

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP386/2016

#### CATCHWORDS

*Domestic Building Act 1995* – s.8 – damages for defective workmanship – s.9 – claim by subsequent owner – defective foundation of rear concrete boundary wall – whether knowledge of defect at time of purchase - ongoing subsidence – owner aware of subsidence but not that it would continue to occur — relevance – assessment of damages - whether – demolition and reconstruction reasonable – owners entitled to be put in the same position as if breach had not occurred – cost of rectification – quotation by builder evidence of what the builder would charge – evidence of quantity surveyor preferred

<b>APPLICANTS</b>	Mr Christopher Liszka, Mrs Ania Liszka
<b>RESPONDENT</b>	Mirvac Victoria Pty Ltd (ACN 006 708 363)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	30 – 31 May 2018
<b>DATE OF ORDER</b>	20 July 2018
<b>CITATION</b>	Liszka v Mirvac Victoria Pty Ltd (Building and Property) [2018] VCAT 1106

#### ORDERS

1. Within 30 days the parties must submit proposed orders or alternatively, request that the matter be listed for further hearing to determine what orders should be made in the light of the accompanying reasons.
2. Costs reserved.

#### SENIOR MEMBER R. WALKER

#### APPEARANCES:

For the Applicants	Mr R. Andrew of counsel
For the Respondent	Mr M.F. Sharkey of counsel

## REASONS FOR DECISION

### Background

- 1 The applicants (“the Owners”) are the owners of a house and land in Port Melbourne (“the Property”) which was constructed by the respondent (“the Builder”) between 2004 and 2006 on reclaimed land adjacent to the beach. The house is one of nine adjacent detached houses, all of a similar design and all constructed on reclaimed land.
- 2 The Owners complain that the retaining wall of their garden, where it adjoins the foreshore reserve, has settled into the ground and tilted. This is said to be as a result of an inadequate foundation for the wall and consequently, defective workmanship on the part of the Builder. They claim damages for the cost of rectification or, in the alternative, the reduction in value of the Property as a result of the alleged defect.

### The hearing

- 3 By order made on 14 February 2017 the tribunal directed that the hearing of this proceeding be conducted together with a related proceeding, BP 338/2016 (“the Related Proceeding”), which concerns a very similar claim brought against the Builder by the owner of the property next door. The proceedings were not consolidated and remain separate but there was only one hearing for the two of them and the evidence for one was also evidence for the other.
- 4 In both proceedings, Mr R. Andrew of counsel represented the Owners and Mr M.F. Sharkey of counsel represented the Builder.
- 5 For the purposes of this proceeding, I heard evidence from the first owner, Mr Lyszka and also from Mr Salvatore, a Builder who had prepared a quotation for rectification works.
- 6 Expert evidence was given concurrently by Mr Roland Black, an engineer on behalf of the Owners, together with Mr Bruce Adams, the structural engineer engaged by the Builder. On the cost of rectification, I also heard the evidence of Mr Pitney, a quantity surveyor. Conclaves of experts had been conducted which narrowed some of the issues and, by order of the tribunal, a combined engineering report was prepared by Mr Black on 8 September 2017 together with a scope of works.
- 7 As to the alternate claim for loss of value, valuation evidence was given by Mr Hay on behalf of the Owners and by Mr Bertacco on behalf the Builder.
- 8 In addition, the Builder relied upon a report dated 25 January 2018 by a Dr Hadfield, a geotechnical engineer, but I was told that he was unavailable to attend to give evidence. The relevance of his report is that it was referred to by the engineers.
- 9 The expert evidence was received as evidence in both this and the Related Proceeding.

- 10 On the first day of hearing, I inspected the premises which were the subject of the Related Proceeding in company with the parties and their representatives. At the same time I was also able to observe the condition of the rear wall of the Property about which complaint has been made and also view the exterior of the Property but I was unable to inspect the interior.
- 11 Submissions by Counsel were made the following day.

### **The construction of the walls**

- 12 Not all of the construction drawings have been produced but from those that are in evidence it is clear that, at the time the houses in this development were designed, there was real concern as to the founding capacity of the reclaimed land upon which the Property and the adjoining houses were to be constructed. The soil report of the ground recorded substantial fill and a layer of what is known as Coode Island silt which, according to the expert evidence will settle under load.
- 13 As a result, the engineering design for each of the houses provided for the house and the retaining wall of the related swimming pool to be constructed on deep piles to penetrate the fill and the Coode Island silt and found the construction upon the rock beneath. However, the engineering design required the remainder of the rear wall of the Property to be founded only upon a strip footing. These designs were by the Builder's engineer.

