

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1743/2016

CATCHWORDS

Domestic building: claim by the builder against owners; counterclaim by owners against the builder and against building surveyors, architect and engineer; no appearance at hearing by builder; obligation of the Tribunal to consider builder's defence considered; builder's claim against owners determined under s 78(2)(b)(i) of the *Victorian Civil and Administrative Tribunal Act 1998*; builder's defence of proportionate liability under the *Wrongs Act 1958* struck out; builder's claim for contribution against consultants struck out; owners' claims for damages for rectification costs and damages for completion costs assessed; determinations made in favour of owners in respect of interest, costs and reimbursement of fees.

APPLICANT	Jinalea Pty Ltd
FIRST RESPONDENT	Cristy Mace
SECOND RESPONDENT	Evan Fleischer
FIRST RESPONDENT TO COUNTERCLAIM	Sproat Holdings Pty Ltd
SECOND RESPONDENT TO COUNTERCLAIM	Craig Sproat
THIRD RESPONDENT TO COUNTERCLAIM	Robson Rak Pty Ltd
FOURTH RESPONDENT TO COUNTERCLAIM	The Meyer Consulting Group
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	8 May 2019
DATE OF ORDER	27 November 2019
CITATION	Jinalea Pty Ltd v Mace (Building and Property) [2019] VCAT 1732

ORDER

1. The claim of the applicant (Jinalea Pty Ltd) against the respondents (Ms Mace and Mr Fleischer) is struck out.

- 2 The applicant must pay to the respondents their costs of and incidental to the defence of the applicant's claim against the respondents up to and including 2 April 2019, such costs in default of agreement to be taxed, on the standard basis by the Costs Court on the County Court Scale of Costs.
- 3 Pursuant to s 78(2)(b)(i) of the *Victorian Civil and Administrative Tribunal Act 1998* the counterclaim against the first respondent to counterclaim (Jinalea Pty Ltd) is determined in favour of the applicants by counterclaim (Ms Mace and Mr Fleischer).
- 4 The Tribunal declares that the cost of rectifying (by demolition and reconstruction) the works to the state they should have been in at the time of termination of the contract is **\$1,321,171** inclusive of GST.
- 5 The Tribunal declares that the cost of completion of the works is **\$764,609** inclusive of GST.
- 6 The Tribunal declares that the unpaid balance of the contract sum is **\$503,975**.
- 7 The first respondent to counterclaim must pay to the applicants by counterclaim damages fixed in the sum of **\$1,581,805**.
- 8 The first respondent to counterclaim must pay damages in the nature of interest to the applicants by counterclaim in the sum of **\$78,264**.
- 9 The first respondent to counterclaim must pay to the applicants by counterclaim their costs of and incidental to the counterclaim, such costs in default of agreement to be taxed on the standard basis by the Costs Court on the County Court Scale of Costs.
- 10 In addition, the first respondent to counterclaim must reimburse to the applicants by counterclaim the filing fee paid by them of \$1,297.80 and three days' fees at \$177.05 per day, a total of **\$1,828.95**.
- 11 The total amount to be paid by the first respondent to counterclaim to the applicant by counterclaim is under Orders 7,8 and 10 is **\$1,661,897.95**.
- 12 The defence of proportionate liability raised by the first respondent to counterclaim to the counterclaim is struck out.
- 13 The respective claims for contribution made by the first respondent to counterclaim against each of the second respondent to counterclaim (Sproat Holdings Pty Ltd), the third respondent to counterclaim (Craig Sproat), the fourth respondent to counterclaim (Robson Rak Pty Ltd), and the fifth respondent to counterclaim (The Meyer Consulting Group Pty Ltd) are dismissed.
- 14 By consent, the claims of the applicants by counterclaim against each of the second respondent to counterclaim, the third respondent to counterclaim, the fourth respondent to counterclaim, and the fifth respondent to

counterclaim are struck out with a right to apply for reinstatement, with no order as to costs.

C Edquist
Member

APPEARANCES:

For the applicant:	No appearance
For the first respondent:	Mr J Forrest of counsel
For the second respondents	Mr J Forrest of counsel
For the first respondent to counterclaim	No appearance
For the second respondent to counterclaim:	No appearance
For the third respondent to counterclaim:	No appearance
For the fourth respondent to counterclaim:	No appearance
For the fifth respondent to counterclaim:	No appearance

REASONS

THE BUILDING OF THE HOUSE

- 1 Cristy Mace in 2010 purchased a substantial property in Glenlyon, in the Central Highlands of Victoria. The property is surrounded by State Forest and farming land and is sited on a hill. It has 360 degree views, including beautiful mountains and valleys. It had earlier been part of a much larger pastoral property dating back to the 1840s. Ms Mace says that she knew she “had to do something special with this unique and stunning property”.
- 2 After careful planning, she and her partner Evan Fleischer elected to build a large house to an environmentally sensitive design.
- 3 To create their dream home, Ms Mace and Mr Fleischer engaged a large design team. The consultants engaged included architects Robson Rak Pty Ltd, an engineering firm The Meyer Consulting Group, and a building surveyor Sproat Holdings Pty Ltd. After designs had been prepared, Ms Mace and Mr Fleischer engaged a builder Jinalea Pty Ltd. under a major domestic building contract executed in May 2015.
- 4 The project did not go well, and 13 months after the contract was signed it was terminated by Ms Mace and Mr Fleischer using the termination mechanism in the contract. After investigating the state of the works, Ms Mace and Mr Fleischer received advice that the house cannot be rectified, and it must be demolished and rebuilt. Clearly, they have suffered a substantial loss.

THE CLAIM AND THE COUNTERCLAIM

- 5 The builder initiated this proceeding in the second half of 2016. Ms Mace and Mr Fleischer counterclaimed against the builder and brought claims against the building surveying company and its director Craig Sproat (together, the building surveyors), the architect and the engineer.
- 6 The proceeding was set down for hearing on 8 May 2019 with an allowance of 13 days. However, in the weeks prior to the hearing, the litigation became simplified. Specifically, at a directions hearing on 2 April 2019, the Tribunal was informed by the builder’s representative that the builder would not be providing any material for the hearing and would not be attending. Then, on the day before the scheduled commencement, Ms Mace and Mr Fleischer advised that the proceedings against the consultants had been settled pursuant to a confidential deed, but the claim against the builder would be proceeding even if the builder did not appear at the hearing.
- 7 Late on 7 May 2019, the solicitors for Ms Mace and Mr Fleischer sent to the Tribunal proposed signed minutes of consent orders under which their claims against each of the consultants was struck out with a right to apply for reinstatement, with no order as to costs.

8 The hearing began before me on 8 May 2019. At the start of the hearing, the claims as between the builder and Ms Mace and Mr Fleischer remained unresolved. Mr Forrest of Counsel appeared for the owners. As expected, there was no appearance from the builder. I was urged to dismiss the builder's defence. This I declined to do as the hearing had started, and I considered that I ought to review the defence as part of the process of satisfying myself of the merits of the owners' counterclaim. This approach was consistent with the Tribunal's obligation to afford the builder the right to be heard arising under s 98(1)(i) of the *Victorian Civil and Administrative Tribunal Act 1998 (the VCAT Act)*, which binds Tribunal by the rules of natural justice.

PROPORTIONATE LIABILITY AND CONTRIBUTION

9 I was also asked at the start of the hearing to strike out the proceeding as against each of the consultants. This I also declined to do on the basis that the builder contended that in the event that the Tribunal found that the builder was liable to Ms Mace and Mr Fleischer in respect of any loss or damage suffered (which the builder denies), their claim was an apportionable claim within the meaning of s 24AE of the *Wrongs Act 1958 (Vic) (the Wrongs Act)*. The builder also alleged, in the alternative, that if the Tribunal determined that Ms Mace and Mr Fleischer's claim, or a part of it, was an apportionable claim under the *Wrongs Act*, then the builder would be entitled to contribution from the consultants pursuant to s 23B of that Act.

THE CONSTRUCTION OF THE HOUSE

10 Because of the very real danger of bushfires, Ms Mace and Mr Fleischer determined that their house was to be built using external products that were solid and non-flammable. Ultimately, they decided upon rammed earth walls and fire-resistant glass windows. Because the house was located in a rural area, it would need its own septic waste system together with 140,000 L of water storage for indoor and outdoor use, and for firefighting. To enhance the environmentally sensitive nature of the design, the owners ultimately decided to adopt Passivhaus design principles. Under this system, the house would be wrapped in a building membrane which would eliminate condensation, while a heat exchange ventilation system would bring in filtered fresh air. While the house could be sealed up fully when it was really hot or cold, it could be opened up in spring and autumn. A concrete slab floor, in conjunction with the rammed earth walls, was to assist to maintain a stable inside temperature, and extra wide eaves and minimal glazing would protect the house and heat from the Western sun.

