the report of Mr David Cheong dated 5 April, 2012.
>
> It is unfortunate that your client has taken this stance given that to date our client has been at the site on almost a daily basis and has had regular weekly meetings with your client and daughter. One would have thought it appropriate to have first provided our client with Mr Cheong's report and then affording him a reasonable period of time to consider it and respond before serving a Notice of Intention to Terminate. In any event our client will respond within the limited timeframe provided.
>
> We shall today refer the report to our client's building consultant and we will provide you with a response within the 14 day period.

35. It seems that the Builder's subsequent conduct was consistent with what it had foreshadowed in that correspondence. In particular, by letter dated 19 April 2012 from the Builder's solicitors addressed to the Builder, the solicitor stated:

> We refer to the above matter and advise that we have engaged the services of Building Surveying Services to prepare a response to the Building Report prepared by Mr David Cheong…

36. In further correspondence dated 19 April 2012 from the Builder's solicitors addressed to be Owners' solicitors, the Builder states:

> … The defects outlined in your client's building report are not admitted and we are currently arranging for our client's expert to view the works and we shall provide you with our report shortly…

37. Interestingly, the above extract of the 19 April 2012 letter does not deny the existence of defects, notwithstanding that the defects are not admitted.

38. On 27 April 2012, the Builder's current solicitors forwarded another letter to the Owners' solicitors, which stated, in part:

> 4. Our client remains ready, willing and able to complete the building works, subject to being paid monies outstanding.
>
> 5. Further, the Notice you have served relies on an expert report of Mr Cheong dated 5 April 2012. The Builder says this report is out of date and some of the items have been rectified, and/or other items are not defects….
>
> 6. Our client requests an opportunity to visit the site with his own building consultant as soon as possible to address all matters in the Cheong report.
>
> 7. In the event that your client chooses to terminate the Contract, we consider that would constitute a repudiation by the Owners, and this letter would be produced on the question of costs.
>
> 8. We will now take instructions from our client in regard to inspection of the site with an expert, though we also understand that building works have not ceased at the site - therefore it cannot in any way be contended that our client has abandoned the works (as implied by your correspondence).

39. On 2 May 2012, the Builder's solicitor forwarded email correspondence to the Owners' solicitors stating:

> My client (the Builder) has engaged BSS to carry out a report (Mr Ian Johnson).
>
> Mr Johnson would like access to the site for inspection on Friday, 11 May 2012. Is this acceptable?

40. On 3 May 2012, further email correspondence was forwarded from the Builder's solicitors to be Owners' solicitors, which stated:

> Further to my email to you of yesterday regarding access to the site for Mr Ian Johnson BSS to inspect.
>
> The suggested date was Friday next week, i.e. 11 May.
>
> Please note that, as the building contract is still on foot, and the Builder obviously still has access to the land in any event to progress the works, our client and his expert will just assume that the request for access for the consultant is accepted and will proceed on 11 May.

41. As indicated above, on 4 May 2012 the Owners, through their solicitors, served a notice purporting to terminate the Contract.

42. In my view, the chain of correspondence passing between the parties over that short period indicated that the Builder was, in all likelihood, desirous of actioning the allegations of defective work set out in Mr Cheong's report. Importantly, however, that chain of correspondence does not indicate an intention on the part of the Builder that it was not willing to rectify the defects in Mr Cheong's report. That being the case, I do not find that the Builder's conduct constitutes an anticipatory breach.

43. Further, I do not consider that the Builder was in *substantial breach*, merely because there were defects in work in progress, notwithstanding the fact that some of those defects were significant. The Builder was still under contract and had a contractual right and obligation to rectify those defects during the contractual construction period. As I have indicated, the Default Notice did not allege that the Builder had *refused or persistently neglected* to rectify the defects. On the contrary, it had engaged the services of a building consultant to inspect the Works and to provide it with advice to enable it to respond to the Default Notice, either by effecting repairs or denying their existence. In my view, to say that the Builder was in *substantial breach* was premature and I do not accept that this was the case.

44. In any event, the Builder denies the validity of the Default Notice on a further ground; namely, that insufficient time was given to the Builder to make the good the defects in Mr Cheong's report. In that regard, the Builder contends that the purported termination was unreasonable and therefore unlawful.

Was the purported termination reasonable?

45. The Owner's right to contractually terminate the Contract is set out in Clause 20, which states:

> **20.1 Owners right to serve notice of intention to terminate contract**
>
> If the **Builder**:
> - …
> - is in substantial breach of this **Contract**;
>
> THEN
>
> the **Owner** may give written notice by registered post to the **Builder**:
> - describing the breach or breaches of the **Contract** by the **Builder**; AND
> - stating the **Owner's** intention to terminate the **Contract** unless the **Builder** remedies the breach or breaches of this **Contract** within a period of fourteen (14) **Days** after the **Builder's** receipt of the above notice.[5]
>
> **20.2 If builder fails to remedy breach owner may terminate contract**
>
> If the **Builder** fails to remedy the breach or breaches of this **Contract** as stated in any notice served by the **Owner** under Clause 20.1 THEN the **Owner** may, without prejudice to any other rights or

[5] Clause 20.1 is more fully set out in paragraph 25 above.

remedies, give further written notice by registered post to the **Builder** immediately terminating this **Contract**.

20.3 Owner may not terminate contract in certain circumstances

The Owner may not terminate this Contract unreasonably or vexatiously or if the Owner is in substantial breach of this Contract.

46. Mr Pumpa submitted that the 14 day period specified in the Default Notice was insufficient time to remedy the defects in Mr Cheong's report and as such, it was impossible to remedy the alleged breaches under the terms of the Default Notice. On that basis, he contends that the purported termination was unreasonable.

47. I note that an additional period of two weeks was given to the Builder before the notice of termination was served. However, both Mr Cheong and Mr Johnson gave evidence that it would take approximately six to eight weeks to remedy all of the defects, the subject of the Default Notice. Therefore, even with the additional time afforded to the Builder, there was insufficient time to remedy the defects.