### **The engineering evidence – Mr Black**

- 14 Mr Black said in his report that the relative level of the house and courtyard in each case was approximately 1.8 m higher than the level of the beach, so that the rear retaining wall holds back approximately 1.8 m of material. However Mr Adams said that the retaining walls are retaining 1.5 to 1.75 m of sand fill rather than 1.8 m and that accords with my own observation.
- 15 Access from the courtyard to the beach is by steps that are set into recesses in the wall alignment. The retaining wall is constructed of precast concrete panels 200 mm thick which are mounted as vertical cantilevered retaining walls on a reinforced concrete footing. Mr Black said that the slabs were arranged in separate panels of varying length with the joints between them being sealed with an elastomeric sealant. He said that the stair, gate and wall together form an integrated box structure.
- 16 Glass balustrade screens have been attached by bolts to the inside face of the tops of the wall of the pool and also the retaining wall panels. The panels are approximately 1.5 m long with a 20 mm gap between.
- 17 The swimming pools of both units are, by Mr Black's measurement, 12.5 m long and about 2 m wide. They are adjacent to one another, separated by the boundary between the two properties, and are set into the earth with the tops at courtyard level. He concluded that they are have been formed by creating a cast-in-situ concrete box, using concrete walls and floor.

- 18 Although when viewed from the beach side, the wall in front of the two pools looks much the same as the retaining walls on either side, they are different structures, in that the pool wall is mounted on deep piles founded on rock whereas the other walls are not.
- 19 Photographs in Mr Black's report show that the wall panel immediately to the west of the pool wall had settled by about 45 mm and moved outwards by about 25 mm, causing the glass panels fixed to the top of the retaining wall to move correspondingly down and outwards and the glass panels to move inward towards each other.
- 20 He said that the movement had caused the glass panels to compress against each other which, he was told, had caused one of the panels to shatter in February 2016, the connections holding the glass to the concrete wall to distort and break away and the elastomeric sealant joint between the wall panels to become stressed and tear away. He said that the box comprising the wall and the stairs seems to be moving together as a whole unit and there does not appear to be any sign of internal distress within that box. He said that the problem was only noticeable in the retaining walls behind the Property and the adjoining property in the Related Proceeding, because those properties had swimming pools.
- 21 In a supplementary report he said that the reinforcing bars that have been cast into the strip footing of the retaining walls are susceptible to air and moisture from an adjacent agricultural drain which he said would lead over time to concrete cancer through the corrosion of the bars and a sudden collapse of the wall itself. This point was not developed during the hearing and I am not satisfied that it has been established.
- 22 He said that sensors mounted on the walls in 2016 have shown continuing movement, first outwards and then backwards, and settlement of 2 mm over four months. He said that this was consistent with a drop of 80 mm since construction and would extrapolate to a relative movement of 240 mm over 20 years if the current rate continues. In his later combined report he said that both retaining structures had moved away from their original locations by 24.5 and 5.5 mm in a little over a year. He said the movement has not been linear but is most certainly a continuation of the direction it has been taking since the structures were built.
- 23 He concluded that the retaining wall panels had already settled by about 80 mm relative to adjacent pool structure and he sees no reason why this will not continue and accelerate. He attributed the cause of the continuing settlement to the structures being founded on weak, dubious material subject to compression and settlement. He also said that the wall panels and steps structure were not of an adequate size or shape to resist overturning forces imposed by the material they are supposed to retain. He said that the retaining walls need to be demolished and replaced.

