VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D409/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Terms of contract – project management agreement – effect of inclusion of clauses from another contract - whether void for uncertainty – whether owners estopped from relying on $1M cap - parties' respective responsibilities for rectification of defects

APPLICANT	Bellcon Developments Pty Ltd (ACN: 084 405 961)
RESPONDENTS	Andreas Triantafyllou, Christina Triantafyllou, William Triantafyllou, Eda Triantafyllou
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Hearing
DATE OF HEARING	27-30 April, 1, 4 and 7 - 8 May 2009
DATE OF ORDER	11 February 2010
CITATION	Bellcon Developments Pty Ltd v Triantafyllou (Domestic Building) [2010] VCAT 133

ORDER

1. The third and fourth respondents shall pay the applicant the sum of $101,499.01 forthwith.
2. The applicant's claim against the first and second respondents is dismissed.
3. Costs and interest reserved – liberty to apply. I direct the principal registrar to list any application for costs for hearing before Deputy President Aird for 2 hours.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For the Applicant	Mr R Andrew of Counsel
For the Respondents	Mr A Kincaid of Counsel

REASONS

1 In an ideal world parties sign a contract, put it in the bottom drawer and never have to refer to it again. Whilst that might have been the hope and the intention of the parties in this dispute, that does not excuse the failure of both parties to read the contract before they signed it, or seemingly since, to ensure it accurately reflected their understanding of the agreement, the terms of which are in dispute.

2 The only certainty is that a house has been built for the second and third respondents (who I will refer to as 'the owners'). The owners wanted to have a new home built in Beach Road, Beaumaris. The land had been purchased by the third respondent, Mr William Triantafyllou in 1999, but registered in his parents' name. Mr Triantafyllou, gave evidence this was on the advice of his accountant for 'tax and other reasons' and that he and his wife are the beneficial owners of the land. His parents are the first and second respondents to Bellcon's claim. The land was subsequently subdivided with one lot being retained for the owners' new home.

3 The owners engaged Newline Drafting Services to design and prepare the drawings for their new home. The quotations obtained by Newline, after calling for tenders, were in the range of $1.2M to $1.3M. Mr Triantafyllou thought this was too expensive and approached Bellcon which was building another unit development nearby.

4 Mr Bellio of Bellcon gave evidence that it initially quoted $1.1M for the works, but after Mr Triantafyllou indicated this was still too high he suggested that if he was to project manage the works, for a flat fee of $90,000 plus GST, he could cap the total costs of the works including the project management fee at $1M inclusive of GST.

5 The works took a number of years to complete. Works were commenced in 2001, the owners moved in on 24 April 2004, a conditional occupancy permit having been issued on 16 April 2004. Works continued after they moved in and a Certificate of Final Inspection was issued on 19 October 2006.

6 The total cost of the works exceeded $1.4M. The owners say the parties agreed that if the cost of the works exceeded the $1M cap, Bellcon would reimburse them for any amount paid in excess of the cap. Bellcon says the $1M cap does not apply, or if it does, that the owners are estopped from relying on it. Bellcon claims payment of $276,619.01. The owners say they have paid $1,143,054, $216,289.32 of which they have paid to Bellcon. The owners deny Bellcon is entitled to any further payment and have counterclaimed seeking a refund of amounts they claim they have overpaid, together with the cost of rectification and completion works, liquidated and inconvenience damages. By reference to their final submissions I calculate the total of their claim to be $245,261.38.

7 Bellcon was represented at the hearing by Mr Andrew of Counsel, and the owners were represented by Mr Kincaid of Counsel. I heard evidence from Mr Bellio, a director of Bellcon, and, on behalf of the owners, from Mr William Triantafyllou, Mr Mikulic of Newline Drafting Services who designed the home and prepared the contract documents, and from the first respondent, Mr Andreas Triantafyllou. The fourth respondent, Mrs Ada Mr Triantafyllou was also called to give evidence but she was not cross-examined. The experts engaged by each of the parties, Mr Rob Lees by Bellcon, and Mr Robert Lorich of Buildspect for the owners, prepared a joint report after attending a view on site during the hearing, and I subsequently heard their evidence concurrently.

The contract

8 The parties disagree about the terms of the contract and the parties' respective roles and obligations. Although in its Amended Points of Claim Bellcon says it was engaged as a builder under a cost-plus contract, the case put at the hearing, and as set out in its final submissions, consistent with Mr Bellio's evidence, is that it was engaged as the project manager, not as the builder. The owners contends that Bellcon was engaged as the builder.

9 Mr Kincaid described the written contract in his opening statements as a 'horrible hybrid'. Mr Andrew submits that '*if the terms are so uncertain that they cannot be ascertained, then the whole agreement is void for uncertainty*'[1].

10 Irrespective of what the parties might have alleged in their respective pleadings and submissions, my task is to determine the terms of the contract between them.

11 Mr Triantafyllou arranged for Mr Mikulic from Newline Design (who had designed the house) to prepare the contract. Neither Mr Bellio nor Mr Triantafyllou read the contract before they signed it. Mr Triantafyllou gave evidence, under cross examination, that he was not interested in reading the fine print, and that was why he had arranged for Mr Mikulic to prepare it.

12 Mr Mikulic prepared a NSW Project Management Agreement ('the PMA') to which he attached a couple of pages from the Master Builders Association of Victoria HC5 domestic building contract ('the MBAV contract'). Mr Mikulic said he had not met Mr Bellio until he met with the parties when the contract was signed. It seems that the choice of contract was Mr Mikulic's. It is unclear why he chose a NSW contract for a Victorian project. Remembering that he had been asked by Mr Triantafyllou to prepare the contract, Mr Mikulic said he prepared a PMA because he understood that was the arrangement between the parties. Mr Triantafyllou is also known as Bill Triant and the principal is identified in the PMA as 'B Triant'.

[1] Applicants' final submissions at [3]

13 The following special conditions were included in the PMA[2]:

i) Building Contract Agreement

ii) Defects Liability Period Clause 19 – MBAV – Contracts Standards.

iii) Liquidated Damages as per Clause 128 MBAV – Contracts Standards and as agreed at $300/week.

iv) All supplied documentation

v) Building cost not to exceed $1,000,000 – (Excess to be paid by Project Manager as agreed). INCLUSIVE OF G.S.T. & MANAGEMENT FEE

14 In schedule 2 of the PMA the 'target completion date' is 14/12/01, and in schedule 12 the 'lump sum fee' is $90,000 + GST. In Schedule 15 the 'method of remuneration' is 'as outlined in Building Contract Agreement dated 17/12/99'. In Schedule 19 the 'minimum guarantee fee' is $90,000 + GST.

15 The contract documents are completed by:

a. the Building Contract Agreement ('the BCA')

b. Bellcon's estimate of the cost of the works

c. the 'Projects Specifications' supplied by the owners

d. 'Computations' supplied by the owners

e. 9 sheets of architectural drawings dated 1 July 1999.

Each page of the contract documents is initialled by Mr Triantafyllou and Mr Bellio.

16 The BCA is a five page document which identifies the owners as Mr & Mrs B Triant. This was prepared by Bellcon, and, although it is undated, Mr Bellio says it was signed on or about 27 December 2000. The first page identifies the parties and the job location and then provides:

UNDER THIS CONTRACT THE BUILDER IS TO CONSTRUCT:

2 Storey Dwelling with a terrace and basement carpark

WARRANTY INSURANCE

HIH Insurance (and their contact details)

BUILDING WORK TO BE CARRIED OUT AT

[Site address and title details]

ESTIMATED COST

I Million Dollars $1,000,000

PROGRESS PAYMENT TO BUILDER

[2] Project Management Agreement, page 15

Base Stage	*$20,000 + GST*
Frame Stage	*$20,000 + GST*
Lock-up Stage	*$20,000 + GST*
Fixing Stage	*$20,000 + GST*
Completion	*$10,000 + GST*
	$90,000 + GST

Page 2:

SPECIAL CONDITIONS

SC1 - Owner is to pay all invoices supplyed by builder. (sic)

SC2 – If the builder is to pay C.O.D. immediately for goods or services, the owner is to reinburse the builder (sic)

CONTRACT DATE *(undated)*

SIGNED *(This is signed by Mr Triantafyllou and Mr Bellio and both signatures are witnessed by Mr Mikulic).*

There follows a further three pages setting out Bellcon's estimate of the cost of the works which totals $893,280 not including the project management fee. It is not clear whether this includes GST. The last two pages contain clauses 18, 19 and 20 from the MBAV contract.