ISSUES

11 Although the claim was undefended, Ms Mace and Mr Fleischer presented their claim for three days. Ms Mace gave evidence in which she adopted her witness statement dated 11 February 2019. In addition, she gave substantial

oral evidence. The owners also called evidence from Mr George Cross, a building consultant Mr Roland Black, an engineer, Mr Mark Newell, a plumber and Mr John Browning, another building consultant.

- 12 By evidence and submissions, the owners sought to establish that:
 - (a) the Tribunal should exercise its powers under s 78, s 76 or s 75 of the *VCAT Act* to strike out the builders claim with costs;
 - (b) the builder had breached a number of the warranties contained in the building contract that were implied by s 8 of the *Domestic Building Contracts Act 1995*;
 - (c) they had lawfully terminated the building contract under clause 43 of the contract and the builder was liable to them for damages assessed under clause 44;
 - (d) alternatively, the builder had repudiated the contract at common law;
 - (e) they were entitled to damages assessed on the basis that the house could not be rectified, but had to be demolished and rebuilt;
 - (f) the total cost to demolish and reconstruct to completion was \$2,814,770;
 - (g) on the basis of the evidence given by their expert witness, Mr John Browning, an allowance of 10% should be made for contingency and a further 10% for margin, and these figures should be added to the base figure; and
 - (h) it will be necessary to identify the unpaid balance of the contract price in order to assess damages, and in this connection oral evidence from Ms Mace should be accepted that the building contract had been varied orally with the effect that the contract price had been increased from the stipulated \$800,000 to \$1,200,000.
- 13 In order to avoid a further hearing against an unrepresented and insolvent builder, Ms Mace and Mr Fleischer also sought a clear demarcation between the damages awarded for rectification and the damages awarded for completion, and also orders for interest, costs and reimbursement of fees.
- 14 In addition to these issues as between Ms Mace and Mr Fleischer and their builder, I must also resolve the builder's claim against them, and the builder's claim for apportionment and contribution against the consultants.
- 15 Relevantly, the owners argue:
 - (a) the warranties implied by ss 8(b), (c) and (f) of the *Domestic Building Contracts Act* are absolute, and not qualified or limited to an obligation to use reasonable care and skill;
 - (b) the builder's liability under these three warranties accordingly cannot be subject to the apportionment defence.
- 16 I now address each of these issues in turn.

THE TRIBUNAL SHOULD STRIKE OUT THE BUILDER'S CLAIM UNDER S 78, S 76 OR S 75 OF THE VCAT ACT

Section 78

- 17 The Tribunal has jurisdiction to make draconian orders against a party if the Tribunal believes that a party is conducting the proceeding in a way that unnecessarily disadvantages another party to the proceeding by its conduct. Ms Mace and Mr Fleischer at the opening of the hearing requested that I strike out or dismiss the builder's application with costs as a result of the builder's conduct of the proceeding, but I declined to do so in the knowledge that the case was complex, and that the owners proposed to present substantial evidence. Having reviewed the builder's claim, and heard the owners' evidence, I am now satisfied that it is appropriate to exercise the Tribunal's discretion arising under s 78(2)(a), for the following reasons.
- 18 The builder pursued its claim against Ms Mace and Mr Fleischer until 2 April 2019. On that day, a director of the builder appeared at a directions hearing by telephone and advised that the builder would not be providing any material for the hearing and would not be attending at the hearing. The uncontradicted submission put by Ms Mace and Mr Fleischer is that as at 19 March 2019, the builder was in breach of programming orders made on 18 July 2018 in respect of expert reports, witness statements, and witness statements in reply. Ultimately, the builder failed to attend the hearing and present any evidence. I find that the builder conducted the proceeding in a way that unnecessarily disadvantaged Ms Mace and Mr Fleischer by forcing them to actively defend its claim until 2 April 2019. The builder's claim against Ms Mace and Mr Fleischer is struck out under s 78(2)(a) of the VCAT Act.
- 19 I also find that Ms Mace and Mr Fleischer are entitled, under s 78(2)(c) of the VCAT Act, to an order under s 109 of the VCAT Act that their costs of defending the Builders claim up to and including 2 April 2019. Such costs are to be assessed on the standard basis on the County Court Scale by the Costs Court in default of agreement.

Section 76

- 20 An alternative submission was made that I should strike out the builder's claim with costs pursuant to s 76 of the *VCAT Act*, which empowers the Tribunal at any time to make an order summarily dismissing or striking out all, or any part, of a proceeding for want of prosecution. As I have determined to strike the builder's claim out under s 78(2)(a) it is not necessary for me to determine this application. However, by way of completeness, I note that this is not a case where I would have been disposed to exercise the Tribunal's power under s 76, because I consider this power is to be exercised where an applicant has failed to press its case for a substantial period with the effect of creating not only delay in the

finalisation of the proceeding but also occasioning prejudice to another party by reason of that delay.

Section 75

- 21 A further alternative was proposed by Ms Mace and Mr Fleischer, which was that the power of the Tribunal to summarily dismiss or strike out the claim under s 75(1) of the *VCAT Act* should be exercised. It is not necessary to express a view about the appropriateness of doing so, having regard to the decision I have made under s 78(1)(a).

THE OWNERS' CLAIMS AGAINST THE BUILDER

The building contract

- 22 Under the building contract the builder agreed to construct on the Property a new residential house and farm shed (**the house**) in accordance with a specification prepared by the Architect, plans prepared by the Architect and engineering plans prepared by the Engineer.

Implied warranties

- 23 The warranties created by s 8 of the *Domestic Building Contracts Act 1995* were effectively incorporated into the building contract in clause 11.
- 24 Section 8 of the *Domestic Building Contracts Act 1995* provides:

Implied warranties concerning all domestic building work

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract—

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the *Building Act 1993* and the regulations made under that Act;
- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
- (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend,

improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;

(f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

- 25 Ms Mace and Mr Fleischer contend that the Builder breached the warranties by constructing the building works with defects and in a manner, which is non-compliant with the Building Code of Australia (**the BCA**).

Primary findings about breaches of warranty

- 26 Having heard uncontroverted evidence from Mr Cross, Mr Black, and Mr Mark Newell (a plumber) I find that the warranties were breached in a number of respects by reason of, at least:
- (a) the manner of installation of the sewage and stormwater drainage through and under the concrete ground slabs;
 - (b) the damp proof course was not installed in accordance with the Engineers design;
 - (c) the frame and the steel columns and beams were defectively constructed;
 - (d) the roof was defective as it was constructed in a manner at variance to the design documentation.

Rammed earth walls

- 27 Ms Mace and Mr Fleischer also contend that there has been a breach of the warranties in relation of the rammed earth walls. Here they rely heavily on the evidence of one of their expert witnesses, Mr George Cross who holds a Master's Degree in Applied Science and a Bachelor's Degree in Civil Engineering, and who is also a municipal building inspector and municipal building surveyor. Mr Cross observes that the builder's scope of works included the construction of the rammed earth walls of the house.
- 28 The factual submissions advanced in relation to the builder's liability in respect of this element of the works are as follows:
- (a) the builder has constructed the rammed earth walls (undertaken by specialist contractor Stabilearth) notwithstanding that there was no structural engineering design for the rammed earth sandwich panel external walls or the solid rammed earth garage and wing walls;
 - (b) the rammed earth walls have cracks ranging from hairline to noticeable;
 - (c) the engineer's drawing S03 stated "refer to architect's drawings for details" in respect of the rammed earth walls, but on the engineer's drawing S02 it stated "refer to manufacturer's specifications" in

- respect of the rammed earth walls. As there are no “manufacturer’s instructions” a competent builder would have sought clarification;
- (d) the builder did not do so;
 - (e) in Mr Cross’ opinion, structural stability and sufficiency of the constructed rammed earth are unknown and unquantifiable either as singular wall panels (all of which are different) or when incorporated with other structural elements: steel columns/beams, braced internal walls, or integration into the roof structure, or a combination of all systems;
 - (f) Mr Cross also considers that an Alternative Solution¹ was required to address the structural sufficiency and other required aspects such as weatherproofing and thermal efficiency; but
 - (g) such a solution was not obtained, and the builder constructed the walls anyway;
 - (h) there is no structural design according to which the builder constructed the rammed earth walls.
- 29 On these facts, Mr Cross opined that the builder should not have proceeded to permit the subcontractor to construct the rammed earth walls without requiring the production of an Alternative Solution so as it complied with its contractual obligations.² As Mr Cross pointed out, under the *Building Regulations* in force at the relevant time, the BCA is incorporated.³ There was accordingly a contractual obligation on the builder to obtain an Alternative Solution in accordance with Part 1.0 of the then current BCA.
- 30 As there are no deemed-to-satisfy provisions in the relevant BCA, the building permit should not have been issued without an Alternative Solution. Although other parties, such as the building surveyor and the architect, are in Mr Cross’s view subject to criticism, the failure of the builder to ensure there was an Alternative Solution in respect of the rammed earth walls constituted a breach of the warranty implied by s 8(c) that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the *Building Act 1993* and the regulations made under that Act.