## **The engineering evidence – Mr Adams**

- 24 Mr Adams agreed that the construction of the pool is on piled footings and that the precast panel retaining wall at the end of the pool appears to be tied to the pool shell. He said that this wall does not appear to be settling while the adjacent retaining wall panels and stairs structure, which are founded on a strip footing are settling. However he said that the walls are clearly stable and not collapsing.
- 25 As an indication of what he described as a relatively good performance, he said that the steel gate that closes off the bottom landing has a parallel gap between the gate support structure and the wall on either side. That is supported by the photographs and my own observation. It seems to be common ground that the structure is acting as a unit and is not distorting within itself.
- 26 Mr Adams said that the ground appeared to be stable and well maintained with no signs of local settlement or issues that would indicate poor compaction of the site. He said that the ground that he excavated to expose the footing of the wall was solid.
- 27 He said that the strip footings supporting the retaining walls were relatively lightly loaded and acted in a similar way to raft slabs. He said that there was minimal distortion of the walls except at the junction of the piled and the non-piled structures that is, the intersections between the pool walls and the retaining walls.
- 28 He disputed Mr Black's suggestion that the wall had settled 80 mm and said that his observation was that the differences were 48 mm and 53 mm. He did not directly deal with the suggestion that the movement would continue and accelerate but he said that he considered that the wall was of adequate size to resist the applied forces, that they are structurally adequate and that despite the settlement and rotation he did not agree that they should be demolished and replaced.
- 29 He said that the articulation of the footings between the two walls and a separate footing system was a design decision that was carried out in construction.
- 30 There was an issue between the engineers as to whether the sand and soil adjacent to the strip footing of the retaining wall can provide passive resistance to any movement. Mr Black suggested that it was subject to change by erosion or wave action and so could not be relied upon to retain its position, let alone provide reliable passive resistance for an earth retaining structure. I prefer Mr Adams opinion that, given the distance of the material from the waterline and its level and the presence of infrastructure such as the walkways, bike path and landscaping adjacent to the wall, that there is no indication that the sand is about to wash away.
- 31 Another issue of dispute between the engineers was the function of the levelling pads that were used to level and support each of the precast wall

panels during construction. The drawings contain no information concerning these objects but during the evidence it appeared that they were temporary supports used to hold up the panels and keep them level while the concrete footing was cast around them and below and around the wall panels. Mr Adams considered them unimportant and after considering the role that they played and what each of the experts had to say about them I accept his opinion.

### **Conclusion as to structural adequacy**

- 32 The alleged structural inadequacy of these retaining wall panels concerns their footings and the material upon which those footings are founded. I am not satisfied that they are otherwise structurally unsound but it appears to be common ground that the Coode Island silt and fill will continue to settle under the weight of the retaining walls and that the difference in height between the retaining walls and the swimming pool walls will progressively increase. It was not suggested that there will be any end to this process. Indeed, the evidence is that it will continue. If that is the case, that would extrapolate to a relative movement of 240 mm over 20 years.
- 33 Since the walls of the swimming pools, which are founded upon rock, abut the adjoining retaining wall for each house, and since the adjoining retaining wall panels in each case are founded upon fill and silt, it must have been obvious to the Builder at the time of both design and construction that differential movement between the two was not only possible but inevitable. Indeed, the apparent decision to articulate each joint appears to confirm that this was contemplated, yet no amount of articulation is going to deal adequately with the differences in height and alignment that are going to occur.
- 34 Yet the two walls, as constructed in each case, formed the common support of a rigid glass balustrade that straddled the piled and un-piled sections of wall and were designed to form a continuous wall across the back of the Property where it abuts the foreshore.
- 35 The defect complained of was the failure of the Builder to found the footings for these retaining wall panels on piles that were founded in turn on the rock below.

### **Submissions**

- 36 Mr Andrew said that, knowing the nature of the soil upon which the retaining walls were constructed, the Builder nevertheless built walls on strip footings without piles. He said that, if the walls had been made of sleepers they would not have needed piles but they are not lightweight garden walls but heavy concrete structures. He said that Mr Adams conceded that if they were to be rebuilt today, a building permit would be required. He said that any competent builder would know that you cannot build a heavy structure on this silt without it sinking and by doing so the Builder did not build the structure in a proper and workmanlike manner.

- 37 Mr Sharkey said that the walls were performing as designed and that no differential movement was observed in regard to the other properties. That is so, but that is because those properties do not have swimming pools and so there is no interface between a piled wall and un-piled wall.
- 38 He also submitted that the settling of the wall was apparent when the Property was purchased. He referred to a number of authorities to the effect that, where a property is purchased with full knowledge of defects, the purchaser suffers no loss by reason of the existence of the defect. Two of those cases, namely *Allianz v. Waterbrook* [2009] NSWCA 224 and *De Lutis v. Housing Guarantee Fund Ltd* [2004] VCAT 2544 were insurance claims where the question was whether the purchaser of the house had suffered a loss by reason of the purchase. The issue in the present case is, if the work was not done in a proper and workmanlike manner, what remedy is required in order to put the Owners in the position they would have been in if the breach had not occurred?
- 39 In any case, Mr Andrew submitted that the Owners did not have full knowledge of the defect.