48. Mr Reid submitted that the contractual mechanism, after the termination procedure has commenced, only provides for the remedy of the breach, not an inspection or a response to a written notice. He submitted that notwithstanding the view expressed by both experts, that the time required to rectify the Works is more than the time nominated in the Default Notice, the contractual nominated time is not rendered invalid by the Owners insisting on strict compliance with the contractual terms. He argued that such invalidity would impose a penalty upon the Owners in circumstances where the Builder is clearly in breach of the Contract.

49. The proposition advanced by Mr Reid creates a tension between Clauses 20.1 and 20.2 on the one hand, and Clause 20.3 on the other hand. In particular, how can the right to terminate be *reasonable* if a builder is given a default notice that is physically impossible to comply with?

50. Having regard to the context in which Clause 20.1 appears, it is unlikely that the clause was intended to set an upper time limit in which to remedy a default under the Contract. In my view, the words *within a period of fourteen (14) Days* in Clause 20.1, read in context, prescribe a minimum period of 14 days in which to remedy a breach but do not necessarily prescribe the upper limit. Otherwise, in a situation such as the present, Clause 20.3 would not be able to operate.

51. In *Australian Broadcasting Commission v Australian Performing Rights Association Ltd*, Gibbs J discussed how clauses in the contract should be construed to produce harmony with one another:

> It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may

> be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend the contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in *Locke v Dunlop,* which, although spoken in relation to a will, are applicable to the construction of written agreements generally; see also *Bottomley's Case*. Further, it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between the provision and the rest of the instrument.[6]

52. Clearly, the purpose of Clause 20.1 is to give a defaulting party an opportunity to remedy a breach of contract. However, that purpose is defeated if notice under the clause is incapable of being complied with. It has no utility if performance is impossible. In my view, that could not have been the intention of Clause 20.1. In *The Epaphus*,[7] Sir John Donaldson M.R. considered this concept in the following terms:

> My starting point is that parties to a contract are free to agree upon any terms which they consider appropriate, including a term requiring one of the parties to do the impossible, although it would be highly unusual the parties knowingly so to agree. If they do so agree and if, as is inevitable, he fails to perform, he will be liable in damages. That said, any court will hesitate for a long time before holding that, as a matter of construction, the parties have contracted for the impossible, particularly in a commercial contract. Parties to such contracts can be expected to contemplate performance, not breach.

53. Given the above, I find that Clause 20.1 is not to be construed as prescribing a maximum period of 14 days in which to remedy the breaches of contract set out in a default notice given under that clause. Rather, the reference to 14 days is interpreted to mean a *minimum* period of 14 days; and it is open for the parties to extend that period so as not to offend Clause 20.3 of the Contract.

54. In the present case, it is common ground that the Default Notice was incapable of being complied with prior to the purported contractual termination. Insufficient time had been afforded to carry out the remedial works set out in the Default Notice prior to the purported contractual termination. In my view, that renders the purported contractual termination ineffective.

[6] (1973) 129 CLR 99 at 109-110.
[7] [1987] 2 Lloyd's Rep. 213.

Termination at common law?

55. Mr Reid submitted that if the Tribunal found the Default Notice to be invalid, the Owners have, nevertheless, terminated the Contract at common law. Mr Reid argued that the Builder's conduct in seeking payment of a contractually premature claim, together with its failure to undertake the Works in accordance with its obligations under the Contract, lead to the conclusion that the Builder was disavowing its contractual obligations. He argued that the conduct of the Builder clearly conveyed to the Owners an inability on its part to perform the Contract, or perform the Contract in a manner consistent with its terms. This, he contended, constituted a repudiation of the Contract, which the Owners accepted by giving written notice of termination on 4 May 2013.

56. Mr Reid referred to a number of authorities in support of that contention. In *Kane Constructions Pty Ltd v Sopov*,[8] her Honour, Warren CJ stated:

> Gibbs CJ in *Sheville & Anor v The Builders Licensing Board* likewise observed that a contract may be repudiated where one party renounces their liabilities under it, evincing any intention to no longer be bound by the contract. His Honour further observed that repudiation may also occur when one party demonstrates an intention to fulfil the contract, but in a manner "substantially inconsistent with his [or her] obligations and not in any other way…" The conduct of the allegedly repudiatory party must be "such as to convey to a reasonable person, in a situation of the other party, repudiation or disavowal either of the contract as a whole or on a fundamental obligation under it".[9]

57. In my view, the conduct complained of does not go so far as to constitute repudiation or disavowal of the Builder's obligations under the Contract. The correspondence passing between the parties leads to the opposite conclusion. In particular, after being served with the comprehensive report of Mr Cheong, the Builder almost immediately notified the Owners that it would engage the services of a building consultant to look into the matters referred to in Mr Cheong's report. Although not admitting the defects, the Builder did not deny their existence and unequivocally indicated that it was seeking further expert opinion in order to respond. The Builder maintained its line of communication with the Owners' solicitors, advising them of the expert that it had retained and of the proposed inspection date. Given the gravity of the defects noted in Mr Cheong's report, I do not consider that response to be unreasonable or to constitute a disavowal of the Builder's obligations under the Contract.

58. In addition, Mr Stefanovski gave evidence that the Builder continued to progress the Works after having been served with the Default Notice, albeit at a slower pace. Mr Stojanovski denied that this was the case. He said that he or his daughter drove past the building site every day after work and did

[8] [2005] VSC 237.
[9] Ibid at [795].

not see any tradesperson in attendance. In all likelihood, that was to be expected given his evidence that he or his daughter drove past the building site after hours.