Finding

- 31 I accept this argument and find that as a result of the manner of construction of the rammed earth walls, there has been a breach of the s 8(c) warranty.

¹ The equivalent under the BCA 2014 which was in force at the relevant time, to a Performance Solution under the current BCA 2016.

² Mr Cross’s first report at p 16.

³ *Building Regulations 2006* (Vic) Regulation 109.

THE OWNERS' CLAIM FOR TERMINATION OF THE BUILDING CONTRACT

Contractual provisions relating to termination by Ms Mace and Mr Fleischer

32 Clause 43 the building contract provides as follows:

- 43 If the Builder breaches (including repudiates) this Contract, nothing in this Clause prejudices the right of the Owner to recover damages or exercise any other right or remedy.
- 43.1 The Builder is in substantial breach of this Contract if the Builder:
- suspends the carrying out of the Building Works, otherwise than in accordance with Clause 35;
 - has the Builder's licence cancelled or suspended; or
 - is otherwise in substantial breach of this Contract.
- 43.2 If the Builder is in substantial breach of this Contract the Owner may give the Builder a written notice to remedy the breach:
- specifying the substantial breach;
- requiring the substantial breach to be remedied within 10 Days after the notice is received by the Builder; and
- stating that if the substantial breach is not remedied as required, the Owner intends to end this Contract.
- 43.3 If the Builder does not remedy the substantial breach stated in the notice to remedy the breach within 10 Days of receiving that notice, the Owner may end this Contract by giving a further written notice to that effect.
- 43.4 The Owner is not entitled to end this Contract under this Clause when the Owner is in substantial breach of this Contract.

33 Ms Mace gave evidence at [305] of her witness statement that her lawyers served on the builder a notice of intention to terminate the building contract under clause 43.2 dated 20 June 2016 requiring the builder to rectify a substantial breach of the contract within 10 days of receipt of the notice. Receipt of the document is acknowledged by the builder in its defence, and I find that the notice was duly served.

34 The alleged substantial breach related to defective works particularised in an expert's report dated 14 June 2016 prepared by Wisecheck Building Inspections Pty Ltd. These included the timber frame, and structural steel work in the roof. I find that these are defects of such significance that they are "substantial" within the meaning of clause 43 of the contract.

35 In the face of Ms Mace's uncontroverted evidence at [310] that the builder did nothing in response to the notice of intention to terminate, indeed did not even bother to return to the property, I find that the builder did not rectify the alleged substantial breach. Ms Mace at [311] deposes that on 4 July 2016 her lawyers sent to the builder a notice terminating the contract. I

accept Ms Mace's evidence at [312] that the builder acknowledged receipt of this letter in correspondence to the building surveyor. Accordingly, I find that the notice to terminate the contract was duly served. In summary, I find Ms Mace and Mr Fleischer lawfully terminated the building contract under clause 43.3.

Did the builder repudiate the contract at common law?

36 In their opening submissions at [139-148], Ms Mace and Mr Fleischer argued that the builder had repudiated the contract by making claims for payment which were invalid, and then suspending the works on 3 June 2016. However, it was not argued that the repudiation had been accepted. Rather, the owners relied on termination pursuant to clause 43 of the contract. No more need be said about common law repudiation.

THE MEASURE OF DAMAGES

37 If the assessment of damages is approached on the basis that the builder breached the contractual warranties, Ms Mace and Mr Fleischer contend they are entitled to be brought back to the same position that they would have been in had the contract been performed properly by the builder, relying on *Bellgrove v Eldridge*⁴ If the assessment is approached from the point of view of termination of the contract under clause 43, then the owners' loss is to be calculated in accordance with clause 44 of the building contract.

38 Clause 44 provides:

44.0 If the Owner brings this Contract to an end under Clause 43, then the Owner's obligations to make further payment to the Builder is suspended for a reasonable time to enable the Owner to find out the reasonable cost of completing the Building Works and fixing any defects.

44.1 The Owner is entitled to deduct that reasonable cost calculated under Clause 44.0 from the total of the unpaid balance of the Contract Price and other amounts payable by the Owner under this Contract if this Contract had not been terminated and if the deduction produces:

- a negative balance – the Builder must pay the difference within 7 Days of demand; and
- a positive balance – the Owner must immediately pay the difference to the Builder.

Analysis of the clause 44 formula

39 In order to give effect to clause 44.1 it is necessary to identify:

- (a) the reasonable cost of completing the building works and fixing any defects;

⁴ (1954) 90 CLR 613 at 617

- (b) the contract price;
 - (c) and other amounts payable by the owner under the building contract if it had not been terminated.
- 40 In order to determine the reasonable cost of completing the building works, a decision has to be made regarding the threshold issue of whether it is necessary to demolish the house before undertaking rectification.

THE OWNERS' CLAIM THAT THEY ARE ENTITLED TO DAMAGES ASSESSED ON THE BASIS THAT THE HOUSE IS TO BE DEMOLISHED AND REBUILT

- 41 Ms Mace and Mr Fleischer seek damages, at [157] of their opening written submissions, for:

the cost of demolition and reconstruction of the works the subject of the original design save and except for the cost of:

- (a) arranging for a new roof design; and
- (b) a performance solution for the rammed earth walls. (My emphasis)

Is demolition and rebuilding necessary and reasonable?

- 42 Mr Cross, in section D of his report dated 27 November 2017, identified numerous building defects including defects in relation to framework, roof trusses, steelwork, the rammed earth wall, stormwater, sewer and water pipes under the slab, and the slab itself. Critically, he opined at [421] that:

The builder's defective work is the reason the slab requires removal and that the roof structure, roof installation, roof drainage and stormwater drainage require replacement.

- 43 Another expert witness called by Ms Mace and Mr Fleischer, Mr Roland Black, adopted a report he had prepared following inspections in August 2016 and May 2017. He opined at [92] that:

this building should be completely demolished as soon as possible, down to and including the slab and under-slab plumbing. (Mr Black's emphasis)

- 44 On the basis of the uncontested evidence of Mr Cross and Mr Black, I find that the demolition and rebuilding of the house is necessary and reasonable.

The exceptions to the cost of demolition and reconstruction of the works to the original design conceded by the owners

New roof design

- 45 The owners clearly concede that they cannot recover from the builder, as damages for breach of a contract for construction only, the cost of arranging for a new roof design.
- 46 It is not clear whether they also concede that they also cannot recover damages from the builder in respect of the cost of constructing a roof to the new design, when it has been developed. In my view, such a claim is not

allowable, because it is not a claim for damages which would put the owners back into the position that they would have been had the contract been performed. It would be a claim for damages in respect of the cost of performing works which, by definition (because they are to a new design), are outside the building contract.

Alternative Solution for the rammed earth walls

- 47 The concession offered by the owners of “the cost of ...a performance solution for the rammed earth walls” is more problematic, even though the contract was for construction only. This is because, for the reasons explained above at [21-26], the failure of the builder to ensure there was an Alternative Solution in respect of the rammed earth walls constituted a breach of the warranty implied into the building contract by s 8(c) of the *Domestic Building Contracts Acts 1995*.
- 48 The question to be addressed is: what is the measure of damages arising from this breach? The measure cannot be the cost of obtaining an Alternative Solution, as this would involve carrying out complex computations, and this is not within the builder’s area of expertise. Moreover, design is not within the scope of work under the building contract, as it was a construct only contract.
- 49 The cost of rebuilding the rammed earth walls themselves is more conveniently discussed below.

THE GRAND TOTAL COSTS TO DEMOLISH AND RECONSTRUCT TO COMPLETION IS \$2,814,707; AND

ON TOP OF THIS BASE FIGURE AN ALLOWANCE OF 10% SHOULD BE MADE FOR CONTINGENCY AND A FURTHER 10% FOR MARGIN.

Assessment: John Browning v market quotations

- 50 Ms Mace and Mr Fleischer contend, at [158] of their opening submissions, that the basis for the award of damages is either according to the opinion of their expert building consultant John Browning and or market quotations obtained by them for the cost of abolishing the works and reconstructing the house.

The estimate of John Browning

- 51 Mr Browning, when giving evidence, adopted a report he had prepared dated 12 April 2019 in which he estimated the cost to demolish and reconstruct the House including all Prime Cost and Provisional Sum items at \$3,849,207 inclusive of GST. As he observed, this sum is significantly higher than the quote from Cassilis Constructions for \$2,277,418. He explained that he had not used the Cassilis quote as his base estimate as he had added some other costs. His base estimate was \$2,891,966. Also, as the Cassilis quote did not contain a contingency sum or margin, he allowed

10% contingency and 10% margin, to reach a GST exclusive total of \$3,499,279.

- 52 In their final submissions the owners urged me to adopt a slightly different base figure of **\$2,814,707** in place of the base assessment ultimately proposed by Mr Browning.