17 It is suggested by counsel for the owners in his final submissions that the PMA has all the features of a construction management agreement – that may be so, but that does not assist the owners. As counsel correctly submits at paragraph 29:

> When the agreement is looked at as a whole, it plainly contemplates a number of contracts being entered into between the Project Manager as the disclosed agent of the Principal…and a number of contractors in respect of each [stage of] the project.

18 He also succinctly summarises the features of this PMA at paragraph 32:

> These features seem to be dealt with in the PMS agreement [the PMA] by (excepting where the liability arises where the Project manager has failed to exercise due care and skill…):
>
> (a) Clause 6(b) the Project Manager will not be liable for the "design of the works";
>
> (b) Clause 6(c) – the Project Manager will not be liable for "construction of the works";
>
> (c) there being no clause by which the Project Manager becomes liable to complete the works by the "Target Completion Date" as defined (the Project Manager's responsibilities as to time related only to monitoring the time obligations of the direct trade contractors-see clause 15(h)).…
>
> (d) there being no clause by which the Project Manager warrants that the works will be completed for a particular price …

19 It is then suggested that Bellcon's otherwise limited liability has been extended by the documents attached to the PMA. First, the BCA requires Bellcon to construct a *'2 Storey Dwelling with a terrace and basement carpark'* - this is simply a re-stating of the works set out in Schedule 1 to the PMA which define the 'project'.

20 Secondly, Bellcon was required under the BCA to arrange warranty insurance, which it did after the building permit which was originally issued to the owners as owner-builders was amended to record Bellcon as 'the builder'. However, that of itself is not evidence of the contractual arrangements between the parties.

21 The suggestion that the BCA is *'to be regarded as the core and fundamental expression of the parties' mutual intentions'* is unsustainable. In my view, the primary contract document is the PMA, prepared by Mr Mikulic on Mr Triantafyllou's instructions. The BCA sets out a broad description of the works and a price ($1M), but specifies that the only amounts to be paid to Bellcon are its fee by way of progress payments at base stage, frame stage, lock-up stage, fixing stage and completion. All other payments are to be made by the owners.

22 I reject the submission that payment by the owners to Bellcon for the brickwork is evidence that Bellcon was the builder. Rather, it seems to me that Bellcon carried out the brickwork in the same way as all other contractors and tradesmen, and the owners were obliged to pay it for these works under SC 1 of the BCA.

23 Counsel for the owners has referred me to the joint judgement of the High Court in *Toll (FGCR) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52 at 179:

> The meaning of the terms of a contractual document is to be determined by what a reasonable person [in the position of the parties] would have understood them to mean. That, normally, requires a consideration not only of the text, but also the surrounding circumstances known to the parties, and the purpose and object of the transaction…

24 I heard evidence from Mr Bellio, Mr Triantafyllou and Mr Mikulic about the intention of the parties when they entered into the contract. Mr Bellio said it was always his intention and understanding that he would project manage the job. This is reflected in the amount to be paid to Bellcon. The fee under the PMA and the amount to be paid to Bellcon under the BCA is $90,000 + GST. It matters not, in my view, that Bellcon is identified as the builder in the BCA – it is identified as the project manager in the PMA and by reference to the Special Conditions in the PMA the so-called 'Building Contract Agreement' is incorporated into its terms – not the other way around.

25 It may be that Mr Triantafyllou did not (and still does not) understand the difference between a builder who accepts responsibility for a construction

project in its entirety, and a project manager who co-ordinates and oversees the works on behalf of a principal. Although he contends Bellcon was engaged as the builder, in paragraph 10 of his witness statement, Mr Triantafyllou states:

> The contract contained special conditions SC1 and SC2 in relation to invoicing and payment. Bellcon was to supply us with copies of all invoices for our project for us to pay. We were also to reimburse Bellcon direct if he had to pay COD for goods or services. Bellcon was to contract with trades and suppliers as our agent. Given the way the works proceeded, the arrangement was varied to the extent that the builder was content for me occasionally to contract directly with certain trades and suppliers. The items which we purchased directly were the Jetmaster heater, hot water service and sauna (refer paragraph 17). Where this occurred, nothing [was] said by Mauro to the effect that his responsibility for rectifying all defects was somehow affected. [emphasis added]

26 Leaving aside for a moment the extent to which the owners contracted directly with contractors, this is a clear acknowledgement by Mr Triantafyllou that Bellcon engaged contractors as his agent (which is consistent with Bellcon having been engaged as a project manager), and with clause 8 of the PMA which provides that Bellcon is to enter into contracts as the disclosed agent of the Principal.

27 However, although that might have been the intention of the parties when they entered into the contract, over time they clearly varied their arrangement. Rather than Bellcon contracting with all contractors and suppliers, Mr Triantafyllou made his own arrangements. Further comments will be made about these when considering whether the $1M cap applies.

28 Further, noting that Mr Triantafyllou had instructed Mr Mikulic to prepare the contract documents it simply does not ring true that the intention was for Bellcon to be engaged as the builder and not as a project manager. If that had been Mr Mikulic's instructions there would have been no reason for him to have prepared a project management agreement. Adding in the additional pages does not, in my view, change the nature of the contractual relationship between the parties – that Bellcon was engaged as the project manager. Unlike what might be described as a traditional building contract, there was no margin for profit and overheads. Bellcon was to be paid a flat fee. The inclusion of the additional pages does not, in my view, create a hybrid contract as suggested by counsel for the owners. Rather the inclusion of the clauses from the MBAV contract, together with the BCA, seem to be an attempt, albeit unsuccessful, to convert the PMA into a building contract.

29 Whether the standard form PMA used in this instance should properly be regarded as a construction management agreement as suggested by Mr Kincaid matters not. It is the terms of the contract between the parties I am

concerned with. The BCA was prepared by Bellcon before the PMA was prepared by Mr Mikulic on Mr Triantafyllou's instructions.

30 It is unclear when the BCA was provided to Mr Mikulic. The terms of the BCA are to a large extent entirely consistent with the terms of the PMA. The works to be constructed are described consistently in Schedule 2 to the PMA and the building contract; the price is $1M which by Special Condition (v) of the PMA becomes a cap for the cost of the works; the fee to be paid to Bellcon is $99,000 with the BCA setting out the stages at which it will be paid, and the BCA confirms that Mr Triantafyllou will pay all invoices where provided to him by Bellcon, or alternatively that he will reimburse Bellcon for any C.O.D. payments. This is consistent with clause 6 of the PMA [that the principal, in this case the owners, acknowledged that the project manager is not responsible for the costs of the project]. The only additional provision is that Bellcon will arrange warranty insurance.

31 It cannot be said that this document complies with s31 of the *Domestic Building Contracts Act* 1995 which sets out an exhaustive list of the provisions which must be included in a major domestic building contract. Nor does it have any of the elements one would normally expect to see in a building contract. If the BCA was the only document recording the agreement between the parties it would be void for uncertainty. Although there is a broad description of the works, the plans and specifications are not referred to nor incorporated and it is therefore impossible to identify the actual works to be carried out other than by reference to the PMA and the other contract documents.

32 Clause 18 of the MBAV contract has been included in an attempt to provide for the payment of liquidated damages although it can only be effective if the 'Completion Date' is read as referring to the 'target completion date' in the PMA. The inclusion of Clause 19 seems to be an attempt to provide for a defects liability period. Nothing more. However, in the absence of the definitions for 'the Works', 'Completion' or 'Completion Date' and the Appendix setting out the relevant period, or a special condition in the PMA to that effect, clauses 18 and 19 are meaningless. Even if a defects liability period was specified this would not, and could not, in my view, render Bellcon liable for all of the works. To do so would be inconsistent with clause 6 which provides the project manager will not be liable for the design or construction of the works, other than where the project manager has failed to exercise due care and skill in carrying out its obligations under the project management agreement. Without the appendix and a complete MBAV contract the clauses are meaningless and I find they are of no effect.