59. Moreover, it is common ground that some additional work had been carried out after the Default Notice was served. This supports Mr Stefanovski's evidence that the Builder was continuing to progress the Works during the period from when the Default Notice was served to when the Contract was purportedly terminated by the Owners. In any event, as I have already commented, the construction period was far from being at an end. The Builder had considerable time left under the Contract in which to complete the Works. Moreover, even if the Works could not be completed within the remaining construction period, time was not of the essence, as the Contract expressly provided that the Owners were entitled to compensation in the liquidated sum of $300 per week for any period that the Works were late in completion.[10]

60. As Mr Reid conceded, repudiation of the contract is a serious matter and is not to be lightly found or inferred.[11] That being the case, I do not find that conduct of the Builder constitutes a repudiation of the Contract, entitling the Owners to terminate the Contract at common law.

Did the Owners repudiate the Contract?

61. Mr Pumpa submitted that the purported termination by the Owners was unlawful and, of itself, constituted a repudiation of the Contract on their part. He referred me to the Builder's *Points of Claim* dated 10 October 2013 filed in this proceeding, in which the Builder states that it has elected to accept the Owners' repudiation of the Contract evidenced by the filing and serving of the *Points of Claim*.

62. It does not necessarily follow that the unlawful exercise of a contractual right to terminate a contract constitutes a repudiation of the contract by the party who sought to exercise that right.[12] In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd,*[13] the parties to a contract for the sale of land fell into dispute over the interpretation of a clause, which effectively crystallised the right to rescind the contract. According to the purchaser, it had a right to rescind the contract which it purported to exercise. The vendor disputed the purchaser's interpretation of the clause and argued that the exercise of the right to rescind, of itself, constituted a repudiation of the contract because the contractual right to rescind never crystallised. In the joint judgment of Stephen, Mason and Jacobs JJ, their Honours stated:

> For the respondents it was submitted that such an intention should be inferred from the appellant's continued adherence to an incorrect interpretation of the contract. It was urged that the appellant, because it was

[10] *Wilson v Kirk Contractors Pty Ltd* (1991) 7 BCL 284 at 295.
[11] *Laurinda Pty Ltd v Capalaba Park Shopping Centre* (1989) 166 CLR 623 at 657].
[12] *Wilson v Kirk Contractors Pty Ltd* (1991) 7 BCL 284 at 295.
[13] (1978) 19 ALR 223.

> acting on an erroneous view, was not willing to perform the contract according to its terms. No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of the contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognise his heresy once the true doctrine is enunciated or may be willing to accept an authoritative exposition of the correct interpretation...
>
> In this case the appellant acted on its view of the contract without realising that the respondents were insisting upon a different view until such time as they purported to rescind. It was not the case in which any attempt was made to persuade the appellant of the error of its ways or indeed give it any opportunity to reconsider its position in light of an assertion of the contract. There is therefore no basis on which one can infer that the appellant was persisting in its interpretation willy nilly in the face of a clear enunciation of the true agreement.[14]

63. In my view, the facts in this proceeding fall outside what I consider to be a genuine, albeit erroneous, attempt to exercise a contractual right to terminate. In the present case, although there were defects in the Works, it was not open to terminate the Contract in reliance upon that fact, given that the Works were still under construction. The current situation is to be distinguished from one where the complaint concerns building works which are handed up as being complete. In the present case, it was acknowledged that there were at least some defects in the construction of the Works. The parties had already discussed rectification of some elements of construction, such as the concrete slab rebate. Other items of defective work described in Mr Cheong's report were being considered by the Builder, pending receipt of expert opinion from its building consultant, Mr Johnson. Therefore, it was premature to conclude that the as-constructed Works had been handed up as being complete.

64. That situation does not change by reason of the Builder having wrongly sought payment of the *Lock-up Stage* progress payment. The case might be different if, after having received technical advice confirming that partial or complete demolition and reconstruction was required, the Builder refused to carry out the necessary repairs. In that situation, it might be said that the Builder's conduct amounted to a repudiation of its obligations under the Contract.

65. The present case is not a situation where the Owners have misinterpreted a term of the Contract, erroneously believing that it gave them the right to terminate. Here, the factual grounds which underpin the Owner's termination simply do not exist. Even if those grounds did exist, Clause 20.1 of the Contract did not give the Owners an unfettered right to terminate if

[14] Ibid at 230.

the defects were not rectified within 14 days after service of the notice. The right to terminate was always subject to it being exercised reasonably.

66. Ultimately, the question whether the Owners repudiated the Contract falls to be determined by examining the Owners' conduct; and in particular, whether they evinced an intention not to be bound by the terms of the Contract. In my opinion, the Owners conduct, in purporting to terminate the Contract in circumstances where they gave the Builder no real opportunity to remedy the defects described in the Default Notice, coupled with the fact that they were warned by the Builder in correspondence dated 27 April 2012[15] that terminating the Contract in reliance on the Default Notice would be regarded as a repudiation, demonstrates an unwillingness on their part to perform the Contract. Accordingly, I find that the Owners repudiated the Contract, which was accepted by the Builder, either by its conduct in not returning to the building site or alternatively; expressly through its *Points of Claim* filed in this proceeding.[16]

DAMAGES

67. As indicated above, the Builder claims damages under the Contract or alternatively, restitution on a *quantum meruit* basis. The claim under the Contract is founded solely on an entitlement to be paid for the *Lock-up Stage* progress claim, less what it would reasonably cost the Builder to rectify proven defects.

68. Damages at common law for breach of contract are to be calculated by reference to placing the innocent party in a position which it would have been in had the contract been performed:

> … - he is entitled to damages for loss of bargain (expectation loss) and damages suffered including expenditure incurred in reliance on the contract (reliance interest).[17]

69. In the present case, the damages claim assumes that the Builder had a right to be paid the *Lock-up Stage* progress claim, presumably on the basis that the Contract was not an entire contract. However, I have already determined that *Lock-up Stage* was not completed. In those circumstances, how can it be said that the Builder is entitled to full payment of that stage (less the cost of repairing defects)?

70. In my view, the Owner's obligation to pay the *Lock-up Stage* progress claim never crystallised. Moreover, the Builder's right to claim the full amount of the *Lock-up Stage* progress claim (less the cost to repair defects) did not materialise merely because it elected to determine the Contract at common law. In the absence of the Builder claiming (or calculating) contractual damages on some other basis, the damages claim is unproven.