The market quotations obtained by Ms Mace and Mr Fleischer

- 53 At [546]of her witness statement Ms Mace deposed that based on the estimates she had received, the total cost of demolition was \$208,746.80 and that the cost of rebuilding the house based on the original design with a new compliant roof design and a roof drainage system, and rammed earth walls with proper certifications is \$2,277,418 inclusive of GST. Ms Mace deposed at [556] that in addition, various consultancy and regulatory costs would be incurred to enable rectification, demolition and reconstruction to occur and that professional services in the nature of architectural, structural engineering and building surveying will be required. Other consultants such as an energy consultant, a bushfire consultant, a land surveyor and a cost consultant will also be required.
- 54 As a matter of general principle, cost estimates based on market quotations are preferable to theoretical assessments. I accordingly find that the appropriate method to adopt in respect of the assessment of damages is quotations obtained from the market.

Cost of demolition and rectification based on market quotations

- 55 The starting point is to understand the scope of the work that the builder undertook to construct in the building contract. The contract works were broken into stages that only partially resembled the stages outlined in s 40 of the *Domestic Building Contracts Act 1995*.
- 56 For example, the building contract included a planning stage, under which the builder was to carry out preparatory works, provide warranty insurance, carry out septic and stormwater plumbing, create the shed footings and the slab, and connect electricity. In respect of most of these items, the builder was to be paid a specified amount. The builder was also to be paid a deposit of 5% (exclusive of GST) namely \$36,363.54, which was to be expended on the shed footings and the slab.
- 57 Next came a special ordering payment stage under which the builder was to be paid \$75,000 as a deposit of 50% towards the windows and doors which had to be ordered from Germany with a 16-week lead time.
- 58 At this point, the conventional stages began. Even so, because of the specific design requirements of Ms Mace and Mr Fleischer, there were some unusual features in the base stage, which included builder management and carpentry, concrete, thermal block footing and bricklaying, rammed earth walls, steel framing, fireplace, flue kit and surrounds, hydronic supply, hydronic installation, and a final concrete

screed pour on the hydraulics. The framing stage and the lock-up stage were relatively conventional. However, the builder's obligations in the finishing stage was unusually limited. Although, apart from builder management and carpentry, the work appears to be conventional, there were very limited allowances for certain items. In particular the electrical fit out sum was limited to \$2,000, the plumbing fit out to \$3,000, sanitary ware to \$6,000, and appliances to \$4,500.

- 59 With these matters in mind, I now turn to an assessment of the reasonable cost to demolish and rebuild the contract works to the state they should have been at the time the building contract was terminated.

The Cassilis estimate

- 60 Ms Mace and Mr Fleischer claim damages in respect of demolition, establishment/setup costs, and building costs. In respect of the cost of reconstruction, the primary document is the quotation obtained by Ms Mace and Mr Fleischer from Cassilis on 4 February 2019 in the sum of \$2,070,380 exclusive of GST.

- 61 The director of Cassilis who prepared the quotation, Mr David Alexandrakis, was not called, but his witness statement was tendered. This indicates that he had been a registered domestic builder since 1992 and that his company has constructed a number of rammed earth homes. He confirmed that in preparing his estimate, he has made "allowances for the amount of work I expect shall be required to undertake the construction of the dwelling and the amount of materials and costs that will be incurred." He confirmed that the estimate was based on the original design even though there were defects in the design documentation. It was noted that an engineering design to resolve the deficiencies in the original roof design had not been developed, an allowance for contingencies arising from a new roof design had been made.

- 62 Mr Browning made a number of comments about it in Schedule C to his report. Here, he set out comments in relation to a large number of quotations obtained by Ms Mace and Mr Fleischer.

- 63 With these matters in mind I now turn to the specific issues.

ASSESSMENT OF DEMOLITION AND RECTIFICATION COST

DEMOLITION

Demolition and power disconnection and rerouting

- 64 Ms Mace and Mr Fleischer claim \$192,533 for demolition of the existing structure. This figure is derived from a quotation obtained from Taterocks Pty Ltd dated 22 December 2018. The quotation is for \$175,030 inclusive of GST. It includes allowances for demolition of the existing structure, all relevant demolition permits, insurance and other preliminaries, disposal and

transfer fees, re-establishment of the site ready for set out a measurement, sanitary requirements, and a contingency allowance of \$20,400.

- 65 The contents of the quotation were explained by the director of Taterocks, Mr Brian Williams, in his tendered witness statement. Mr Browning analysed the quotation, and recommended that it be accepted, although he noted that it did not allow for the disconnection of services. On the basis of Mr Williams's explanation, and on the basis of Mr Browning's evidence, I find that the Taterocks quotation is reasonable and I allow **\$175,030** exclusive of GST for demolition.
- 66 In order to render the site safe during demolition, the power will have to be disconnected and rerouted. In respect of these works, Ms Mace and Mr Fleischer obtained a quotation from Fells, an electrician, for \$13,937.27 exclusive of GST. On the basis of Mr Browning's evidence that this is "OK" I find that the Fells quotation is reasonable and allow **\$13,937** for this item on a GST exclusive basis.

Site establishment/set up costs

- 67 Ms Mace and Mr Fleischer's claim under this heading is \$180,553, less a credit of \$4,800 in respect of the cost of site excavation/preparation which was included in the Taterock's quotation. Ms Mace and Mr Fleischer in a footnote⁵ in their final submissions indicate that this figure includes architectural costs of \$125,000, and also engineering costs, regulatory and building surveying costs. I am not satisfied that these costs are costs for which the Builder is responsible. The contract was for construction only, not design and construction. It is not clear to me why design consultants' costs are being claimed from the builder. I can understand why regulatory and building surveyor costs might be claimed, but it is not for me to construct Ms Mace and Mr Fleischer's case. In the absence of a compelling argument as to why these design costs should be allowed, I **disallow** this particular claim.

RECTIFICATION COSTS

Preliminaries

- 68 Cassilis allowed \$10,350 exclusive of GST for "Preliminaries". Mr Browning discounted, as the figure had been included in his allowance for supervision and overheads. I am not persuaded by this argument and allow the Cassilis figure of **\$10,350**.

Surveying fees

- 69 The next item claimed by Ms Mace and Mr Fleischer was surveying fees. Macey Surveying had quoted \$1,375. Mr Browning opined that this was satisfactory for a site establishment survey. I am not prepared to allow the figure, because the house has already been built, and the site had already

⁵ Footnote 67

been established. There is no justification for redoing this work, in my view. I allow **nothing** for this item.

Green Rate Energy report

70 Ms Mace and Mr Fleischer claim \$900 plus GST for this. Mr Browning considers the allowance to be “OK”. The allowance may be satisfactory, but I find that this sum is not claimable from the builder on the basis that the energy report was not a part of the builder’s work under the building contract. I allow **nothing** for this item.

Fitzgerald engineering fees

71 The amount claimed is \$12,000 plus GST. Mr Browning considers this “OK”. The quantum may be satisfactory, but this item is not to be claimed against the builder, given that the contract was for construction only. I allow **nothing** for this item.

KWA Building Surveying

72 \$14,177 exclusive of GST is claimed in respect of this surveying firm covering professional fees, mandatory inspection fees (but not additional inspections) and government fees and charges. I accept that building surveyor’s fees incurred in respect of the first attempted construction of the house have been wasted, and that as a direct consequence of the builder’s breach of the contract these fees will be incurred again. I accept the claim and allow damages of **\$14,177** exclusive of GST.

Ballarat Soil Testing

73 A figure of \$1,040 plus GST is claimed. Mr Browning thinks the allowance is satisfactory. It may well be, but the soil conditions must have been tested prior to the first attempted constructing the house as it is mandatory under the *Domestic Building Contracts Act 1995*, and there is no justification for imposing the cost of carrying out the testing again on the builder. I allow **nothing** for this claim.

Hepburn Shire Council Permit extension

74 The amount claimed here is \$364 plus GST. Mr Browning suggested that the fees were satisfactory in quantum. I allow **\$364** as I consider the need for a permit extension is a direct and natural result of the builder’s breach of contract.

Northwind Quantity Surveyors

75 The amount claimed is \$5,200 plus GST. The services offered include tender management. This will be a role of the new builder, and the builder cannot be asked to pay for the same services to be provided by a consultant engaged by Ms Mace and Mr Fleischer. Other services offered by Northwind include project management, the preparation of tax depreciation reports, and the provision of financial reports to Ms Mace and Mr

Fleischer's bank. I consider that the cost of provision of these services is not claimable against the builder as the original building contract made no allowance for them. The quotation also includes assessing progress assessment reports. This may assist Ms Mace and Mr Fleischer, but these assessments are not something for which the builder is to pay. The proposed role includes acting as superintendent under the building contract. This also is not claimable, as there was no superintendent under the original building contract. More examples can be given, but the point is well established already that the cost of the quantity surveyor cannot be passed on to the builder. I allow **nothing** for this claim.