33 Although clause 20 of the MBAV contract has not been deleted, the owners are not suggesting it forms part of the contract between the parties.

34 So, to recap, I am satisfied the parties agreed that Bellcon would be engaged as the project/construction manager to co-ordinate the works with the cost of the works to be capped at $1M. Bellcon was to be paid a project

management fee of $99,000 inclusive of GST which was to be included in the $1M cap. Mr Triantafyllou was to pay all invoices provided to him by Bellcon, or otherwise reimburse Bellcon where it was required to pay C.O.D. Bellcon was to arrange warranty insurance.

THE $1M CAP

35 The owners contend the cost of the works was capped at $1M inclusive of Bellcon's project management fee and GST. As the cost of the works exceeded $1M they deny they are obliged to make any further payments to Bellcon, and seek reimbursement of the sum of $107,026.38 being the amount they say they have paid in excess of the $1M cap, after taking into account additional costs they accept responsibility for. The owners rely on special condition (v) in the PMA which provides:

> Building cost not to exceed $1,000,000 – (Excess to be paid by Project Manager as agreed). INCLUSIVE OF G.S.T. & MANAGEMENT FEE

Does the cap apply?

36 Bellcon contends that the $1M does not apply. It concedes that the cap was fixed at the time the contract was entered into, that the works were to be carried out on a cost-plus basis and says that it is entitled to be paid the outstanding balance. It contends that by 2002 the contract had been frustrated and that, rather than walk away as they would have been entitled to do under the *Frustrated Contracts Act* 1959, as it then applied, the parties proceeded on the basis of a new contract or agreement as evidenced by their conduct. Alternatively, that the owners have waived, or are estopped from relying on, the $1M cap.

37 As discussed above the PMA provided that the project manager would engage all contractors, obtain invoices, authorise payment and forward them to the owners for payment. However, Mr Triantafyllou contracted directly for many of the works and received and paid their invoices, all without any consultation or discussion with Mr Bellio who gave evidence he had been content with this arrangement because it was the 'owners' house'.

38 Notwithstanding the terms of the contract were varied so that Mr Triantafyllou contracted directly with a number of contractors, I am satisfied the $1M cap was a clear term of the contract between the parties. There is no evidence to support Bellcon's contentions that the cap was only to apply if the works were carried out during 2001, or that as the cost of the works increased because of the effluxion of time the cap should not apply.

Have the owners waived compliance with the cap, or are they estopped from relying on it?

39 Although the owners moved into the house in April 2004, the first time the owners raised any concerns about the cap having been breached was in 2008, after Bellcon commenced these proceedings. Mr Triantafyllou gave

evidence that he did not realise the cost of the works had exceeded the $1M cap until he carried out a reconciliation in early 2008. I find this hard to believe. Mr Triantafyllou is an experienced and apparently successful businessman with the financial resources to pay nearly $400,000 in cash (which will be discussed later). He has carried out a detailed assessment of Bellcon's general ledger and its supporting invoices, statements and cheque butts. Although the amounts entered in the ledger are exclusive of GST and the amounts on the relevant invoices, statements and cheque butts are often inclusive of GST, this has apparently not created any difficulties for him in assessing Bellcon's claim.

40 Further, it is inconsistent with his evidence at page 5 of his witness statement in reply where he says:

> I agreed with Bellio that I would be free to obtain prices from proposed contractors and suppliers. Occasionally I did so. Most of those engaged were his, not mine. I was concerned about the price being exceeded. Whenever there was an increase in the price of an item beyond Bellcon's estimate, Bellio would reassure me that he "would make it up on something else". [emphasis added]

41 Whilst Mr Bellio denies these conversations, Mr Triantafyllou's evidence confirms that he was 'keeping tabs' on the cost of the works, and it beggars belief that in such circumstances he did not know at the time that the $1M cap had been exceeded, and that he had spent more than $1M.

42 Again, counsel for the owners has succinctly summarised the law concerning estoppel[3] on page 15 of the owners' final submissions where he says:

> Bellcon claims that Mr T is now estopped from now maintaining that the $1 million cap applies. It will be necessary for this purpose for Mr B to demonstrate to the Tribunal that he has relied upon an assumption made by him as to Mr T not relying on the $1 million cap, *which Mr T has induced Mr B to hold,* that he has suffered a detriment as a result of relying on the assumption and that therefore Mr T cannot now deny the correctness of the assumption.

This is, in effect, a re-phrasing of the comments by Mason CJ in *Commonwealth v Verwayen* (1990) 170 CLR at p 413 where he said:

> The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness.

43 Nothing could be clearer in the circumstances of this case. Mr Triantafyllou has paid more than $1M without demur. He did not raise the issue of the

[3] Respondents' final submissions, page 15

cap at any time during the course of the contract works, and did not raise this as an issue until some four years after he and his family moved into the house. Of course Bellcon relied on this inducement, and it is clearly to its detriment if it is unable to recover the additional monies spent by it in reliance on Mr Triantafyllou's inducement. Accordingly, I find that the owners have waived compliance with the cap and are estopped from relying on the $1M cap.

44 Even if I was not satisfied that the owners are estopped from relying on the cap, in circumstances where Bellcon was not in control of the project or the cost of the works, and having regard to ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 and s53 of the *Domestic Building Contracts Act* 1995 it would, in my view, be unfair to enforce the cap.

THE OWNERS' CLAIM

45 Although the owners are the respondents it is convenient to consider their claim first. The owners' claim for $245,261.38 is calculated as follows:

- reimbursement of $107,026.38 being the amount they claim to have paid in excess of $1M cap, and
- rectification costs of $98,517 (the amount agreed by the experts as the cost of rectification), and
- $23,718 for further defective works as identified and assessed by their expert' and
- liquidated damages of $6,000 for the period 14 December 2001 (the date they say the works should have been completed) to May 2002, and
- damages for physical inconvenience because of the defective state of the works and delays, 'say $10,000' (sic).

46 The owners' claim for reimbursement of $107,026.38 is calculated as follows:

Amount paid by owners by reference to their payment schedule	$1,143,054.00
Paid by owners to Oxford Painting	$ 19,906.00
Credit for tiling	$ 6,325.00
	$1,169,285.00
Less	
Allowance for excavation of cellar	$ 10,000.00
Extra paid for pool	$ 32,631.00
Increased steel costs	$ 8,811.00
Extra cost of kitchen	$ 5,824.62

More expensive toilets	$	2,500.00
Extra garage door cost	$	2,492.00
		$1,107,026.38

47 The owners rely on a handwritten schedule of payments which was revised a number of times during the hearing. Although I have found the owners are estopped from relying on the $1M cap I consider it appropriate to consider their claim that there has been a cost over-run.

48 First, although Bellcon's estimate is an estimate and nothing more, the owners seem to have regarded the estimate for each item as a 'fixed price'. This is not consistent with the terms of the contract between them. As noted above Bellcon's estimate totals $893,280 not including the project management fee. Assuming the estimate is inclusive of GST as the $1M was inclusive of GST and the project management fee, if the project management fee is added the total estimate is $992,280.

49 Unfortunately, despite the payment schedules and supporting documentation prepared by each of the parties, neither of them has reconciled the actual costs against the estimates attached to the BCA. In the absence of any evidence from the parties it has been impossible for me to reconcile these. Although the owners claim there has been a cost over-run, apart from some specific instances, such as the steelwork and the stairs, it is not immediately clear where the additional costs have been incurred, and whether they are in respect of the same scope of works or a varied scope, the extent of any variations, and the impact of such variations on the cost of the works. I am unable to determine the exact cost of the works, and whether any escalation in cost is due to underestimating by Bellcon, the effluxion of time, and general increase in prices, or to a change in scope.

50 Mr Triantafyllou has exhibited invoices and payment receipts for payments made by him which he says total $1,143,054.74.[4] This includes the $216,289.32 which the owners concede they have paid to Bellcon ($20,000 of which was paid in cash), and cash payments totalling $379,284.91. However, on my calculations (not including the amount paid to Oxford Painting which only appears on the latest payment schedule) the amounts paid by the owners (including the payments to Bellcon) total $1,117,404.73. If the payment to Oxford Painting is included, the amount paid direct to contractors (not including the payments to Bellcon) is $976,021.41. There are multiple copies of the same documents and many of the copy invoices and payment receipts are illegible. It has therefore been impossible to reconcile them with the payment summary. Unfortunately they are not in any order. Although the payment summary is 'by contractor' the invoices and quotations are scattered throughout a lever arch folder. Not only are they not grouped 'by trade' they are not even in date order.