#### **Knowledge of the defect**

- 40 The Owners purchased the Property on 18 April 2015 and took possession on 21 July 2015.
- 41 Prior to purchase, the Property was inspected thoroughly by the first owner, Mr Liszka. He saw that the buildings were substantially new, of concrete construction and appeared to have been well built. The Owners did not obtain a professional person to inspect the Property on their behalf prior to purchase.
- 42 Immediately upon settling the purchase, the Property was leased to tenants. In August 2015 the tenants contacted the Owners' estate agent to say that a glass panel in the balustrade fixed to the top of the retaining wall was bearing on the concrete of the wall and was in danger of shattering. Mr Liszka inspected the retaining wall and found that it was moving most noticeably at the junction with wall enclosing the swimming pool. He said that it was sinking vertically, moving horizontally away from the swimming pool, and the top of the wall was moving away from the house. He said that the movement of the wall relative to the swimming pool was causing the concrete of the wall to contact the balustrade panel.
- 43 During the course of his inspection he found glass shards which he considered indicated that a balustrade panel had shattered previously at that location. On the advice of a landscape engineer he loosened the attachments between the panels and the concrete wall and cut a section of the concrete so that it was not touching the glass. He said that since then, the continuing movement in the wall has resulted in a glass panel again touching the concrete and again coming under significant pressure he said that he is concerned that it is likely to shatter.

- 44 Although Mr Liszka said that his inspection of the Property before purchase was thorough, he said that he did not notice that the wall was moving. It seems obvious from his evidence that the wall had moved sufficiently two years previously to cause the glass balustrade to shatter.
- 45 Under cross-examination, Mr Liszka acknowledged that, if he had looked at the wall or walked down the stairs leading to the foreshore he would have seen the difference in the levels of the swimming pool and the adjoining wall and he acknowledged that was the case. From the photographs and the engineer's evidence I think that the difference in levels must have been obvious at that time.

### **What is the defect?**

- 46 In considering the issue of knowledge of the defect however, I think it is important to examine what the defect is. If the defect is simply the discrepancy in heights between the piled wall and the retaining wall on the strip footing, then that ought to have been obvious to the Owners when they bought the Property. On the other hand if the defect is that the wall has been constructed on an unsound foundation that is sinking and going to continue to sink for an unknown period then that was certainly not obvious.
- 47 Mr Andrew said that the Owners were not suing for misaligned panels but because of the fact that the panels were continuing to move. He said that the deficiency in the foundation material was not observable and I accept that is the case.
- 48 Consequently, I am satisfied that, by constructing the retaining wall on an unsound foundation the Builder is in breach of the terms implied into the building contract by s.8 of the *Domestic Building Contracts Act 1995* and that, by reason of s.9 of that act, the Owners as subsequent owners of the Property are entitled to damages for that breach.

### **Assessment of damages**

- 49 Mr Andrew relied upon the principle of *Belgrove v. Eldridge* (1954) 90 CLR 613 as explained in the later case of *Tabcorp Holdings v. Bowen* [2009] 253 ALR 1. In *Tabcorp*, the High Court said (at p.6):
- “The "ruling principle"... confirmed in this Court on numerous occasions..., with respect to damages at common law for breach of contract is that stated by Parke B in *Robinson v Harman* (1848) 154 ER 363 at 365):
- "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."
- 50 The Court also referred to the following passage from the judgment of Oliver J in *Radford v. De Froberville* [1977] 1 WLR 1262 and (at p. 1270):



"Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. Pacta sunt servanda. If he contracts for the supply of that which he thinks serves his interests – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit."

51 Mr Andrew said that the Owners were entitled to the cost of demolition and reconstruction unless that was found to be an unreasonable course to adopt.

52 Mr Sharkey submitted that, even if the retaining walls are defective, the scope of works proposed by Mr Black is excessive, in that it requires the complete demolition of the walls and stairs and continuous piles of a type used for bridge and major high-rise construction. He said this was excessive for the problem that is said to require remedy and that the proper measure of damages would be diminution in value and there was none.

53 He referred me to the following passage from the judgement of Lord Lloyd of Berwick in the House of Lords case of *Ruxley Electronics and Construction Ltd v. Forsyth* [1996] 1 AC 344 where his Lordship said (at p. 368):

"If reinstatement is not a reasonable way of dealing with the situation, then diminution in value, if any, is the true measure of the plaintiff's loss. If there is no diminution in value, the plaintiff has suffered no loss."