PLA architectural fees

- 76 According to Mr Browning's evidence, architect's fees totalling almost \$290,000 are claimed exclusive of contract administration. Design fees in my view are not claimable, as the house has already been designed. Although the house needs some limited redesigning because it is faulty, that is a matter for Ms Mace and Mr Fleischer to address with the consultants. The cost of redesign cannot be claimed against the builder. Furthermore, part of the design fee relates to interior design. This was never a responsibility of the builder.
- 77 The fee also relates to tendering and negotiation. Management of subcontractors is usually a responsibility of a builder, and so the builder is not liable to pay damages to Ms Mace and Mr Fleischer in respect of the cost having this service provided separately. Contract administration fees paid to an architect are not recoverable either, principally because the HIA contract is not architect administered. I allow **nothing** for architects' fees.

Site excavation/preparatory works

- 78 Cassilis allowed \$3,450 exclusive of GST for this item. Mr Browning accepted this but opined that an allowance should be made for blinding cement resulting from removal of floaters. His argument is that because some large floaters were removed during the initial construction, and were backfilled, the process of demolition will cause disturbance to the foundations. The disturbance to the soil will necessitate significant backfilling with blinding cement to achieve the required bearing pressure. His allowance is \$6,445 exclusive of GST. I accept Mr Browning's opinion. Accordingly, I allow the figure of \$3,450 estimated by Cassilis plus the extra \$6,445 estimated by Mr Browning. The total allowance is, accordingly, **\$9,895** exclusive of GST.

Concrete structural slab

- 79 In respect of the concrete structural slab Cassilis quoted \$97,750 exclusive of GST. Mr Browning contended that as the area of the slab was about 575 m², and the typical rate for a raft slab was \$191 per m², a figure of \$110,000 exclusive of GST was indicated. I have indicated above, at [54], that I consider market quotations are preferable to theoretical assessments, and

for this reason I accept Cassilis's assessment. I award **\$97,950** exclusive of GST in respect of the concrete structural slab.

Concrete screeding slab and exterior patios

80 In respect of the concrete screeding slab over the same area, and the exterior patios, Cassilis allowed \$34,500 exclusive of GST. Mr Browning asserted that the typical rate for a screening slab was \$45 m², and on this basis recommended reducing the allowance to \$25,875 exclusive of GST. For the reasons stated in respect of the structural slab, I prefer Cassilis's assessment. I accordingly allow **\$34,500** exclusive of GST in respect of the screeding slab and the exterior patios.

Slab insulation

81 Cassilis made no allowance for this item. Mr Browning opined that allowance of \$18,456 exclusive of GST should be allowed. I note that \$46,000 was separately allowed by Cassilis for insulation and thermal wraps. On the basis that all insulation has been allowed for there, I **allow nothing** separately for slab installation.

Rammed earth walls

82 Cassilis allowed \$222,695 for this item including materials and labour. At paragraph 10 of his witness statement, David Alexandrakis of Cassilis states that following discussions with the architect he has provided his estimates "based on its original design documentation noting there are non-compliant works documented and defects in the design documentation".

83 The original estimate for the construction of the rammed earth walls based on the original design documentation, even though the design had not been the subject of an Alternative Solution under the BCA, was \$151,415.⁶

84 The new assessment is clearly derived from an "indicative quotation" in the same amount prepared by the specialist contractor which had carried out the rammed earth wall construction in the first instance, namely StabilEarth Construction. Reference to this quotation gives no indication as to the plans upon which their quotation was prepared, other than to indicate that the estimated face area is 288 m². Mr Browning indicated that the estimate was acceptable, without giving reasons.

85 That the new assessment is as high as \$225,695 suggests that it is the estimated cost of reconstructing the rammed earth walls in accordance with a Performance Solution obtained under the current BCA⁷ (previously called an Alternative Solution in the BCA 2006)

86 In seeking such damages for the reconstruction of the rammed earth walls, Ms Mace and Mr Fleischer are impliedly suggesting that a Performance

⁶ See the progress payments scheduled breakdown contained in the contract.

⁷ BCA 2016.

Solution can be developed. It is clear from Mr Cross's report that none has been developed. He opined that:

- (a) the walls will need to be removed and constructed in accordance with a properly prepared Performance Solution to match the contract plans.
- (b) the Performance Solution would need to follow the specified method and provisions of the BCA 2016. In particular, relevant Performance Requirements and deemed-to-satisfy provisions from all sections and parts of the BCA must be identified.

87 Not only had no Performance Solution been prepared at the time Mr Cross gave evidence, it is possible that one will never be developed having regard to the specific design Ms Mace and Mr Fleischer are seeking to achieve. It is possible that the walls will have to be reinforced or reconfigured in some way. To assess damages on this basis accordingly would at best be speculative, and at worst impossible.

88 In the circumstances, I find that the amount that Ms Mace and Mr Fleischer can recover in respect of the rammed earth walls against the builder is to be limited to the sum that was paid in respect of the rammed earth walls in the original contract, on the basis that this is a clearly supportable figure. I accordingly allow the sum of **\$151,415**.

Frame carpentry/batten out/materials /labour

89 Cassilis allowed \$108,000. Mr Browning indicated that he considered this allowance was acceptable. I allow **\$108,000**.

Structural steel

90 Cassilis allowed \$82,000, including a contingency for redesign. Mr Browning suggests that this allowance included structural steel redesign, which was separately quoted in the engineering fees of Fitzgerald. He recommends an allowance net of an estimated amount for engineering and assesses a figure of \$72,273 exclusive of GST. I do not accept Mr Browning's point, as Mr Alexandrakis's covering witness statement makes it clear that he has allowed for "contingencies arising when a new roof design is provided". I read this as indicating that the Cassilis quotation allows a contingency for constructing to the new design, but not for the redesign work.

91 The contingency for constructing to the new design cannot be charged to the builder. In the circumstances, I limit Ms Mace and Mr Fleischer's recovery to the total allowance for steel frame made by the builder in the original contract, which was \$10,000 at base stage, and \$19,700 at the framing stage. The total allowance accordingly is **\$29,700**.

Roof plumbing

92 Cassilis allowed \$70,500, including a contingency for redesign. Mr Browning observed that it was not clear whether this included for sumps

and downpipes and recommended an additional \$12,000 for this. I do not accept this recommendation. The builder's original allowance for roofing in the contract was \$28,000, based on a quote from Garry Howe Plumbing. The figure estimated by Cassilis exceeds this by more than \$40,000. On this basis there is reason to think that the new assessment includes every relevant item called up in the documentation.

- 93 Moreover, the Cassilis estimate appears to contain a significant contingency for redesign. As the Cassilis figure is clearly not based on the original design documentation, I allow only the builder's original allowance of **\$28,000**.

Window removal and reinstallation

- 94 Cassilis allowed \$64,400 for this item, but the specialist contractor who is likely to carry out the work, Laros, allowed \$62,000. Mr Browning recommended taking the Laros figure, and I allow it exclusive of GST at **\$56,364**.

Lock up carpenter/materials

- 95 Cassilis allowed \$146,650 for this item. Mr Browning considered this figure to be acceptable. I note that in the original contract breakdown, the builder had not differentiated between frame carpentry and lock-up carpentry, and the builder's overall allowance for carpentry appears to be much less than the total allowed by Cassilis for frame carpentry and lock-up carpentry. Nonetheless, as all carpentry will have to be rebuilt, I allow Cassilis's assessment of **\$146,650**.

Heating and cooling (HRV systems, hydronics, commissioning)

- 96 As the subfloor heating system had been installed and will be destroyed in the course of demolition, and will have to be rebuilt, these damages are claimable.
- 97 Cassilis allowed \$113,300 for these items. Mr Browning relied on individual quotations from specialist subcontractors such as Pivot, QPS, Wignals Maverick and Fantech which together total just under \$117,000. The Cassilis quotation is so specific that I infer that is based on quotations from subcontractors. Mr Browning's research confirms the Cassilis figure to be reasonable. I allow the Cassilis figure of \$113,300 on a GST exclusive basis, calculated at **\$103,000**.

Novomur block work

- 98 For rebuilding the blockwork Cassilis allowed \$31,850 exclusive of GST. Mr Browning noted that the contractor who laid the original Novomur blockwork had allowed \$44,165 inclusive of GST to supply the blocks and lay them, and I accept this is the appropriate figure for rebuilding the blockwork, rather than the Cassilis figure. I will allow damages assessed at the GST exclusive figure of **\$40,150**.

99 As a consequence of the block work, rectification work will be required by the window subcontractor Laros, who quoted \$11,650. Mr Browning opined that this allowance was acceptable, and I allow the figure exclusive of GST at **\$10,591**.

Travel/accommodation

100 In justification for this claim, Ms Mace in her witness statement at [551] deposed that because the private building surveyor had “bad mouthed” her and Mr Fleischer to trades and builders, they had not been able to obtain quotations from local trades and they had had to go further afield, which meant that they will incur hefty travel and accommodation expenses for all contractors for an estimated 12 month re-build schedule. This was reflected in many quotes received by individual contractors and in the Cassilis estimate.