[4] Witness statement in reply of William Triantafyllou at p13

51 In reviewing the supporting documents I have noticed that Bellcon has made, or authorised, payment to S.A. & N Clarke for carpentry works on production of a tax invoice. The owners have made three payments by cheque to S.A. & N Clarke for invoices addressed to Bellcon where it has authorised payment. These total $26,100. The owners have paid them an additional $15,000 cash. The only evidence of payment is a cash receipt (there is no tax invoice) and it is unclear what work these payments relate to.

52 A number of payments have been made by the owners where the only supporting documentation is a 'cash receipt'. Others have been made 'on a quotation', often as a deposit but are unsupported by tax invoice. There are also a number of payments where it seems Mr Triantafyllou has negotiated and paid a lower price than that appearing on the invoice. These matters are indicative of an astute businessman who was aware of how much money he was spending.

53 However, I note in passing that in reviewing the invoices exhibited to Mr Triantafyllou's witness statement in reply the invoice at TB1017 from Rio Sound and Vision dated 21 April 2004 is for a phone system, an alarm system, 5 internet points, 8 telephone points, and a home wiring cabinet with amplifier for a total cost of $8,162. There is an allowance of $4,000 in Bellcon's estimate for the intercom system but there is no allowance or estimate for the other items.

54 Although in their payment schedule the owners record that $8,162 has been paid to Rio (plus $1200 for the replacement of a master video door station which was apparently stolen), there is no evidence that $8,162 has been paid. The invoice at TB1017 records a balance owing of $2000 as at 28 April 2004 indicating $6,162 has been paid.

55 In their payment schedule the owners record that $36,709 has been paid for landscaping. Invoices from Hallmark Landscape & Design were produced by the owners during the hearing and total $39,379. A copy of the quotation and/or contract were not produced so the scope of landscaping works is unclear. There is no specific allowance in Bellcon's estimate for landscaping as a single item.

56 Although Bellcon has allowed $600 for steel fences and gates the owners record they paid Gardens of Steel $2,420 for a gate (the invoice is at TB1148)

57 It is abundantly clear that Mr Triantafyllou was very involved with this project. Despite the PMA providing Bellcon was to engage all contractors as agent for a disclosed principal, Mr Triantafyllou engaged a number of contractors directly. In other instances it appears that he negotiated the final price with the contractor even after the invoices had been rendered. By way of example, Mr Triantafyllou exhibits to his witness statement in reply at TB893 the following letter which I believe is from DBH Constructions &

Dandenong Bobcat Hire. Although undated, and difficult to read the facsimile transmission header shows it was faxed on 28 January 2002:

> Attached invoices for your records also set out below summary of payments for the excavation at the agreed price.
>
> | | | |
> |---|---|---|
> | Agreed price | $29,178.00 | |
> | Paid on Inv No | $10,273.00 | Plus $1027.00 GST = $11,300 |
> | Balance | $18,905.00 | |
> | Inv No 1256 | $ 5,905.00 | Plus $590 GST = $6,495.50 |
> | Balance | $13,000.00 | |
>
> You can contact me on [telephone number] to arrange a convenient time for us to meet and finalize payment. Please destroy all previous invoices as they are no longer valid.
>
> A copy of the invoices have been [given to] Mauro for his records.
>
> Regards Don

At the bottom of the page is the following handwritten note signed by 'Don':

> Inv No 1256 paid by chq no 2 on the 28/1/02
>
> Balance of $13,000 paid by cash on the 28/1/02

Invoice 1235 has been included the tribunal book but I have been unable to locate Invoice 1256 and it appears there is no invoice for the balance of $13,000 paid in cash on 28 January 2002. I have been unable to locate the original invoices so do not know how much they were for, although it seems a discount for cash may have been agreed.

58 It is also difficult to determine, in a number of instances, whether the works, for which invoices or cash receipts have been exhibited to Mr Triantafyllou's witness statements, were carried out at the property the subject of these proceedings. For instance, Mr Triantafyllou exhibits a typed quotation from Malcolm Waterproofing dated 9.12.01 for 'tanking to panels' for $3,800. The name at the bottom of the quote is 'Michael Bakens'. At the bottom of the page appears the following 'triantafyllou-280118\translation of d.d. 112.doc – 160309'. I assume this is a reference to discovered document number 112 which is at TB112. This document, which is illegible, is dated 9 December 2001 from Melbourne Waterproofing. Written on this document is 'Received $3000' which has been signed although I am unable to decipher the signature. At TB958 is a handwritten receipt from Michael Bakens confirming receipt of $800 from Mr Triantafyllou. This document is undated. It is unclear whether these works relate to the property the subject of these proceedings, noting that in December 2001 the works were stalled pending resolution of the cellar issue.

59 In any event as I have found the owners are estopped from relying on the $1M cap the cause of the cost over-run is irrelevant.

Changes to the scope of the works

60 There were a number of changes to the scope of the works. On the first day of the hearing counsel for the owners said they were prepared to allow credits for some changes. By reference to the calculations set out above, the owners have allowed credits totalling $62,258.62, $32,613 of which relates to the swimming pool, and $10,000 for the excavation of the cellar. However, there were a number of other changes including: substituting tiles for timber for the upper deck flooring. I accept this required significant additional works which are succinctly summarised in Bellcon's closing submissions[5] including: *'a redesign of the structural elements to take the increased load, a new steel beam and purlins, a board base, screed, drain and tiles, all to be lifted up to the upper floor using a scissor lift.'*. Unfortunately I do not have any evidence about the consequent increase in the price, although commonsense dictates that the installation of a tiled floor and the associated works would have been more expensive than installing a timber floor. The owners have made no allowance for this.

The heating and cooling system

61 Bellcon allowed $34,000 in its estimate for heating and cooling. Mr Bellio's evidence is that this was based on a quotation obtained on behalf of the owners in September 1999 for $32,800 from W.Lee & Sons, Heating & Air Conditioning Engineers, addressed to Mr T Bulic of Newline Designs for the supply of three Fujitsu 'split heat pump' systems and a hydronic heating system with ten double panel radiators.

62 The owners made their own arrangements for heating and cooling and paid $51,000 for the heating and cooling system which is different from the one allowed for in the estimate. Mr Triantafyllou obtained a quotation from C&S Airconditional Services Pty Ltd dated 12 February 2003 for the supply and installation of Daikin Reverse Cycle Split Airconditioning Systems. Initially, the owners attempted to blame Bellcon for these changes alleging Bellcon had failed to install the necessary pipes in the slab for the 'first system'. After this had been put to and denied by Mr Bellio a number of times in cross-examination, it was conceded on behalf of the owners that there was no provision in the specification for the installation of pipes in the slab.

63 Even if I were satisfied the $1M should be enforced, and that the system installed was less costly than the system allowed for in Bellcon's estimate, as suggested by Mr Triantafyllou, having regard to ss97 and 98 of the VCAT Act, and s53 of the DBC Act, it would be unfair to hold Bellcon responsible for the increased cost where it relied on the owners' quotations in preparing its estimate, and where it did not engage the air conditioning contractor, as contemplated by the PMA.

[5] Applicant's outline of submissions at [38]

Defects

64 Initially, the owners were claiming $202,887 for the cost of rectification of defective works. During the hearing I attended a view with the parties, their legal representatives and their experts. That this is a well built house finished to a very high specification is demonstrated by the very few items which the owners claim are defective albeit the cost of rectification of those is significant.

65 My task in considering the defects claim has been assisted by the co-operative approach displayed by the experts. Following the view they met and prepared a joint report. I indicated I would be assisted if, where they were unable to agree on a method of rectification, they would comment on the cost estimate of the alternative scope. They have agreed the cost of rectification at $98,517 with the cost of the works around the swimming pool being the only major area of contention. The owners subsequently reduced their claim to $98,517 plus $23,718 for the additional rectification works where the experts were unable to agree a method, scope and cost of works.