54 Mr Andrew submitted that *Ruxley* was not good law in Australia and had not been followed. It was said by the High Court in *Tabcorp* to be an exceptional case but I do not need to concern myself with its correctness unless I should form the opinion that demolition and reconstruction is an unreasonable course to adopt.

### **Reasonableness**

55 Mr Andrew urged me to take a similar approach to that taken by Robson AJA who gave the leading judgement of the Court of Appeal in *Mettricon Homes Pty Ltd v. Sofitley & anor* [2016] VSCA 60. That case concerned foundation movement in a house that was due to the defective construction of the slab upon it had been constructed. The problem was not simply that the slab had moved and caused consequential damage which could be repaired but also that it was continuing to move and that there was a real risk that unacceptable damage would happen again in the future. The appellant had failed to establish that any lesser remedy than demolition and

reconstruction would adequately address the real risk of future unacceptable damage to the house and that the tribunal had correctly decided that demolition and reconstruction was necessary and reasonable. It appears from reading the judgement that, if the Tribunal had found in that case that movement had stopped then rectification of the resulting damage would have been the appropriate remedy.

- 56 However the engineering evidence in this case is that the movement will continue and further damage will result. Mr Andrew said that, in those circumstances, for the Respondent to avoid the cost of demolition and reconstruction it has to show exceptional circumstances which he said are rare. I do not think that it assists to say that exceptional circumstances are rare. It is a question of reasonableness to be determined on the facts of each case.
- 57 As another example of what is considered to be reasonable, Mr Andrew referred me to the case of *Yates v. Mobile Marine Repairs Pty ltd & anor* [2007] NSWSC 1463. In that case the applicant had a custom-made prestige motor cruiser built for his leisure use, the engine room of which was designed to accommodate engines of a particular design and manufacture. The respondent negligently damaged the engines and was unable to repair them, resulting in the replacement of the engines with those of another manufacturer. As a result of the replacement the engine room had to be reconstructed and its appearance and that of the boat as a whole was adversely affected. The plaintiff was awarded damages for the loss of use of the vessel while the repairs were undertaken which were assessed at the amount he would have received if he had chartered it out, and also the diminution in the value of the boat, due to the fact that its appearance was ruined by the replacement with different engines.
- 58 Mr Andrew submitted that the fact that the Property was built as a prestige house is relevant in terms of the assessment of damages and what is reasonable in the circumstances.
- 59 Mr Sharkey said that it was not established that the retaining wall was at risk of failing and it will continue to perform for the entirety of its design life, despite what he described as the minimal movement observed, even if that movement continues. He said that the Owners had suffered no negative impact on the value of the Property as a result of the condition of the wall panels.
- 60 Since I have found that the settlement is continuing and will continue and having regard to the fact that this is a prestige house and these wall panels were designed to present a uniform appearance with the panel attached to the end of the swimming pool, I do not think that it is unreasonable for the Owners to demand that the retaining wall panels be brought into conformity with the contract that is, be supported on a proper foundation. Otherwise, ongoing repairs will be required into the future as the panels continue to

sink. That burden would not be suffered by the Owners if the breach of contract had not occurred and so it must be compensated.

### **Cost of demolition and reconstruction**

- 61 The scope of the works assessed by Mr Black does not appear to be disputed. The issue was the cost of carrying them out.
- 62 As to the assessment of the cost, I have the evidence of the Builder, Mr Salvatore and the quantity surveyor, Mr Pitney. As I suggested during argument, Mr Salvatore's evidence is the amount for which he is willing to undertake the scope of works prepared by Mr Black, whereas Mr Pitney's assessment, as a quantity surveyor, is what it should reasonably cost the two sets of applicants to have the works carried out for both properties. Mr Salvatore's quote is dated 11 April 2018 and states an estimated price of \$85,210.50 for Part A of the scope of works, which is for site establishment and preliminaries, and \$605,115.10 for Part B, being the demolition and reconstruction.
- 63 There is no breakdown in the document to show how these figures are arrived at but he gave evidence that he obtained quotations from various proposed subcontractors. Although these figures are stated in the quotation as estimates, these are the figures that are claimed by both sets of applicants in the two proceedings to demolish the retaining wall panels for both of the two properties and reconstruct them on a proper foundation and footing.
- 64 Mr Pitney said that his instructions were to review the scope of works prepared by Mr Black and also the quotation by Mr Salvatore and comment on whether the costing provided in the Salvatore quotation was fair and reasonable. He was also asked to provide his opinion as to the cost of carrying out the Black scope of works.
- 65 In arriving at his figures he allowed labour rates of \$60 per hour for a skilled labourer, \$70 an hour for a renderer and painter and \$95 an hour for a plumber and electrician. He adopted a mark-up of 20% on the net cost as being an appropriate allowance for Builder's overheads and profit and an allowance of 5% for contingencies.
- 66 He noted that the scope of works prepared by Mr Black is general in nature and did not provide any design details. He said that in his costing he had included some additional items that are not part of the Black scope of works but that he considered necessary, including waterproofing to the retaining walls, and the provision of home warranty insurance. He also included the authority and building surveyor fees and charges that were not included in Mr Salvatore's figures. Having examined his methodology, I see nothing to criticise in it.
- 67 Mr Pitney costed three options. The first, was the full replacement of the walls including the stairs which he costed at \$357,898.00 plus GST. The second option was the same as the first but contemplated re-using the precast panels. The cost for that was \$336,371.00 plus GST. The final