101 Reference to the Cassilis assessment indicates that \$46,000 has been allowed for travel and accommodation. Mr Browning recommended that this figure should be included in supervision and overheads. I reject this approach, as it is convenient to address travel and accommodation as a discrete item.

102 I reject this head of damages for two reasons. Firstly, even if it is accepted that Ms Mace and Mr Fleischer will have to pay a special allowance for travel and accommodation in order to obtain suitable trades for their project, Ms Mace’s evidence is that the loss was caused by the actions of the building surveyor. This is not a matter for which the builder can be held responsible. Furthermore, by the time Ms Mace and Mr Fleischer sign a building contract in respect of the rebuild, more time will have passed. It may well be that the effect of the reputational damage caused to them by the building surveyor will have subsided. I accordingly allow **nothing** for this claim.

SUMMARY IN RELATION TO RECTIFICATION COSTS

103 The total value of the demolition and rectification works, excluding supervision and overheads, contingency and profit margin is **\$1,030,073**, as follows:

DEMOLITION AND RECTIFICATION COSTS

Demolition	\$175,030
Render site safe during demolition – electrician	\$13,937
Site establishment/set up costs	\$Nil
Preliminaries	\$10,350
Surveying fees	\$Nil
Green Rate Energy report	\$Nil
Fitzgerald Engineering fees	\$Nil
KWA Building surveyor	\$14,177
Soil testing	\$Nil
Council permit extension	\$364

Northwind Quantity Surveyors	\$Nil
Architect's fees	\$Nil
Site excavation/preparatory works	\$9,895
Concrete structural slab	\$97,950
Screeding slab and exterior patios	\$34,500
Slab insulation	\$Nil
Rammed earth walls	\$151,415
Frame carpentry/batten out/materials/labour	\$108,000
Structural steel redesign engineering	\$29,700
Builder's original contingency for redesign	\$28,000
Window removal and reinstallation	\$56,364
Lock-up carpentry/materials	\$146,650
Heating and cooling (HRV systems, hydronics, commissioning)	\$103,000
Rebuilding block work	\$40,150
Window rectification work	\$10,591
Travel/accommodation - damages	\$Nil
Total	\$1,030,073

Supervision/overheads

- 104 The next item to be considered as part of the assessment of rectification costs is supervision and overheads, as they cover both the rectification and completion works.
- 105 Cassilis allowed \$128,000 for these items. Mr Browning notes that this amounts to 6% of the invoice costs and suggests this is "very tight for remote area working including travel, accommodation". He recommends a margin for supervision and overheads of 9%.
- 106 As Cassilis allowed a separate item \$146,000 for travel and accommodation, and as Mr Browning is arguing for a separate allowance of 10% for margin, I think that 6% for supervision and overheads is reasonable. I assess Ms Mace and Mr Fleischer's entitlement for supervision and overheads on demolition and rectification costs of \$1,030,073 at \$61,804 on a GST exclusive basis. When this margin is added, the sub total is \$1,091,877.

Contingency

- 107 The penultimate item to be assessed in respect of rectification costs is contingency. Mr Browning notes that Cassilis made no allowance for this, and recommended an allowance of 10% as being "reasonable".
- 108 I am not satisfied that such an allowance is appropriate. The house is going to be rebuilt from the ground up. The house was extensively planned the first time around using architects and engineers. It was built substantially in accordance with the plans and specifications, but as noted, with deviations. Unsuccessful parts of the design are going to be reworked. For this reason, Cassilis allowed a contingency in respect to structural steel and roof

plumbing. With respect to the window contractor Laros, the situation is also clear. Laros will be reinstalling windows which have been constructed and installed in the first house and are to be removed and stored for reuse. No contingency can be justified here. Moreover, Mr Browning has expressly allowed for contingency in the excavations/site preparation allowance where an allowance for blinding concrete of \$6,445 plus GST has been recommended. Many items in the Cassilis quotation including electrical fittings, plumbing fittings, heating and cooling fittings, joinery, appliances, fittings and fixtures, light fittings and audiovisual relate to known quantities and do not justify contingency. It is not for me to go through the remainder of the Cassilis quotation in order to identify items which might justify contingency. Ms Mace and Mr Fleischer have not discharged the burden of establishing that contingency is justified, and I make **no allowance** for contingency.

Margin

109 Mr Browning noted that Cassilis had made no allowance for margin and recommended that a figure of 10% be allowed. In circumstances where Mr Browning has indicated that the margin for supervision and overheads is only 6%, I think a margin of 10% for profit is acceptable, and I will allow it. The addition of a 10% margin on \$1,091,877, ie \$109,188, to \$1,091,877 yields to new sub-total of \$1,201,065.

GST

110 Adding 10%, or \$120,106, for GST to \$1,201,065, yields a total of \$1,321,171.

COMPLETION COSTS

111 Ms Mace and Mr Fleischer assert that after they rebuild the works to the state they should have been in at the time of termination of the contract, they will incur damages in the form of completion costs. I regard this as uncontroversial.

112 The owners' entitlements are governed by clause 44 of the contract. Under this clause it is necessary to identify the reasonable cost of completing the building works as well as fixing any defects and giving the builder a credit in respect of the unpaid balance of the contract price.

113 I now turn to an assessment of the completion costs.

Alucabond cladding supply

114 Cassilis made no specific allowance for this item. Mr Browning clearly considered this to be an omission. I note that Alucabond cladding is dealt with by Cassilis as part of the work of the fix out carpenter. **No separate allowance** will be made for Alucabond cladding here.

Electrical rough in and fit off

- 115 This work had not been performed at the time of termination of the contract, according to Wisecheck⁸. Nonetheless, the work was part of the building contract scope, and damages are to be allowed in respect of the cost of its completion.
- 116 Cassilis allowed \$72,000 for these two items. Mr Browning considered this figure acceptable. Curiously, the builder allowed only \$3,500 for the electrical rough in and \$2,000 for the electrical fit out, a total of \$5,500. To assess the owners' damages at this figure would be to assess damages on a loss of bargain basis. This is not appropriate under clause 44.
- 117 On the basis of Mr Browning's evidence, I accept the Cassilis assessment as reasonable, and allow **\$72,000** exclusive of GST for these items.

Plumbing rough in and fit out

- 118 Cassilis allowed \$63,500 exclusive of GST for these two items. Mr Browning considered this allowance acceptable. Neither the plumbing rough in nor the fit out had been performed at the time of the termination of the contract, and these are completion items. The builder had allowed \$3,000 for plumbing rough in and \$3,000 for plumbing fit out, a total of \$6,000 inclusive of GST. Despite this, I accept the Cassilis estimate and allow **\$62,500** for these two items on a GST exclusive basis.

Insulation and thermal wraps

- 119 Cassilis allowed \$46,000 exclusive of GST. This appears to have been derived from the quotation from Laros. Mr Browning opined that the figure was acceptable. I accept Mr Browning's opinion, and although the builder had allowed only \$5,000 inclusive of GST, I award Ms Mace and Mr Fleischer completion damages of **\$46,000** exclusive of GST on the basis of the Cassilis assessment.

Plaster supply and installation

- 120 Cassilis estimated \$42,750 exclusive of GST for this item. Mr Browning thought this allowance was acceptable. Although the figure is in sharp contrast to the builder's original allowance of \$11,000, I allow damages of **\$42,750**.

Fix out carpenter/materials/Alucabond cladding installation

- 121 Reference to the progress payments schedule breakdown contained in the building contract indicates of the builder allowed \$60,000 inclusive of GST for Alucabond cladding. As the cladding had not been supplied and installed at the time of termination of the building contract, this is one of the completion tasks. Cassilis allowed \$108,500 exclusive of GST for these items. Mr Browning opined that the figure included fitting but not the supply of Alucabond. It is not clear to me why he reached this conclusion.

⁸ Wisecheck report dated 14 June 2016

He referred to a quotation from JM Cladding for the supply and installation of Alucaabond cladding in the sum of \$123,911.15 plus GST. That suggests that Cassilis's allowance may have been conservative, but it does not demonstrate that Cassilis overlooked the supply of Alucabond.

- 122 I adopt the Cassilis assessment, and allow to the owners, completion damages of **\$108,500** exclusive of GST in relation to carpentry fix out and installation of the Alucabond.

Joinery supply and installation, stone bench tops, custom

- 123 Cassilis allowed \$137,100 exclusive of GST for this. Mr Browning recommended adopting individual quotes from the subcontractor Evolve, which totalled \$141,610. Assuming Mr Browning had looked at the same items that Cassilis had costed, his research confirms that the Cassilis assessment is conservative.
- 124 The builder in his breakdown of costs for the building contract had allowed only \$35,000 for the kitchen, laundry and bathrooms. It did not separately breakdown the costs of some of the items quoted for by Evolve Interiors, including a Dekton Hearth, splash backs, bench tops or internal doors. It may well be that these were items that the owners had agreed to supply.
- 125 I assess damages for completion of the joinery only. In this connection I note that the quotation from Involved Interiors joinery on a GST exclusive basis of **\$101,327**. I allow this sum to Ms Mace and Mr Fleischer.