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[15] Letter from Lovegrove Solicitors to Noble Lawyers dated 27 April 2012.
[16] See also judgment of Muir J in *Qline Interiors Pty Ltd v Jezer Construction Group Pty Ltd & Ors* [2002] QSC 88 at [28-30].
[17] *Gates v City Mutual Life Assurance Society Ltd* (1986) CLR 1 at 11-12.

71. Nevertheless, the Builder also claims on a *quantum meruit* basis.

72. Mr Johnson produced a report dated 24 May 2013, wherein he estimated the value of the as-constructed Works. According to that report, the cost of the as-constructive Works is $177,381.32, which includes a *builder's margin* of 20%, *preliminaries* of $8,013 and GST. That represents 55.43% of the total contract price.

73. The Owners did not adduce any evidence dealing directly with the cost of the as-constructive Works. Nevertheless, Mr Rosier, the quantity surveyor engaged by the Owners, was called to give evidence in relation to the cost of rectifying the Works as described in the report prepared by Mr Cheong and also, the cost of completing the Works. Mr Rosier concluded that the total cost of rectifying and completing the Works was $393,442. Of that amount, $54,519 represented rectification costs and $171,676 represented completion costs. The balance of that amount was made up of *preliminaries*, *contingency fees*, *builder's margin* and GST.

74. As there is no evidence adduced by the Owners in relation to the reasonable cost of the as-constructed Works, I am left with only the evidence of Mr Johnson in that regard. During cross-examination, Mr Johnson was criticised for adopting certain rates which he said were derived from his own *rates spreadsheet*. He said the *rates spreadsheet* was data that he had recorded on his computer, based on his previous experience in costing projects. The *rates spreadsheet* was not discovered, nor was it produced during the course of the hearing. Mr Reid submitted that in those circumstances, Mr Johnston's opinion evidence was not transparent and the Owners were therefore denied the opportunity to analyse and test those rates under cross-examination. Mr Reid submitted that Mr Johnson's evidence on quantum should therefore be excluded.

75. I do not accept that proposition. I note that Mr Rosier also gave evidence that some of the rates adopted by him were derived through his own experience in costing similar building projects or quantities of work, rather than from sourcing rates through the use of publications such as *Cordells* or *Rawlinsons*. In my view, each of these two expert witnesses have the expertise, experience and qualifications to form an opinion as to what are the prevailing rates for various quantities of building work. In any event, many of the prices adopted in Mr Johnston's report stem from either invoices or quotations, which he annexed to his report.

76. Mr Johnson was extensively cross-examined on his cost estimates, including the rates he adopted. In my view, ample opportunity was given to the Owners to adequately deal with this aspect of his evidence. Moreover, I do not consider it appropriate to raise an objection in closing submissions; in circumstances where no objection was raised at the time Mr Johnson gave his evidence.

77. Accordingly, I accept what is the uncontested opinion evidence of Mr Johnson of the cost or value of the as-constructed Works in the amount of

$177,381.32. Of this amount, the Builder has already been paid the following amounts:

Description	Amount
Deposit	$16,000
Base Stage	$24,000
Frame Stage	$48,000
Total	**$88,000.00**

78. That leaves a shortfall of $89,381.32. Mr Pumpa contends that the Builder is entitled to that amount less the cost to the Builder to rectify the Works ($46,101) on the basis that the Owners would be unjustly enriched if they did not pay a reasonable sum for the Works completed by the Builder. Hence, the amount is claimed on *quantum meruit* basis.

79. In *Pavey & Matthews Pty Ltd v Paul,*[18] the High Court held that a builder was entitled to claim on a *quantum meruit* for the reasonable value of the work and labour performed by it under an unenforceable contract. Similarly, in *Sopov & Anor v Kane Constructions Pty Ltd (No 2)*,[19] Maxwell P, Kellam and Whelan JJ stated that the entitlement of the builder, following its acceptance of the principal's repudiation, *to sue on a quantum meruit rather than for contract damages is supported by high authority of long standing.*[20]

80. I accept that in the present circumstances, it would be unjust for the Owners not to reasonably compensate the Builder for the value of as-constructed Works, for which they now retain a benefit. However, the value of the as-constructed Works needs to take into account the cost to make good defects, given that the costing prepared by Mr Johnson is calculated on the assumption that the as-constructed Works are free of defects.

81. That raises another question. According to Mr Pumpa, any discount representing the cost of repairing defects must be calculated on the basis of what it would have cost the Builder to rectify and not what it would cost the Owners to rectify, the latter being more costly.

82. In support of that proposition, Mr Pumpa referred me to *Pearce and High Ltd v Baxter and Baxter.*[21] In *Pearce* the Court of Appeal (UK) held that the assessment of the cost to repair defects in circumstances where a contractor has been denied a contractual right to repair should be calculated by reference to the cost to that contractor, rather than what it would cost to employ a third party builder to carry out that work.

83. *Pearce* concerned a claim made by a contractor for payment of the final progress certificate, which was issued after the defects liability period under the contract had expired. In that case, the proprietor sought to set off the cost of repairing defects, even though no notice of any defects was given

[18] (1986) 162 CLR 221.
[19] [2009] VSCA 141
[20] Ibid at paragraph 5. See also paragraph 12 of the judgment.
[21] [1999] BLR 10.

during the defects liability period. This had the effect of depriving the builder of its right to repair the defects at its own cost during the defects liability period.