66 First, though, I must determine whether Bellcon has any responsibility for defective works.

67 The owners submit the warranties set out in s8 of the *Domestic Building Contracts Act* 1995 extend to all of the works, not just the brickwork, and that accordingly Bellcon is responsible for the cost of rectification of defective works.

68 The s8 warranties can only apply if I am satisfied the contract is a major domestic building contract. Counsel for the owners suggests that having regard to the narrow interpretation of the definition of a 'domestic building contract'[6] in the *Domestic Building Contracts Act* 1995, a PMA in the form used here is not a 'domestic building contract'. As neither party has otherwise addressed me about this I make no finding as to whether the PMA should be properly regarded as a 'domestic building contract' particularly as the parties seeking to rely on the s8 warranties assert the PMA is not.

69 In my view, accepting for the purposes of this proceeding only that the PMA is not a major domestic building contract, the s8 warranties can only apply to works which Bellcon carried out itself – the brickwork – or for which it has otherwise assumed responsibility.

70 In support of their contention that Bellcon was to be responsible for all defects the owners rely on clause 19 of the MBAV contract [defects liability period] and on the discussions at the time the contract was signed.

71 Mr Triantafyllou said that Mr Mikulic had suggested to him and Mr Bellio that the provisions of the MBAV building contract be included so that the

[6] Counsel referred to *Kane v Sopov* [2006] VSC 237, *Shaw v Yarranova Pty Ltd & Anor* [2006] VSC 45 and *Shaw v Yarranova Pty Ltd & Anor* [2006] VSCA 291

owners would only have to look to Bellcon for rectification of any defects. Mr Bellio said he had no recollection of this discussion.

72 The evidence about this in Mr Mikulic's witness statement[7] is almost identical to that as set out in Mr Triantafyllou's statement[8]. Mr Triantafyllou states:

> At this meeting Mr Mikulic informed both me and Mauro [Bellio] that the contract had been structured in a way that meant I would only need to look to Bellcon in regard to any defects in the works, rather than having to chase down a particular tradesman or supplier. Mauro said that he was happy for this arrangement to apply. I was always of the view, having regard to this conversation, and the contract documents, that Bellcon would be liable in respect of any defects in the construction of the house.

Mr Mikulic states:

> At this meeting [on 15 January 2001] I suggested to Mr Triantafyllou and Mr Bellio that (c) and (d) above [special conditions in the PMA and clauses 18 and 19 of the MBAV HC5 New Homes Contract] form part of the agreement so that Mr and Mrs Triantafyllou would only need to look at Bellcon in regard to any defects in the works, rather than having to chase down a particular tradesman or supplier, and to allow liquidated damages if the works were late. Both parties agreed with this.

73 Not only are these two statements remarkably similar, under cross-examination Mr Mikulic said he could not recall the discussions he had with the parties at the meeting on 15 January 2001. For the reasons set out above I have found clause 19 cannot apply to this contract. Further, even if it were to apply it is only concerned with a defects liability period, not with the ongoing responsibility for defective works.

74 In any event, clause 6 of the PMA provides:

> The Principal [Mr Triantafyllou] acknowledges that subject to clause 7, the Project Manager [Bellcon] will not be liable for:
>
> (a) any costs of the project other than those referred to in clause 22 [there is no suggestion that clause 22 is relevant]
>
> (b) the design of the works' or
>
> (c) construction of the works

75 Therefore under the strict terms of the PMA Bellcon is only responsible for defects in the work it carried out, or for defective works carried out by an alternative contractor engaged to complete another contractor's works. Mr Bellio is a bricklayer and therefore if I were to find these works defective, Bellcon would be responsible for them.

[7] Witness statement of John Mikulic, 20 April 2009 at paragraph 7
[8] Witness statement of William Triantafyllou, 27 March 2009 at paragraph 7

76 My comments in *MX Projects Pty Ltd v Hyber Pty Ltd* [2007] VCAT 271 are relevant here:

> Many of Hyber's claims are for rectification costs or reimbursement of additional costs it has incurred because of a failure by a trade contractor to carry out its contract works in a proper and workmanlike manner. Where trade contracts were entered into they identify Hyber as the Principal, and MX Projects as the Construction Manager. Any claim Hyber has in relation to the works, the subject of those trade contracts, should properly be made against the contractor. There is no privity of contract between MX Projects and the trade contractors which could make it difficult for it to recover any amounts it was ordered to pay in respect of a contractor's performance of the contract works. [131]

and

> Further, it seems that Hyber seeks to impose on MX Projects unrealistic obligations for the failure of trade contractors to carry out their works in a proper and workmanlike manner. Whilst I accept that MX Projects was obliged under the PMA and the CMC to 'manage the works' and 'make them happen' it was not its responsibility, either as project manager, or construction manager, to closely supervise each contractor in the performance of their contract works. [134]

77 Under the strict terms of the PMA Bellcon is not liable for any of the defective works. That this was clearly understood and appreciated by Mr Triantafyllou is demonstrated by his response to the proceedings issued by Technova in 2005 (which I will discuss when considering the claim for rectification of the windows).

78 However, in circumstances where Bellcon did not fulfil its obligations under the PMA insofar as it was required to tender for the works, enter into major domestic building contracts with each of the trades, and ensure they had the appropriate insurances, I am satisfied it is fair that each of the parties should be responsible for rectification of the works carried out by those contractors they each engaged, with the exception of the leaks to the pool area for reasons which I will discuss later. I make this finding having regard to ss97 and 98 of the VCAT Act and the tribunal's power *'to make any order it considers fair to resolve a domestic building dispute'* under s53 of the DBC Act. I will consider each of the alleged defects in turn.

The windows

79 The cost of rectification of the windows in the main living area, which are leaking, makes up nearly fifty per cent of the owners' claim for defective works. The experts have agreed that the windows to the north and west elevations are to be removed and replaced after new subsills are supplied and installed. Their agreed estimate of the cost of these works is $46,571.

80 Mr Bellio concedes he introduced Mr Triantafyllou to Technova who supplied and installed the windows. In 2005 Technova commenced

proceedings in this list in D276/2005, seeking payment of the balance outstanding under its contract with Mr Triantafyllou. Mr Triantafyllou counterclaimed alleging the windows were defective because they leaked. At the time he relied on an expert report obtained from John Atchison who estimated the cost of rectification works at $6,902.

81 D276/2005 was subsequently settled between Technova and Mr Triantafyllou whereby Technova was to return to site to rectify the leaking windows. Bellcon was not a party to those proceedings, and no claim was made against Bellcon in respect of the leaking windows until after Technova went into liquidation in 2008. This confirms, in my view, that Mr Triantafyllou accepted and understood that his contract was with Technova and that Technova was responsible for rectification of the windows.

82 Following settlement of the Technova proceeding, Mr Bellio attended site a number of times with representatives from Technova. The owners submit this confirms Bellcon accepted responsibility for the rectification works. I reject this. Once again, the owners have failed to appreciate and understand the role of a project manager – the co-ordination and management of the works, and in attempting to co-ordinate the rectification works Bellcon was fulfilling its obligations under clause 15(j) the PMA to *'monitor the rectification of defects and completion of the works …'*

83 Counsel for the owners contends that even if I find Technova is primarily responsible for the defective windows, Bellcon has a secondary liability to the owners and they can recover the cost of rectification of the windows from it. He referred me to Goff & Jones *The Law of Restitution (15th edition)* pp 423-442 where the learned authors set out the relevant principles for recoupment from one who is secondarily liable:

> To succeed in his claim for recoupment, the claimant [the owners] must satisfy certain conditions:
>
> (1) that he was compelled, or was compellable, by law to make the payment;
>
> (2) that he did not officiously expose himself to the liability to make the payment and
>
> (3) that his payment discharged a liability of the defendant.

84 However, these principles cannot apply in relation to the window claim. They are concerned with recoupment of monies paid on behalf of another, where the payee is compelled by law to make that payment, and where the rights of a party are subrogated to another. This is not the case here.

85 It is unfortunate for the owners that Technova has gone into liquidation. However, I am not persuaded that Bellcon has any responsibility for the windows and this claim is disallowed.