Tiles-labour and materials, internal/external

- 126 Cassilis allowed \$135,500 exclusive of GST for tiles. Mr Browning recommended adopting quotations from three contractors, whose quotations totalled \$155,614. His research indicates that the Cassilis figure is conservative, but I am prepared to accept it. Tiling and waterproofing were part of the original building contract, and although the builder's allowance was remarkably low at \$9,000, Ms Mace and Mr Fleischer will have to incur a cost of at least \$135,500 in order to complete the works. I assess damages at **\$135,500**.

Garage door

- 127 Cassilis allowed \$14,835 exclusive of GST for this item. Mr Browning agreed that this figure was appropriate. The builder had allowed only \$3,000 for this item, on a GST free basis. I allow Ms Mace and Mr Fleischer completion damages of **\$14,835**.

Site clean

- 128 Cassilis allowed \$8,450. Mr Browning noted that this figure allowed for regular site cleaning to remove builder's rubbish and opined that the estimate as acceptable.

129 I note that express exclusions contained in the building contract were skip and tip fees, which were to be borne by Ms Mace and Mr Fleischer. I allow **\$nil** for this item.

Appliance supply

130 Cassilis allowed \$63,250 for appliances. Mr Browning recommended taking individual quotations from specialist suppliers. The builder has allowed \$4,500 only for appliances, which indicates of the equipment to be supplied by the builder was very limited. This is consistent with Ms Mace's evidence that she and Mr Fleischer expected to pay for the cost of fitting out the house.⁹ I find that Ms Mace and Mr Fleischer cannot recover damages for failure to supply and install appliances which the builder was not contracted to supply.

131 In the event, the contract was terminated well before the builder had to supply any appliances, and nothing had been paid for them. I consider the extent of the builder's obligations in respect of appliances was to spend \$4,500. Accordingly, I limit completion damages for appliance supply to \$4,500 inclusive of GST, or **\$4,091**.

Fittings and fixtures

132 Cassilis allowed \$81,750 for fixtures and fittings. Mr Browning assessed this cost at nil, noting that the item had been assigned to trade costs. A review of the progress payments schedule breakdown contained in the building contract indicates that the only fixture identified was sanitary ware, costed at \$6,000. I allow this sum on the GST exclusive basis, namely **\$5,455**.

Light fittings

133 Cassilis allowed \$22,300 for light fittings. Mr Browning allowed nothing, on the basis that this item could be assigned to trade costs. I allow **nothing** on the basis that lighting fittings were not part of the building contract.

Audio Visual

134 Cassilis allowed \$42,350 for this item. Mr Browning suggested that there was a provisional sum for supply and fitting of the system to client specifications. Reference to the building contract indicates that "formal quotes" were attached in respect of provisional sum items. I could find none attached and allow **\$nil** for this item.

Painting

135 Cassilis allowed \$14,950 for painting. However, the painting was expressly excluded from the contract. I allow **nothing** for painting.

⁹ Owners' written submissions dated 8 May 2019, at [161].

External stone walls labour & material

136 Cassilis allowed \$42,600 for stone walls. A stonemason named Josh Brown had quoted slightly less in 2014-15 and Mr Browning recommended an uplift to the stonemason's figure. However, "landscaping & stonewalling" was specifically excluded from the contract, and I allow **\$nil** for this item.

Door furniture

137 Cassilis had allowed \$9,200. Ms Mace and Mr Fleischer had obtained a quotation from Designer Doorware of \$149 and Bellvue Architectural of \$5,113. Mr Browning recommended accepting these quotations, and I accept they are reasonable. However, door furniture does not appear to be part of the builder's contract and accordingly I allow **nothing** for these items.

House clean

138 Cassilis allowed \$5,900 for this item. Mr Browning suggested this price was excessive and recommended an allowance of \$3,500. I agree with Mr Browning on the basis that \$5,900 appears to be a very high price to pay for a post construction house clean. I allow a GST exclusive figure of **\$3,182**.

Summary so far

139 The total damages for completion awarded to this point, exclusive of allowances for travel and accommodation, supervision and overheads, contingency and margin, is **\$596,140**, calculated as follows:

COMPLETION COSTS

Alucabond cladding supply	\$Nil
Electrical rough in and fit off	\$72,000
Plumbing rough in and fit off	\$62,500
Insulation and thermal wraps	\$46,000
Plaster supply and installation	\$,42,750
Fix out carpenter/materials/Alucabond cladding installation	\$108,500
Joinery supply and installation, stone bench tops, customs	\$101,327
Tiles-labour and materials, internal/external	\$135,500
Garage door	\$14,835
Site clean	\$Nil
Appliance supply	\$4,091
Fittings and fixtures	\$5,455
Light fittings	\$Nil
Audio visual	\$Nil
Painting	\$Nil
External stone walls, labours materials	\$Nil
Door furniture	\$Nil
House clean	\$3,182

Total	\$596,140
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Travel/accommodation

140 For the reasons given in connection with this item in the context of rectification works, I allow **nothing** for this claim.

Supervision/overheads

141 For the reasons explained above in connection with demolition and rectification costs, I allow 6% margin for supervision/overheads. Addition of this margin on completion costs of \$596,140, namely \$35,768, yields a sub total of \$631,908.

Contingency

142 For the reasons explained above in relation to the rectification works, there is no justification for making any allowance for contingency on completion works.

Margin

143 However, as with the rectification works, I am prepared to allow a margin for profit of 10% on the completion works. Addition of \$63,191 yields a GST exclusive total of \$695,099.

Summary of completion costs

144 The addition of GST, or \$69,510, yields a grand total of \$764,609.

THE TOTAL OF RECTIFICATION COSTS AND COMPLETION COSTS

145 The total of rectification costs inclusive of GST is \$1,321,171. The total award in relation to completion costs inclusive of GST is \$764,609. The total of rectification and completion costs is accordingly **\$2,085,780**.

THE CONTRACT PRICE

146 Under clause 44.2 of the contract the owners are entitled to deduct that reasonable cost calculated under clause 44.0 from the total of the unpaid balance of the contract price and other amounts payable by the owners under the building contract if the contract had not been terminated. Accordingly, it is necessary to make a determination about the contract price.

147 The contract price agreed between Ms Mace and Mr Fleischer and the builder was \$800,000, as set out at schedule 1 clause 2 of the building contract.

Ms Mace's oral evidence that the contract price had been increased from the stipulated \$800,000 to \$1,200,000.

148 In the owners' final submissions, the Tribunal was reminded that Ms Mace's *viva voce* evidence was that the builder had not included many of

the materials, fixtures and fittings contained in the builder's breakdown of costs. She deposed that the parties agreed that such items would be paid for by her and Mr Fleischer as variations to the contract price. She also deposed that the parties agreed that these additional costs would be approximately \$400,000, resulting in the total costs payable to the builder to be \$1,200,000. In the event, the exact amount paid to various contractors by Ms Mace and Mr Fleischer for works they contend fell within the scope of the contract totalled \$422,042.98. They concede that this arrangement was not documented. They nonetheless, contend that \$1,200,000 should be adopted as the contract price.

- 149 It was surprising that this evidence was given for a number of reasons. First of all, there appears to be no reference to this adjustment to the contract price in the pleadings. Specifically, the builder in its Points of Claim referred to the contract price being \$800,000 and any other amounts owed pursuant to the building contract.¹⁰ Ms Mace and Mr Fleischer did not deny this, but merely did not admit it.¹¹ They did not elaborate on the issue in their Points of Counterclaim.¹²
- 150 Secondly, The Tribunal made orders regarding witness statements on 12 July 2018. They were to be served by 21 December 2018, and witness statements in response were to be filed in the New Year. It was ordered that a party would not be allowed to present any evidence of the hearing which was not contained in the witness statement without justifying the need to do so to the Tribunal. A review of Ms Mace's 105-page witness statement dated 11 February 2019 indicates that at [147] she referred to the total contract price is being \$800,000 including GST. That the contract sum was \$800,000 was confirmed by her evidence at [552- 553] that the owners had paid \$296,025.11 to the builder before the termination of the contract, and the remaining balance under the contract was \$503,974.89.
- 151 On 16 April 2019 Ms Mace filed a witness statement in reply. This made no reference to any adjustment to the contract price.
- 152 Thirdly, I find it highly surprising that Ms Mace and Mr Fleischer contend that an extensively documented major domestic building contract with a stipulated contract price of \$800,000, was amended with the result that the contract price was increased by more than 50% without any documentation. Section 31(1)(j) of the *Domestic Building Contracts Act 1995* requires that a major domestic building contract must state the contract price, except in the case of a cost-plus contract. A major domestic building contract can of course, be varied by the builder and the procedure set out in s 37 of that Act, where the builder wishes to vary the plans and specifications, alternatively under the procedure set out in s 38 where the contract is to be varied by a building owner. No evidence was given by Ms Mace about

¹⁰ Builder's Points of Claim dated 23 December 2016

¹¹ Ms Mace and Mr Fleischer's Points of Defence dated 7 April 2017, paragraph 7

¹² dated 15 August 2018

whether s 37 or s 38 had been complied with. No submissions were made regarding these matters.