option was replacing the inner retaining walls only, at a cost of \$254,196 plus GST. He said that included in those figures was an allowance of \$5,000.00 for local authority fees and charges and 5% contingency. Although he said that he considered some aspects of Mr Black's scope of works to be excessive, he nonetheless costed it.

- 68 Mr Andrew submitted that Mr Salvatore's evidence was the best evidence of what the work would cost because it was a quote from the marketplace. He said that it was not suggested to Mr Salvatore that his quotation was inflated. Mr Pitney said in his report that he was not able to comment on the reasonableness of Mr Salvatore's quotation because it was not supported by any detailed cost breakdown.
- 69 Although I accept that Mr Salvatore's quote is from the marketplace, his evidence is only what he would charge and says nothing about what other builders might charge. I think I should prefer the evidence of Mr Pitney, since it is directed to the particular question that I have to answer namely, what should it reasonably cost to put the two sets of applicants in the position they would have been in had the contract in each case been complied with? Of the three options that Mr Pitney has costed, I should adopt the first, because that is what Mr Black has said needs to be done in order to rectify the defect.

#### **The alternate claim of diminution in value**

- 70 Mr Hay said that he had been instructed to assess the loss in market value of each of the two properties that has resulted from the movement of its retaining wall. He concluded in Clause 5.6 of his report:

“Rectification of the movement of the retaining walls between the swimming pool and the southern boundary of the property is considered necessary in order to achieve the maximum sale price should the properties be sold as this type of property would be appealing to a limited, discerning and selective target market. Without rectification it is considered this property would be more difficult to sell with the present defect as discussed later in this report. From the information provided it is advised that the movement in the retaining walls is likely to continue to deteriorate and therefore further detract from the selling appeal as the movement is becoming more visible and evident. These aspects have been taken into consideration in this report.”

- 71 He assessed the probable selling range for each property at between \$8 million and \$10 million and then placed a value on each Property of \$9 million. He said that if they were sold in their current condition with the defective retaining wall evident the selling price would be reduced by between 5% to 10% less than that value. He said in evidence that he was informed the Owners that received an offer in September 2017 for the Property of \$13 million. Since the offer was not accepted and no sale was negotiated, it is impossible to know what to make of that evidence but it

would seem that the state of the retaining wall did not discourage the person who made that offer from offering the Owners considerably more than Mr Hay said the property was worth.