Tiles in kitchen floor

86 The experts agree that the kitchen floor tiles need re-grouting and estimate the cost of this at $850. However, the owners engaged the tiler and accordingly Bellcon is not responsible for this item and no allowance is made.

Render

87 Bellcon engaged Pallarosa/Palla Rendering to carry out the rendering works. When these works were not to an acceptable standard it engaged in discussions and negotiations with Mark of Pallarosa who agreed to rectify and complete the works. When this did not occur, Bellcon engaged a building consultant to advise on the appropriate method of rectification and subsequently engaged RTT to complete and rectify the works (as discussed above).

88 Unfortunately, the render is still unsatisfactory with significant cracking and crazing being apparent. The experts have agreed a method and scope of rectification. I am satisfied that Bellcon is responsible for rectification of the render and allow $36,616 being the amount the cost of rectification agreed by the experts.

Down pipe spreaders

89 The experts agree the downpipes have not been clipped. The leaking into the basement is primarily due to the faulty waterproof membrane, and they have made no allowance for the clipping of the downpipes. As these should be clipped, and in the absence of any evidence about the cost of doing this I allow $100. As Bellcon engaged the plumber it is responsible for this item.

Leaks from pool area

90 The experts agree waterproofing around the pool area has failed. The waterproofing contractor was also engaged directly by the owners when Bellcon's usual contractor was unavailable to carry out the works.

91 Mr Triantafyllou apparently found the waterproofing contractors in the yellow pages. Their full names and contact details have not been provided – they are simply referred to as 'Terry' and 'Lory'. Mr Triantafyllou says that Mr Bellio suggested that Terry be engaged to carry out the waterproofing works around the pool, and that when the leaking commenced Mr Bellio contacted Terry and asked him to return and repair the membrane, but he did not return.

92 Mr Triantafyllou exhibits a cash receipt to his witness statement in reply at TB955 for the payment of $4,000 for 'membranes on terras' (sic). There is no address identifying where the works were carried out, and it is signed by 'Janelle' [Mr Triantafyllou says she is Terry's wife[9]]. This payment is included in the payment schedule prepared by the owners. The supporting

[9] Witness statement of William Triantafyllou, 27 March 2009 at paragraph 24

'invoice' for Lory Tiling is very difficult to read. It is not a tax invoice and is undated. It is simply headed 'Lory Tiling'. There is no site address recorded. It seems to set out orices for tiling inside, outside, membrane, screed, wall and stairs. The total cost appears to be $47,925. Two payments of $20,000 are noted, and there is a 'balance' of $7,900. There is no evidence of payment of the $7,500 although it is recorded on the owners' payment schedule as having been paid in cash.

93 Mr Triantafyllou gave evidence that he noticed the screed and the membrane was cracking but that Mr Bellio told him he would arrange for the tiler to install a second membrane over the screed. It was suggested by counsel for Bellcon that this was the owners' responsibility because the works were carried out by a contractor engaged by them directly, and having noticed the crack it was their responsibility to ensure the membrane was rectified before the tiles were laid.

94 Mr Bellio concedes that he directed the tiler to lay the screed and a second waterproof membrane and that he had discussed this with Lory who agreed to repair the crack. The crack was taped over and more membrane applied. The method of rectification of the cracking in the screed and waterproofing membrane was approved by Bellcon, because Mr Bellio thought the leaks were coming from the pool. There is no evidence that he carried out any investigations or sought any expert advice to identify the source of the leaks. Accordingly, I find it is in breach of its obligations under clause 7 of the PMA [to carry out its services with due care and skill] and is responsible for the cost of rectification.

95 The experts disagree about the method and scope of necessary rectification works. Although the minimal works suggested by Mr Lees might suffice, I accept Mr Lorich's evidence that a contractor engaged to rectify the leaking would be reluctant, and unlikely, to accept responsibility for the works without removing and replacing the tiles. Mr Lorich's estimate for his recommended scope of works is $23,265. Mr Lees estimates the cost of Mr Lorich's scope at $19,119. In the circumstances I consider $21,000 to be an appropriate allowance.

Cracked tiles under pool ladder

96 The experts agree that there is a cracked tiled under the pool ladder and the ladder will need to be removed, the tile replaced and an extra bolt installed in the ladder which only has two bolts rather than the requisite three. As the pool was installed by a contractor directly engaged by the owners I disallow this claim.

The stainless steel gate

97 The stainless steel gate is showing signs of surface rust. Not only am I satisfied this is as a result of poor maintenance by the owners, they made their own arrangements for the supply and installation of the gate. Bellcon is not responsible and I make no allowance for this item.

The sewer pipe

98 The experts agree that a section of sewer pipe outside ensuite bathroom 3 has not been completed and agree the cost of completion is $145. As Bellcon engaged the plumber I find it is responsible for this item and allow $145.

Basement

99 There is evidence of water leaking in the basement. The experts agree there is minimal leaking from around the downpipes and that the primary source of the leaks is from around the pool equipment. They have agreed the cost of rectification is $7,550. As the pool was installed by a contractor engaged directly by the owners I find Bellcon is not responsible for rectification of the leaks, and this claim is disallowed.

Claim for credit for tiles

100 The owners claim a credit of $6,325.00 for tiles which were supplied by Bellcon and later removed from site at their request. The tiles which were as initially selected by the owners were delivered to site in November 2003. Some ten months later, Mr Triantafyllou told Mr Bellio he no longer wanted to use those particular tiles. The supplier was not prepared to refund the cost of the tiles, although it did try to on-sell them. Mr Bellio removed the tiles from the site, where they were being stored in the basement, and took them to his father's house for storage. When they could not be sold the tiles were used to tile his father's verandah. In the circumstances, as Bellcon has found an alternative use for the tiles I find a credit is due to the owners. Noting Mr Bellio's evidence that two trips were required with a trailer to move the tiles from Beaumaris to Endeavour Hills I consider it appropriate there be some allowance for the cost of this including the time spent by him and his father. Accordingly I find the owners are entitled to a credit of $6,000.

Liquidated damages

101 Until they filed their amended counterclaim on the first day of the hearing, the owners were seeking $90,685.28 for liquidated damages: $51,814.28 for the period from 14 December 2001 to 24 April 2004 [when the owners moved in], and $38,871 for the period 25 April 2004 to 19 October 2006 [when the certificate of final inspection was issued]. In their amended counterclaim this claim is significantly reduced to $6,000 from 14 December 2001 to *'May 2002 (and possibly longer subject to evidence)'*.

102 It is submitted on behalf of the owners that they are entitled to liquidated damages from the completion date under the contract to the date on which the cellar issue was finally resolved because, as there was no provision for an extension of time in the PMA, Bellcon is deemed to have taken responsibility for any delays caused by the latent condition. It is unclear why the owners have otherwise abandoned their claim for liquidated

damages but I take this as a tacit acknowledgement that they were responsible for or shared responsibility with Bellcon for the delays at least up until the date on which they moved in. In his final submissions, counsel for the owners suggests the claim for liquidated damages is up until May 2002 because *'This is the earliest date, stated in Bellcon's pleadings, that an "act of prevention" occurred'* [when the works were delayed whilst the the structural drawings were amended].

103 Their claim for inconvenience damages, which I will consider shortly, apparently relates to the period after they moved in until the certificate of final inspection was issued.

104 As discussed above, the owners rely on clause 18 of the MBAV contract to support their claim for liquidated damages which I have found is meaningless in the absence of the other relevant provisions of that contract.

105 Whilst the owners concede Bellcon is entitled to recoup the cost for the additional excavation of the cellar they say it is not entitled to rely on it in claiming an extension of time. It is true the contract does not have any provision for an extension of time, nor does it provide for any variation to the works. However, there was no firm completion date – the date set out in Schedule 2 of the PMA: '14/12/01', is a target completion date only. As at 14 December 2001, the works had been delayed by the 'cellar issue'. The excavation of the cellar was not completed until February 2002. The owners do not appear to have raised any concerns about the delay caused by this latent defect until they filed their counterclaim.