- 153 In all these circumstances, I am not prepared to accept that the contract price was adjusted to \$1,200,000. I find that the contract price remained at \$800,000.

Other amounts payable under the building contract by the owners

- 154 The builder gave no evidence and made no submissions about other amounts which might be payable by the owners to it under the building contract. Accordingly, there is no basis to adjust the amount payable to the builder in this respect.

Liquidated Damages

- 155 However, any amount remaining to be paid by the owners to the builder under the building contract would have been subject to reduction in respect of any liquidated damages owed by the builder to the owners. It is relevant to note that in their opening at the hearing, Ms Mace and Mr Fleischer indicated that they were not making a claim for liquidated damages under the contract. There is, accordingly, no adjustment to be made for liquidated damages.

FINAL CALCULATION UNDER THE CLAUSE 44 FORMULA

- 156 Under clause 44.2 of the contract the owners are entitled to deduct that reasonable cost calculated under clause 44.0 from the total of the unpaid balance of the contract price and other amounts payable by the owners under the building contract if the contract had not been terminated.
- 157 For the reasons explained above, the original contract price was \$800,000, and there is no accepted basis to adjust it up or down. Prior to the termination of the contract, the owners had made payments to the builder of \$296,025.11. Ms Mace in her witness statement has, as noted, confirmed the unpaid balance of the contract sum to be \$503,974.89, which I round up to **\$503,975**.
- 158 The total of rectification and completion costs has been found to be \$2,085,780. The difference between the unpaid balance of the contract price and the other amounts payable by the owners under the contract if the contract had not been terminated, and the cost of rectification and completion, is accordingly **\$1,581,805**. I find the builder must pay this sum to Ms Mace and Mr Fleischer.

Interest

- 159 Ms Mace and Mr Fleischer in their final submissions at [169-171] seek damages in the nature of interest on the sum they contend represents the reasonable and necessary cost of rectification and completion of the defective and non-compliant building works performed by the builder, less the balance of the contract price, namely \$2,332,775. They say interest

should be calculated from the date of filing the Points of Counterclaim under s 53 of the *Domestic Building Contracts Act 1995*.

- 160 Putting aside the fact that I reach a different assessment of the reasonable and necessary cost of rectification and completion, I decline to assess interest on this basis because I am not prepared to award interest on the expenditure on rectification and completion which has not yet been incurred by the owners.
- 161 However, I think it is appropriate that an award of damages in the nature of interest should be made on the sum paid by the owners to the builder under the building contract, which I find to be \$296,025.11. This expenditure will be wasted because of the necessity to demolish and rebuild the house. Applying s 53(2)(b)(ii) together with ss 53(3) of the *Domestic Building Contracts Act 1995*, I find that Ms Mace and Mr Fleischer are entitled to an order for damages in the nature of interest on the sum of \$296,025.11, calculated at the interest rate fixed from time to time under s 2 of the *Penalty Interest Rates Act 1983*. I also find that interest will be payable from the date Ms Mace and Mr Fleischer initiated their counterclaim (taken to be the date upon which the relevant fee was received by the Tribunal, namely 7 April 2017) to the date of this decision, 27 November 2019.

Calculation of interest

- 162 Interest on \$296,025.11 at 10% per annum is \$81.1028 per day. There are 965 days between 7 April 2017 and 27 November 2019. The award in respect of damages in the nature of interest is \$78,264.17, which I round to **\$78,264**.

Total award of damages to the owners

- 163 As I have found above that Ms Mace and Mr Fleischer are entitled to damages in the sum of \$1,581,805, and that they are entitled to damages in the nature of interest of \$78,264 I award them total damages of \$1,660,069.

THE BUILDER'S CLAIM FOR APPORTIONMENT AND CONTRIBUTION AGAINST THE CONSULTANTS

- 164 The builder contends in its defence to the owners' counterclaim that the owners' claim is:
- (a) a claim for economic loss or property damage in an action arising from a failure to take reasonable care within the meaning of s 24AF(1) of the *Wrongs Act* and
 - (b) an apportionable claim within the meaning of s 24AE of the *Wrongs Act*.¹³
- 165 The builder further alleges that it and the consultants are concurrent wrongdoers within the meaning of s 24AH of the *Wrongs Act* and that

¹³ Builder's defence to Amended Consolidated Points of Counterclaim filed 30 October 2018, at [18]

pursuant to s 24A(1)(sic)¹⁴ of that Act the builder's liability is limited to an amount reflecting the proportion of the loss and damage claimed by Ms Mace and Mr Fleischer that the Tribunal considers just having regard to the extent of the builder's responsibility for that loss or damage, and judgment must not be given against the Builder for more than that amount in relation to the claim¹⁵.

The warranties contained in ss 8(b), (c) and (f) are absolute

166 The owners contend that three of the warranties implied into the building contract by s8 of the *Domestic Building Contracts Act* are absolute and are not qualified or limited by an obligation to use reasonable care and skill. These warranties are, in brief, the warranties as to:

- suitability of materials (s 8(b));
- compliance with the law (including the BCA) (s 8(c)); and
- fitness for purpose (s 8(f)).

167 In *Owners Corporation No 1 of BS613436T v LU Simon Builders Pty Ltd*¹⁶ (*Lacrosse*) Judge Woodward at [286] accepted a submission that these three warranties are “not qualified or limited to an obligation to use reasonable care and skill”. At [285] he said:

In *Barton v Stiff*¹⁷, Hargrave J (as he then was) confirmed the principle that a builder's liability for design and construction was not merely an obligation to use reasonable care. In particular, the warranty of fitness for purpose was absolute. His Honour added that: “the absolute warranty of fitness for purpose relates to the purpose as properly identified”. That is, the obligation of the builder must be measured by reference to the purpose for which the building was required under the conditions likely to be encountered at the land

168 Applying *Barton v Stiff*, and respectfully adopting Judge Woodward's approach in *Lacrosse*, I accept that the warranties implied by ss 8(b),(c) and (f) are absolute. As they are not subject to an obligation to use reasonable care and skill, it follows that the builder is not entitled to apportionment in respect of these warranties.

The other warranties implied by s8 of the *Domestic Building Contracts Act*

169 The remaining warranties implied by s8 of the *Domestic Building Contracts Act* are that:

- (a) the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;

¹⁴ Clearly, s 24AI was intended.

¹⁵ Builder's defence to amended consolidated points of counterclaim filed 30 October 2018, at [21]

¹⁵ Builder's defence

¹⁶ [2019] VCAT 286 at [285-286]

¹⁷ [2006] VSC 307

(d) the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;

(e) if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed.

170 On the basis of *Lacrosse*, it would seem that these warranties are qualified in the sense that the builder's obligation is limited to an obligation to use reasonable care and skill. Accordingly, liability under each of these warranties can be seen to be theoretically apportionable.

171 However, the builder did not attend at the hearing to give evidence, and nor did the building surveyors, the architect or the engineer. Accordingly, there is no basis upon which the Tribunal can make any finding as to the apportionment of liability as between the builder and any of the consultants. For this reason, I will strike out the builder's defence in so far as the builder seeks apportionment from the building surveyors, the architect and the engineer.

The builder's claim for contribution from the building surveyors, the architect and engineer

172 In its defence to the owner's counterclaim, the builder contends that if the Tribunal determines that the owners' claim is apportionable under s 24AE of the *Wrongs Act*, then the builder is entitled to contribution from each of the consultants under s 23B of that Act.

173 The builder presented no evidence at the hearing regarding its claims for contribution against the building surveyors, the architect and the engineer. Accordingly, these claims for contribution will be dismissed.

Costs and disbursements

174 In their final submissions, Ms Mace and Mr Fleischer seek an order that the builder pay their costs of and associated with their counterclaim, such costs to be taxed in default of agreement on the standard basis in accordance with the County Court Scale of Costs.

175 For the purposes of s 109(3) of the *VCAT Act*, I find that I am satisfied that it is fair to make such an order having regard to the builder's failure to attend at the hearing and present any evidence or make any submissions. This failure enlivened ss 109(3)(c) - which relates to the relative strengths of the claims made by each of the parties- in favour of the owners.

Reimbursement of filing fee

176 Further, as Ms Mace and Mr Fleischer have been substantially successful in their counterclaim, they are entitled under s115B of the *VCAT Act* to an order that they be reimbursed by the builder the filing fee they paid on their counterclaim of \$1,297.80. Ms Mace and Mr Fleischer are also entitled to

be reimbursed the hearing fee they paid on each of the three days of the hearing, a total of \$531.15. The total fees to be reimbursed are \$1,828.95.

**Member
C Edquist**