- 72 Mr Hay referred to the quotation by Mr Salvatore but said that since there was an element of risk associated with an unknown, many purchasers will further discount the price they would be prepared to pay. He concluded that the diminution in value was "...within the range of \$450,000 to \$900,000 to each Property". As Mr Sharkey pointed out, that is a very wide margin.
- 73 Mr Sharkey referred me to an earlier County Court proceeding in which Mr Hay's firm was sued for misleading and deceptive conduct in negligently overvaluing a property. Mr Hay provided some explanation of that in the witness box and it was suggested that the decision was overturned on appeal. I do not think that I can draw any conclusions from what happened in another case without full evidence of all the facts and circumstances which I do not have. Further, the mere fact that there has been a negligent valuation of a different property in the past does not mean that this valuation is deficient.
- 74 Mr Bertacco said that he was asked to provide his opinion as to whether there had been any estimated loss in market value of the properties as a result of the alleged movement of the retaining walls and if so, what was his estimated value of the loss.
- 75 He said that properties like these with direct beach access are in very limited supply and are tightly held. He said that the behaviour of potential buyers would vary but they would have two distinct profiles, being a buyer who deducts a notional "make good" allowance from their view of the value to arrive at a net purchase price, and another type of buyer who recognizes the wall movement as a general maintenance matter rather than a structural issue and makes little or no adjustment, cognisant that the opportunity to buy a property like that is very limited. He said that a buyer who made a deduction from the price on account of the wall would be uncompetitive. He said that although the pool of buyers in this price range will be small, so is the supply of comparable property.
- 76 Mr Bertacco criticised Mr Hay's report for a lack of analysis of the comparable sales. He said that three of the four highest magnitude sales referred to by Mr Hay were not relevant or comparable, being "dated" transactions in the Brighton market that has a different buyer profile. He said there was no rationale supporting \$9 million as being a correct level of value. He also said that Mr Hay's reduction in value of 5% to 10% was arbitrary with no basis or foundation the amount selected.
- 77 He provided details of comparable sales, some of which appeared in Mr Hay's report. His discussion of these is more comprehensive than that of Mr Hay. He valued the Property at \$6,750,000 and the house in the Related Proceeding at \$6,650,000.

- 78 As to any diminution in value by reason of the retaining walls, he said that although the existing visual markers of the wall in the balustrade may affect some marketability and saleability, it would not manifest itself into a loss of market value because:
- (a) there is a paucity of comparable property, given the unique characteristics, the direct beach access and outlook plus the private location;
  - (b) in a competitive bidding process there will be buyers who, even with due diligence, could conclude that the retaining wall was as a result of soil movement and not a structural fault;
  - (c) the two engineering reports in evidence disagree and a prospective purchaser might rely upon the recommendation in the Adams report and not make any deduction while those that relied upon the Black report and made a deduction would not succeed in purchasing the Property.
- 79 He also noted that the Owners do not appear to have made any adjustment to the market price at the time they purchased it even though the subsidence of the retaining wall was apparent at that time.
- 80 Mr Hay provided a written response to Mr Bertacco's report which I have also considered.
- 81 Weighing up the valuation evidence I prefer the opinion of Mr Bertacco in regard to the value of the Property. Not only do I prefer his methodology but the figures that he arrived at are more in line with what was actually paid for the Property three years ago and I am concerned about the width of the range of figures given in Mr Hay's report which seem to me to demonstrate a level of uncertainty in his opinion.
- 82 As to the alleged diminution in value by reason of the retaining walls, the figures suggested by Mr Hay again appeared to be somewhat speculative. There does not appear to have been any notional deduction from the price by the Owners when they purchased the Property even though the settlement of the wall was apparent. It is impossible to know what effect the wall would have on competitive bidding for a high-priced Property of a nature that is in very short supply.
- 83 Consequently, apart from saying that it is certainly possible that the value of the Property would be adversely affected I am unable to make any assessment of any diminution in value.
- 84 Damages will therefore be awarded on a rectification basis.

## **Betterment**

- 85 I suggested to Mr Andrew during argument that if the Owners were now to obtain the cost of reconstructing the retaining wall panels on piles, level with the swimming pool walls, there would be an element of betterment. He said that it would be minimal and pointed out that Mr Bettaco said that he thought that a buyer of the house would consider the wall being out of level to be an aesthetic issue only.
- 86 There is a difference between a house with an apparently defective wall, which is what the Owners purchased and paid for, and a house without any apparent defect. That does not apply to the case of Mrs Pahor who does not appear to have purchased a noticeably defective house.
- 87 Despite these misgivings, it appears that the present view of the law is that, if an applicant incidentally derives a greater benefit than mere indemnification through the impossibility of otherwise indemnifying him, the law does not burden him with the cost of the betterment (see *McGregor on Damages* 20<sup>th</sup> edition para 2-007 and the cases there cited).

## **Orders to be made**

1. These reasons are common to both proceedings and the damages have been assessed with respect to both properties. Mr Andrew also said that he wanted the opportunity to elect the basis upon which damages would be claimed once the reasons for decision were known. Given what I have said, I assume the election will be for damages for reinstatement.
2. I will reserve costs and direct the parties to either submit proposed orders or alternatively, request that the matter be listed for further hearing to determine what orders should be made in the light of the foregoing reasons.

**SENIOR MEMBER R. WALKER**