106 Accordingly, this claim is disallowed.

Inconvenience damages

107 The owners have claimed $10,000 for *'inconvenience, distress, loss of enjoyment and loss of amenity by reason of the defective state of the works both prior to and upon the Third and Fourth Respondents taking possession of the works – $ to be assessed by the Tribunal'*[10]. In the owners' final submissions these have been described as *'damages for physical inconvenience by reason of the defective state of the works and delay, say $10,000'*.

108 This claim is not otherwise addressed in the owners' final submissions. Bellcon concedes that there were some items of incomplete works when the owners moved into the house in April 2004. These included the rendering, the balustrade and the sliding doors. The parties agree that the owners indicated that access would only be available for works to be carried out between 1pm and 4pm on weekdays. Mr Triantafyllou said this was because they wanted to be home when works were being carried out, even though the most of the incomplete works were external works. I accept this

[10] Paragraph 16(d) Amended Points of Defence and Counterclaim dated 27 April 2009

made it difficult for Bellcon to co-ordinate trades to attend to the completion works.

109 As noted above, this house has been finished to a very high standard with relatively few defects. The major defects relate to the rendering and to water leaks: the windows, the area around the pool and the leaks into the basement from the area around the pool equipment. Of these I have found Bellcon is responsible for the leaking around the pool area, and the render, neither of which have prevented or hindered occupation of this home.

110 However, this claim also concerns the inability of the owners to use the pool and the surrounding area until October 2006 when the certificate of final inspection was issued. Mr Bellio says this was because the self closing mechanism had not been installed by Technova because it had not been paid by the owners. Mr Triantafyllou denies this and says that one of the reasons they were unable to use the pool was because the pool gate had not been installed pending rectification of the render. I note the pool gate was something the owners arranged directly. I do not know when it was installed, or whether it could have been installed earlier.

111 This claim is disallowed.

Bellcon's claim

112 Bellcon's claim for payment of $276,619.01 is calculated as follows, by reference to its final submissions:

Original ledger	$328,932.41
Further payments	$ 16,715.05
Bricklaying invoices	$ 48,260.87
Project management fees	$ 99,000.00
	$492,908.33
Less payments by owners	$216,289.32
	$276,619.01

113 Bellcon relies on its general ledger where all amounts have been entered exclusive of GST. I accept this is appropriate for accounting purposes but as the invoices, statements and cheque butts are for amounts inclusive of GST it has made reviewing the supporting material difficult and time consuming.

114 The owners contend that of the $276,619.01 claimed by Bellcon, $128,814.10 plus GST - $141,665.51 are rectification costs, for which, they say, Bellcon is responsible. They also say that Bellcon makes a number of claims for payment totalling $27,640.85 plus GST - $30,404.94, which are not supported by invoices and that these should be deducted from its claim.

115 Despite both parties having filed lists of documents, and their representatives having apparently inspected the discovered documents, whether there were invoices validating Bellcon's claim did not become an

issue until during the hearing when counsel for the owners called for the invoices. Initially the owners attacked Bellcon's ledger saying that not all invoices had been discovered, and then changed this to not all invoices having been attached to Mr Bellio's witness statement. Mr Bellio found further invoices, which had not previously been discovered, in his garage and copies were provided to the owners on the second day of the hearing. On day 6 of the hearing a further copy of Bellcon's ledger was produced by Bellcon cross referencing the 'old discovery', the 'new discovery' [invoices produced by Bellcon on day 2 of the hearing], invoices and cheque butts in the tribunal book to the ledger entries.

116 On the last day of the hearing counsel for the owners handed up a further copy of Bellcon's general ledger with an additional remarks column ('the owners' assessment schedule') completed by Mr Triantafyllou in which he identified those claims which he said were not supported by invoice (consistent with the information inputted into the ledger by Bellcon handed up on day 6 of the hearing), and those which he contends relate to rectification works. In a column headed 'remarks' there are various remarks against each entry in the ledger including "inv ok', "no inv', 'inv other', 'wrong amount charged', 'some', 'statement', double count', 'twice', 'inv R' (which I understand means the owners contend the invoice is for rectification works which I will discuss later).

117 Attached to the owners' assessment schedule are invoices, receipts, cheque butts and other documents numbered 1-179 – these are the invoices produced by Bellcon on the second day of the hearing. Only some of those numbers have been noted on the schedule. Unfortunately, the schedule was not accompanied by a witness statement.

118 With the exception of a few invoices relating to the render, these were not otherwise put to Mr Bellio during cross examination. The owners' detailed assessment of Bellcon's claim was not provided until the final day of the hearing after the evidence had closed. Leave was not sought to re-examine Mr Bellio.

119 Frankly, this assessment should have been carried out before the commencement of the hearing. If the owners believed copies of all relevant invoices had not been discovered this should have been raised during the interlocutory process. Bellcon's list of documents was filed on 21 January 2009, more than three months prior to the commencement of the hearing. I do not know when the documents were inspected by the owners' solicitor, although I understand copies of the discovered invoices had only been received the previous week.

120 I am satisfied Bellcon has incurred additional costs for which it should be reimbursed by the owners under the terms of the PMA. It was an express term of the PMA that the owners would make payment, whether directly or by way of reimbursement to Bellcon, upon production of the relevant invoices. Although not put to Mr Bellio in cross-examination I accept the

accuracy of the detailed cross referencing which has been carried out by the owners. The owners have identified that ledger entries unsupported by invoices total $27,640 exclusive of GST ($30,404.94 inclusive of GST) and of the entries which they say relate to rectification costs that $51,126.64 exclusive of GST ($56,239.10 inclusive of GST) is unsupported by invoices.

121 As Bellcon has not provided invoices supporting claims for reimbursement for $30,404.94 inclusive of GST, as required by the PMA, that part of its claim is disallowed.

Excavation of the cellar

122 Bellcon's claim includes $29,178.00 for excavation of the cellar. The owners contend that $10,000 only should be allowed. However, this must be considered in the context of Mr Triantafyllou having negotiated and agreed the price for excavation with DBH Constructions, and paid the agreed amount in full. Accordingly, there is no adjustment to this amount.

Invoice from RD Carter & Assoc

123 The owners also dispute the invoice from RD Carter & Assoc dated 25 March 2005 for $4,023.25 saying they do not know what it is for. A copy of the invoice was produced by Bellcon during the hearing. It is plain on its face that it is for surveying and setting-out the house, with a number of site visits being required. I accept this was required and the owners are responsible for this invoice.

Rectification costs

124 As to the owners' contention that $128,814.10 plus GST - $141,665.51 are rectification costs there is limited evidence to support this. Although many of the invoices are dated after the owners moved in on their own evidence the work was incomplete at that time. With some exceptions, the relevant invoices were not put to Mr Bellio in cross-examination.

Rendering

125 Bellcon's estimate for rendering was $30,000. This did not include rendering of the basement. It obtained a quotation from Palla Rendering for $34,455 dated 3 April 2004. It is not clear whether this includes the fence and the basement works, but I accept that it does not. The owners have paid $21,500 to Palla Rendering. Mr Triantafyllou said that he stopped paying their invoices when it was apparent that the works were defective. When the works were not completed and rectified by Palla Rendering Bellcon engaged RTT to complete and rectify the rendering. They provided two quotations. The first, dated 10 September 2004, is for $51,800 plus GST. The second, dated 27 January 2005 is for $48,500. Both contemplate completion and rectification works and specifically exclude the front fence, parts of the garage and third level.

126 By reference to its General Ledger Bellcon has paid Palla Rendering/Pallarosa (the two names appear to have been used interchangeably in the General Ledger by reference to the invoices and cheque butts) $13,181.82 exclusive of GST ($14,500 inclusive of GST) and RTT $53,636.36 exclusive of GST ($59,000 inclusive of GST). The total paid by Bellcon for rendering works is therefore $66,818.18 exclusive of GST ($73,500 inclusive of GST). This includes rendering the basement (garage) and the front fence. Although I have not been provided with a separate quotation for these works, it is apparent they have been carried out. The owners record on the annotated General Ledger that there is no invoice or statement for many of the payments paid to Pallarosa/Palla Rendering and RTT although the cheque butts have been discovered and included in the tribunal book.