84. In that case, Evans LJ stated:

> The cost of employing a third party repairer is likely to be higher than the cost to the contractor of doing the work himself would have been. So the right to return in order to repair the defect is valuable to him. The question arises whether, if he is denied that right, the employer is entitled to employ another party and to recover the full cost of doing so as damages for the contractors original breach.
>
> In my judgment, the contractor is not liable for the full cost of repairs in those circumstances. The employer cannot recover more than the amount which it would have cost the contractor himself to remedy the defects. Thus, the employer's failure to comply with clause 2.5, whether by refusing to allow the contractor to carry out the repair or by failing to give notice of the defects, limits the amount of damages which he is entitled to recover. This result is achieved as a matter of legal analysis by permitting the contractor to set off against the employers damages claimed the amount by which he, the contractor, has been disadvantaged by not being able or permitted to carry out the repairs himself, or more simply, by reference to the employers duty to mitigate his loss.[22]

85. According to Mr Pumpa, the analogy between *Pearce* and the present case is that the Owners' repudiation of the Contract has denied the Builder the right to carry out the repairs at its cost. In those circumstances, Mr Pumpa argued that the Builder should not have to carry the additional cost of repairing defects associated with another builder undertaking that work.

86. Mr Reid submitted that *Pearce* does not apply to a situation where the contract has been repudiated. I do not accept that proposition as a general statement of principle. In my view, *Pearce* could still apply if a contract has been repudiated and the claim is founded on damages for breach of contract. However, the present case is different. Here, the alternative claim made by the Builder is founded on principles of restitution. It claims on a *quantum meruit* basis, rather than claiming damages under the Contract. As highlighted by the Court of Appeal in *Sopov*, the *quantum meruit* remedy rests on a different foundation to a remedy based on breach of contract:

> [21] … It is because the *quantum meruit* remedy rests on the fiction of the contract's having ceased to exist *ab initio* that the contract can have no 'continuing influence' when the value of the work is being assessed on a *quantum meruit*. It is because this alternative remedy *does* ignore the bargain which the parties struck, and *does* ignore the rights accrued under the contract up to the date of termination, that the availability of *quantum meruit* in the alternative is now seen as anomalous. But, for reasons we have already given, those incongruities are as entrenched as the remedy itself. It is true that the

[22] Ibid at page 104.

> contract price is relevant on a quantum meruit, but not because of any 'continuing influence' of the contract. The price is merely a piece of evidence, showing what value the parties attributed - at a particular time - to the work which the builder was agreeing to perform.[23]

87. In *Brenner and Anor v First Artists' Management Pty Ltd and Anor*, Byrne J stated:

> In my opinion, benefit in this context must be seen from the perspective of the recipient who is, after all, the person to be charged. It may be that for some idiosyncratic reason the defendant seeks the performance of work which another would see as without benefit or, indeed, as a positive dis-benefit. Examples of these are given by Goff J in *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 WLR 783, at p. 803. But where a person requests another to do something, it is not unreasonable for the law to conclude that the former sees some benefit in its performance, however wrong this view may be on an objective basis and for the law to act upon the perception of the recipient. [24]

88. Again in *Sopov*, the joint judgment of Maxwell P, Kellam JA and Whelan AJA confirmed that:

> [25] The proper approach to assessment of a quantum meruit claim is, as the trial judge said, to ascertain the fair and reasonable value of the work performed. Axiomatically, the measure of the restitutionary remedy is the value of the benefit conferred on the party which received it.

89. In my view, the Builder's *quantum meruit* claim is to be considered by reference to the benefit bestowed upon the Owners. The benefit they received is the value of the Works *in their hands*, rather than the value of the Works from the perspective of the Builder. That being the case, I do not accept that *Pearce* applies to a situation where the relief is founded on a *quantum meruit* claim. The value of the benefit is to be measured without reference to any contractual right that the Builder may have had to repair because the terms of the Contract are to be largely ignored for the purpose of the assessment. Therefore, I consider that the assessment of the benefit retained by the Owners must be measured by reference to the reasonable value of the Works completed by the Builder, less what it would cost the Owners to repair that work.

DEFECTS

90. There are twenty items of defective work which have been identified in the report prepared by Mr Cheong. Mr Rosier priced the cost to repair those items of defective work, on the basis of another builder carrying out the rectification work, to be $93,704.94, made up as follows:

[23] *Sopov and Anor v Kane Constructions Pty Ltd (No 2)* [2009] VSCA 141 at [21].
[24] [1993] 2 VR 221 at p. 258.

Description	%	Amount
Rectification costs		$54,519
Preliminaries, supervision	15%	$8,177.85
Contingency fees	10%	$5,451.90
Subtotal		$68,148.75
Margin	25%	$17,037.19
Subtotal		$85,185.94
GST	10%	$8,519
Total cost of rectification		**$93,704.94**

91. By contrast, of the items that Mr Johnson accepted as being defective, he calculated the cost of rectification based on two scenarios; namely, the cost to the Builder and the cost to the Owners if they had to engage another builder to carry out that work. In the first scenario, Mr Johnson estimated the cost of rectification at $46,101. In the second scenario, Mr Johnson estimated the cost of rectification to be $61,642,.63, made up as follows:

Description	%	Amount
Demolition and reconstruction of brickwork		$29,285
Rectification of other items [25]		$9,299
Preliminaries		$1,848
Subtotal		$40,432
Margin	20%	$8,086.40
Subtotal		$48,518.40
Contingency fees	10%	$4,851.84
Subtotal		$53,370.24
Allowance for cost increase	5%	$2,668.51
Subtotal		$56,038.75
GST	10%	$5,603.87
Total cost of rectification		**$61,642.63**

92. Although the experts retained by the parties have reached common ground in respect of some of the items of defective work set out in Mr Cheong's report, there were differing views on quantum. For that reason it is necessary to consider each of the items of defective work (or categories) individually. What follows is my assessment of the raw costs associated with each of the items of defective work that I have found proven. I have not included any amount in respect of *preliminaries, margin, contingency fees* or GST to these individual amounts but have added those costs to the aggregate raw amount found proven.

[25] Items 4, 5, 8, 14, 16, 17 and 20 in Appendix E2A of Mr Johnson's report dated 24 May 2014.

Brickwork (Items 1, 2, 3, 6, 7, 9, 10, 11 and 19)

93. Many of the items of defective work identified in the report prepared by Mr Cheong relate to the brickwork, which Mr Rosier has costed at $32,721 to demolish and re-build.[26] Adopting the same numbering as set out in the report prepared by Mr Cheong, Items 1, 2, 3, 6, 7, 9, 10, 11 and 19 are all included in the scope of work related to the brickwork.

94. Although Mr Johnson originally opined that the brickwork could be repaired, following further investigation and a site visit, he revised his opinion and agreed that it was more economical to demolish and rebuild the whole of the brickwork, rather than rectifying it in a piecemeal fashion. With that in mind, Mr Johnson recalculated his price to repair the defective Works to include the cost of demolishing and reconstructing the brickwork in the amount of $29,285, excluding any margin or GST.

95. Given that Mr Johnson has costed demolition and reconstruction of the brickwork as one single project, whereas Mr Rosier has costed the demolition and reconstruction of the brick piers separately to the remainder of the brickwork, I accept Mr Johnson's cost estimate on this particular item of defective work. Therefore, I find that the reasonable cost to demolish and rebuild the brickwork is $29,285.

Slab rebate edge (Item 4)

96. Both experts agree that the concrete slab rebate does not exactly follow the building line. In addition, the levels at which the damp course has been installed will require render to finish below the brickwork and over the edge of the concrete slab. This means that any concrete slab proud of the brickwork must be cut back to allow an even application of the render coat. In addition, some of the brickwork is unsupported by more than 15 mm by the slab rebate edge. This will require engineered reinforcement to ensure that the brickwork is properly supported. Mr Johnson has priced the cost of undertaking that work at $3,420.

97. Mr Rosier priced this work at $7,358. According to Mr Rosier, the work required cutting back or building out the face of the slab below the brickwork as required. He said that the rectification work would require two labourers working two to three days at $65 per hour. On a worst case scenario, that would equate to $3,120. Therefore, it is unclear to me how Mr Rosier arrived at the figure of $7,358.

98. By contrast, Mr Johnson said that he would allow a lower rate for the labourer and believed that the work could be completed in half the time estimated by Mr Rosier. He said that his costing also included an engineering design and an allowance for backfilling. The backfilling was required to raise the soil level around the perimeter of the house to cover slab rebate, where it sat proud of the ground. In his report, Mr Johnson

[26] This includes Items 1, 2, 3, 6, 7, 9, 10, 11 and 19.

allowed a rate of $45 per hour for the labourer and estimated that the time to complete the work would be 16 hours.

99. Given the lacuna in Mr Rosier's evidence, I largely accept Mr Johnson's costing on this item. In particular, I prefer Mr Johnson's evidence that the applicable rate for a labourer is $45 per hour rather than the rate of $65 per hour as adopted by Mr Rosier. In that respect, I do not accept Mr Rosier's evidence that the rate for a skilled labourer is the same as a tradesperson. However, I do accept that the time in which to complete the work may well exceed the time which Mr Johnson allowed. For that reason, I will allow 32 hours for labour, increasing Mr Johnson's costing by a further $720, making the total raw cost to complete this item of defective work $3,840.

Dampcourse not according to plan (Item 5)

100. This item is associated with the rectification work set out under Item 4. Given that the experts agree that all of the brickwork is to be demolished and rebuilt, the damp proof course will be reconstructed as part of the rebuilding of that brickwork. The original costing prepared by Mr Rosier contemplated grinding out the mortar and replacing the damp proof course at $25 per metre. That will not be required as the brickwork is to be reconstructed. Both experts agreed that the revised costing is likely to be $4 to $5 per lineal metre. Therefore, I will allow $4.50 per linear metre. The original costing contemplated 59 lineal metres. Accordingly, I will allow $265.50 for this item of rectification work.

Gutters and fascias embedded in brickwork (Item 8)

101. In a number of locations the gutters and and/or the fascias had been left too close to the brickwork, which is to be rendered. It is common ground between the experts that the gutters and the fascias must be kept clear of surfaces to be rendered to allow for differential expansion and for the gutters to deflect under load.

102. Mr Rosier has costed the labour involved in removing the gutters and fascias and re-fixing them to the correct line at $1,971. Mr Johnson originally costed this item at $3,160. However, Mr Johnson's costing also included associated repairs to the brickwork, which are now comprised in his revised costing to demolish and rebuild the brickwork. That being the case, if the brickwork component of Mr Johnston's report relating to this item is isolated, the amount attributable to the plumber's labour only is $2,100, which is commensurate with Mr Rosier's costing. Therefore, I accept Mr Rosier's costing of this item. Accordingly, I will allow $1,971.

Roof and eaves not constructed according to drawings (Item 12)

103. According to Mr Cheong, the Builder has not constructed the roof in accordance with the architectural plans. He gave evidence that the roof at the north west internal corner of the main flat roof is shown on the architectural plans to have a tile roof ridge line level with the opposite east

side of the roof. That would have allowed a single level of fascia gutter on the west elevation leading up to internal junction with the garage wall.

104. Mr Johnson gave evidence that he interpreted the architectural drawings differently. He said there were problems in constructing the detail in accordance with the architectural drawings. In that respect, he noted that the architectural drawings were prepared by the Owners and in those circumstances, formed the view that what the Builder had constructed was a reasonable interpretation of the architectural drawings.

105. Mr Cheong gave evidence that the roof should be modified by extending the roofline higher, changing the frame and then reconstructing the roof so as to better represent what is depicted in the architectural drawings. During the experts concurrent evidence, Mr Johnson conceded that he would have to revise his thinking on this issue, having regard to the evidence of Mr Cheong.

106. In my view, Mr Cheong's analysis is correct. That will require minor rebuilding of that section of roof.

107. Regrettably, none of the experts have provided any specific costing for this work. It appears that Mr Rosier's costing under Item 12 of his report either relates to the work described in Item 15 of Mr Cheong's report or is included in that costing. Nevertheless, Mr Cheong's report contemplates that the work involved in reconstructing that small section of roof would be undertaken when the brickwork is rebuilt. Accordingly, I make no further adjustment to the value of the as-constructed Works by reason of this item.