127 Under cross-examination Mr Triantafyllou confirmed the owners should pay the $30,000 allowed for rendering in Bellcon's estimate. Mr Bellio suggested $8,000 was a reasonable allowance for the cost of rendering the basement. In the absence of any better evidence I accept this and find that the owners are obliged to pay an additional $16,500 for rendering. For reasons which I will consider later in these reasons I find Bellcon is responsible for the cost of rectification of the render and accordingly the balance of $57,000 must be deducted from its claim.

128 Acquila tex were also engaged by Bellcon to carry out further completion and rectification works to the render. They have been paid $8,902 plus GST - $9,792.20. Mr Bellio suggested under cross examination that 50% or three quarters or half or one quarter of the cost could be for completion works but that he was not sure. In the circumstances, doing the best I can on the evidence before me, I find 25% is for completion works and accordingly, $7,344.15 must be deducted from Bellcon's claim.

The tiling around the pool

129 I have found that Bellcon is responsible for rectification of the leaking from the tiled area around the pool. This includes the cost of attempted rectification for which Bellcon has paid Welcome Home Maintenance $2,736 plus GST - $3,009.60, and Designer Tiles $2,510 plus GST - $2,761 for replacement tiles. This is a total of $5,770.60 which must be deducted from its claim.

130 I cannot be satisfied on the evidence before me, that any of the other invoices put to Mr Bellio during cross-examination relate to rectification of the render as alleged by the owners. However, apart from those which I have considered above, I have calculated that those entries in Bellcon's general ledger unsupported by invoices total $9,763.01 exclusive of GST ($10,739.31 inclusive of GST). Again, Bellcon is in breach of its obligations under the special conditions to the PMA in not providing these invoices, and this amount must be deducted from its claim.

THE CLAIM AGAINST MR AND MRS TRIANTAFYLLOU SNR

131 Mr and Mrs Triantafyllou Snr are the first and second respondents to Bellcon's claim. They are the registered proprietors of the land on which the owners' house is built and it is apparently held on trust for the owners. The claim against them is in the alternative seeking restitutionary damages if the tribunal finds the contract between Bellcon and the owners is void or unenforceable. As that is not my finding it is not necessary to consider the claim against them.

The witnesses

132 Before concluding I consider it appropriate to make some observations about the principal witnesses.

Mr Bellio

133 I found Mr Bellio to be an honest and credible witness who generally gave consistent answers to questions put to him in cross-examination, without embellishment. It is obvious that paper work is not his strong point and that his wife looks after the books. She was not called to give evidence.

Mr Triantafyllou

134 I found Mr Triantafyllou to be an unreliable witness. When he was sworn in he identified and adopted his witness statement and witness statement in reply. Yet, within a very short time it became apparent that he was not familiar with their contents, although he said he had read them hundreds of times, and had been reading them constantly during the hearing. I rose for an early lunch, shortly after cross examination commenced, to allow him an opportunity to familiarise himself with the tribunal books, and the attachments to his witness statement. Upon resuming after lunch, approximately one and a half hours later, he said he had no recollection of matters which had been put to him shortly prior to lunch, including a sentence he had been asked to read out aloud by counsel for the builder. In response to simple questions such as when he and his family had moved into their home, he said he could not remember. When pressed he confirmed that it was sometime in 2004 but said he could not even remember the month. He also said that he was unable to recollect a number of matters to which I had been referred during counsel's opening.

135 However, a little later he was able to give very expansive evidence about the arrangements in relation to the windows, although he became evasive when asked about the claim he had made against Technova in this tribunal and the settlement of that claim.

136 This was extraordinary conduct from a successful businessman. I find it very difficult to accept that he could remember some things which happened a number of years ago in exquisite detail but have absolutely no memory of the contents of his witness statement which he said he had read hundreds of times during the couple of weeks prior to the hearing.

137 His seeming preparedness to change his evidence to suit the outcome the owners are seeking is well illustrated by matters set out in the final submissions prepared on behalf of the owners. On page 6, in relation to Bellcon's claim that the works were delayed by the need to redesign the steelwork and the consequent delays from the supplier, Metweld, is the following extraordinary submission:

> Mr T denies that the whole house had to be re-designed. At the time of his statement, he considered that Newline simply did not alter the downstairs floor plan to match up with the upstairs floor plan which meant that after the slab had been poured downstairs there was no support for 1 column (paragraph 40 Reply of Mr T). He now considers that the contract documentation demonstrates that the builder was directed by the engineer to extend the slab in accordance with the engineer's slab design but failed to do so. He considers that any delay in this respect was caused by the builder's failure to construct the ground floor slab in accordance with the engineering design….

138 Counsel conceded this had not been put to Mr Bellio, nor was it raised by Mr Triantafyllou when he was giving evidence. Considering counsel's experience, I can only imagine that he was acting on his client's instructions when he included this in the final submissions. I do not consider it to have any probative value.

Mr Andreas Triantafyllou

139 Mr Andreas Triantafyllou, Mr Triantafyllou's father, does not speak English. He is 80 years of age and gave evidence that his wife is 82 years of age. A Greek interpreter was arranged by the tribunal to assist him. His witness statement was translated for him, by the interpreter, and he was asked a number of questions in cross examination. It quickly became apparent that he was having some difficulty understanding the questions being put to him. He said that the land was his son's, and that his son had asked if he could put it in his name for tax reasons. He said he agreed because Mr Triantafyllou is his only son, and what is his will eventually be his son's.

140 When asked whether he knew that he was being sued in this tribunal he reiterated that the land was his son's and that it had nothing to do with him. It was not until I asked all parties to leave the tribunal that counsel for the builder indicated, for the first time, that Mr Andreas Triantafyllou had executed an enduring power of attorney in favour of his son in 1998. I viewed the original and a copy was provided to me.

141 Counsel submitted that in those circumstances it was not unexpected that Mr Andreas Triantafyllou was not aware of the claims being made against him in these proceedings. I am not sure why he was called to give evidence.

CONCLUSION

142 This case demonstrates the importance of parties ensuring they properly document their agreement and then reading the contract documents before they sign them. It also reinforces the importance of careful and thorough preparation before the hearing. Despite asserting that all the relevant invoices had been exhibited to Mr Bellio's witness statements, a further 179 invoices were produced on day 2 of the hearing by Bellcon – and still all the invoices have not been produced.

143 The owners' case, both in defence of Bellcon's claim and in support of their own, was a constantly moving feast. Although the cost of the works was of primary importance the closing submissions are silent as to how the voluminous material presented by both parties should be considered. As noted above, despite the exhaustive analysis of each other's claims, neither party has prepared any material comparing the scope of the contract works, and what has been built. I heard much about delays, increased costs due to deficiencies with the drawings (for instance, in relation to the structural steel invoices), the difficulties encountered on site by Bellcon with some of the contractors engaged at Mr Triantafyllou's direction (including Riverview Concrete and CP Concreting) but once the owners abandoned most of their claim for liquidated damages this became irrelevant, other than as demonstrating the close involvement of Mr Triantafyllou in the project.

144 In summary, $111,259.00 inclusive of GST must be deducted from Bellcon's claim calculated as follows:

Where no supporting invoices	$ 30,404.94
Where no supporting invoices for 'rectification costs'	$ 10,739.31
Amount paid for rectification of render	$ 57,000.00
Costs paid in attempt to rectify leaks around pool	$ 5,770.60
Paid to Aquila Tex	$ 7,344.15
	$111,259.00

145 Of the owners' claim I allow $63,861 calculated as follows:

Rectification costs	
Render	$36,616.00
Downpipe spreaders	$ 100.00
Leaks from around pool area	$21,000.00
Sewer pipe	$ 145.00
	$57,861.00
Credit for tiles	$ 6,000.00
	$63,861.00

146 I agree with counsel that it is appropriate that there be a set-off and calculate the amount to be paid to Bellcon by the owners is $101,499.01 calculated as follows:

Bellcon's claim	$276,619.01
Less amounts to be deducted as set out in paragraph 140	$111,259.00
	165,360.01
Less amounts allowed to owners as set out in paragraph 141	$ 63,861.00
	$101,499.01

147 Accordingly, there will be judgement for Bellcon for $101,499.01. I will reserve interest and costs with liberty to apply.

DEPUTY PRESIDENT C. AIRD