Tower crown (Item 13)

108. As mentioned above, the architectural drawings were based on another design known as *The Monet*. *The Monet* and the Works both have what is known as a tower crown which sits on top of the roofline over the front entrance area. Its function is purely aesthetic. According to Mr Cheong, the tower crown is too small. He gave evidence that the crown on top of the tower should measure approximately 1,100 mm x 800 mm if scaled prior to the moulding being fitted. Mr Cheong suggested that the point where the perimeter of the tower intersects with the roof should have been lower, which would have resulted in the sides of the tower being longer.

109. Mr Johnson gave evidence that the height of the tower crown was dimensioned on the architectural drawings and that its height was in accordance with those drawings. He said that this dimension effectively fixed the size of the tower because its base perimeter was then dictated by where it intersected with the roofline. He said that if the tower was constructed lower in the roofline (in order to increase its perimeter size), the vertical sides of the tower would be too long for the mouldings, if its dimensioned height is to be maintained. In my view, Mr Johnson's analysis is correct. If the tower was constructed lower in the roofline, its vertical sides would increase in size which would again, result in a tower crown that

did not reflect what was depicted in the architectural drawings or the brochure of *The Monet*. In either case, the architectural drawings would not allow the as-constructed tower to be constructed in a manner that was substantially identical in size to what is depicted in the brochure of *The Monet*.

110. In my view, this is an anomaly in the design of the Works. The Builder has constructed the tower substantially in accordance with the architectural drawings and I do not consider that the as-constructed tower constitutes a defect in those Works. Accordingly, I make no further adjustment to the value of the as-constructed Works by reason of this item.

Damaged roof iron (Item 14)

111. Mr Cheong has identified that the roofing iron over a relatively small section of the roof has not been securely clipped, is minimum gauge and appears to flex excessively. As a result, the roofing iron is kinked on many of the ribs. According to Mr Cheong, the damaged roof sheeting should be replaced. Mr Johnson agrees with Mr Cheong's observations.

112. Mr Rosier has costed this work at $4,572. By contrast, Mr Johnson has costed this work at $1,960. The difference between the two costings is that Mr Johnson has only allowed for those damaged sheets to be replaced.

113. Mr Cheong gave evidence that there were a number of reasons why it was appropriate to replace all of the roofing sheets, rather than only the damaged sheets. First, he said that given the passage of time since the sheets were first laid, there would be a difference in colour shade between new and old. Second, he suspected that the gauge of the sheets was too thin in any event. Finally, he said that the undamaged sheets would have to be lifted in order to remove the damage sheets, which may cause further damage.

114. In my view, it is appropriate and reasonable to replace all of the roofing sheets. In that respect, I accept Mr Cheong's evidence that there will be a colour difference between old and new, which would be aesthetically unpleasing and not in accordance with the architectural intent of the Works. Moreover, allowing for the full replacement of the roof sheeting will eliminate the risk of other sheets being damaged during the rectification process.

115. Therefore, I will allow Mr Rosier's costing in the sum of $4,572.

Metal capping in lieu of tiled capping to roof (Item 15)

116. According to Mr Cheong, the architectural drawings depict a tiled roof capping to the ridge line on the south face of roof. Mr Johnson gave evidence that he did not consider that the drawings clearly showed the capping to be tiled. Moreover, he observed that there was nothing specified in the drawings or other Contract documents that the ridge capping was to be tiled. He gave evidence the Builder was not able to source matching ridge capping tiles as an accessory to the roof tiles used on the Works.

Consequently, the Builder has constructed the roof with a *Colorbond* steel ridge capping.

117. Mr Cheong gave evidence that it was open for the Builder to flash the ridge with a metal capping and then lay the same ridge tiles that were used on other parts of the roof or use the hip capping tiles which has been laid on other sections of the roof as a form of ridge capping. He was of the opinion that this would still achieve the same architectural effect. Having perused the architectural drawings depicting the various sections of the roofs, I accept the evidence of Mr Cheong that the ridge is depicted as being capped with ridge tiles, rather than with a metal flashing.

118. In my view, even if matching ridge tiles were not available, there are other options open to the Builder, as outlined by Mr Cheong. That being the case, I find that the placement of a metal capping is not in accordance with the Contract and the Builder would have been required to remove the metal capping and construct a tiled ridge.

119. Mr Rosier has costed this work at $1,220. Mr Johnson has not provided any costing for this item of work. Accordingly, I will allow Mr Rosier's costing.

Box gutter and valley gutter not laid on marine ply (Item 16)

120. It is common ground that the box gutters and valley gutters are specified to be laid on a 20 mm marine ply base. The box gutters have not been installed in that manner. In particular, the box gutter on the east side of the building has been laid on treated pine timber slats. The box gutter on the west side of the garage is supported by timber blocks to the sides of the rafters. The valley gutters are also supported by pine timber.

121. Mr Johnson gave evidence that the treated pine was H3 rating which was acceptable to the application in question. In relation to the box gutter on the west side of the garage, Mr Johnson conceded that insufficient support had been provided.

122. Mr Cheong recommended that the existing box and valley gutters and the overlapping tiles and capping would need to be removed to achieve compliance with the Contract documents. He disagreed with Mr Johnson that the treated pine was an appropriate base equivalent to the specified marine ply. In particular, he formed the view that the treated pine was prone to expand and contract, which could lead to it distorting and thereby affecting the gradient of the box gutter.

123. In my view, what was installed was less than what was required. I do not accept that substituting treated pine timber for marine ply achieves the same result. In that respect, I prefer the evidence of Mr Cheong over that of Mr Johnson on this issue.

124. Given that Mr Johnson has only costed minor remedial work relating to this particular issue, I am left with Mr Rosier's costing as the only pricing which contemplates removing the treated pine timber and replacing it with marine

ply as a base for the valley and box gutters. In that respect, Mr Rosier has provided a raw costing for this work of $2,423, which I accept.

Box gutter does not comply and batten exposed (item 17)

125. According to Mr Cheong, box gutters require a minimum depth of 75mm. He said that the internal side of a box gutter must finish higher than the external side and where the outside is laid back to the pitch of the roof, it must be folded to deflect rain and underlap the tiles by a minimum of 150 mm.

126. The as-constructed box gutter on the southern end on the east side of the roof has a lear which extends from the base of the gutter up the slope of the roof by approximately 260 mm. According to Mr Cheong, the box gutter is deficient because it has insufficient depth, given the as-constructed profile.

127. According to Mr Johnson, information was received from the Plumbing Industry Commission indicating that it considered the as-constructed profile permissible and that it would be approved if required. I accept Mr Johnson's evidence relating to this issue. The mere fact that the profile of the box gutter is unconventional does not necessarily mean that it is defective.

128. Nevertheless, the last timber tile batten has been laid over the internal side of the gutter. It is common ground that this is not acceptable as water damage to the timber can occur. This needs to be rectified.

129. Mr Rosier has costed the work involved to re-position the timber batten at $270. I accept that costing.

Anti ponding not restored after removal of scaffold (Item 18)

130. It is common ground that after the roof tiling scaffolding was removed, some of the anti-ponding boards were not refitted and sarking not extended to the last tile spacing. According to Mr Johnson, the lack of anti-ponding boards or sarking only occurred in a few isolated locations. He opined that a tile could be lifted and the anti-ponding board and sarking inserted.

131. However, Mr Rosier has costed this item of defective work on the basis that 21 metres of anti-ponding boards and sarking need to be re-installed.

132. In my view, the scope of work contemplated in Mr Rosier's costing is excessive, especially bearing in mind that it includes scaffolding, which will be provided in any event when the brickwork is re-built. Moreover, I accept that this work can be done in the manner suggested by Mr Johnson, which would not be as labour intensive as contemplated by Mr Rosier. Mr Johnson has allowed $100 to undertake this work. On the other hand, Mr Rosier has priced this work at $1,905. Doing the best I can with the evidence before me, I will allow $720 for item, made up as follows:

    (a) Carpenter at $65 per hour for 8 hours: $520

    (b) 10 metres of anti-ponding board at 15 per metre: $150

(c) 10 metres of sarking at $5 per metre lineal length: $50

Damaged bracing ply (Item 20)

133. It is common ground that the ply bracing at the southeast front of the dwelling has been damaged. Mr Rosier has costed the repair of this item at $50. Mr Johnson has costed that item at $150. The difference between the two costings is that Mr Rosier's costing contemplates that the brickwork will be demolished making access easier. Mr Johnson's costing was undertaken at a time when he had not recommended complete demolition of the brickwork. Given that fact, I accept Mr Rosier's costing on this item and will allow $50.

Gas pipe touching metal frame brace (Item 21)

134. Mr Cheong initially reported that a copper gas pipe was in contact with a galvanised angle brace and that it needed to be isolated to prevent electrostatic action. It appears, however, that remedial work has been undertaken since Mr Cheong prepared his report. There is no further work required in relation to this item.

Summary of defects proven

135. As I have already noted, the amounts which I have allowed in respect of defective works are raw costings. They do not include any amount in respect of preliminaries, contingencies, builder's margin, uplift or GST.

136. In relation to *builder's margin*, Mr Johnson has allowed 20%, whereas Mr Rosier has allowed 25%. Given that a contingency allowance of 10% has also been added to the overall cost of building, I find that the lower of these two percentages better reflects the reasonable percentage to be added for *builder's margin*.

137. In relation to *preliminaries*, Mr Rosier has adopted a flat percentage increase of 15% on the cost of building, whereas Mr Johnson has costed each element of the expenses associated with *preliminaries* to arrive at a cost of $1,848. In my view, Mr Johnson's cost estimate is more transparent and for that reason, I accept his evidence on this particular issue over that of Mr Rosier. I will allow $1,848 in respect of *preliminaries*.

138. Both experts have added a contingency fee of 10%, which I accept as being reasonable.

139. In relation to Mr Johnson's 5% allowance for cost increases, I note that no uplift has been included in Mr Rosier's costing. No evidence was given by Mr Johnson explaining why he considered it was necessary to add a 5% uplift to his pricing. In the absence of any clear explanation as to why 5% should be added to the aggregate raw cost of building, I decline to adopt that approach in my determination of the reasonable cost of rectification.

140. Accordingly, the total amount which I find to be the reasonable cost of rectification; and which I consider should be deducted from the sum payable to the builder on a *quantum meruit*, is $68,872.05, made up as follows:

Item No	**Description**	**Amount**
1,2,3, 6,7,9, 10, 11 and 19	Brickwork demolition and reconstruction	$29,285
4	Slab rebate edge	$3,840
5	Dampcourse	$265.50
8	Gutters and fascia embedded in brickwork	$1,971
12	Roof and eaves not constructed to drawings	$0
13	Tower crown	$0
14	Damaged roof iron	$4,572
15	Metal ridge capping in lieu of tiled capping	$1,220
16	Box gutter not on marine ply	$2,423
17	Non-complying box gutter	$270
18	Anti-ponding not restored	$720
19	Damaged bracing ply	$50
20	Gas pipe	$0
Subtotal		$44,616.50
	Preliminaries	$1,848
Subtotal		$46,464.50
	Contingency (10%)	$4,646.45
Subtotal		$51,110.95
	Margin (20%)	$10,222.20
Subtotal		$61,333.15
	GST (10%)	$6,133.30
TOTAL		**$67,466.47**

141. Accordingly, the net amount payable to the Builder in respect of its *quantum meruit* claim is the unpaid reasonable value of the Works completed ($89,381.32) less the reasonable cost of the Owners having that work rectified ($67,466.47), leaving a net balance payable by the Owners to the Builder of $21,914.85.

SENIOR MEMBER E. RIEGLER