VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1262/2016

CATCHWORDS

Domestic Building Contracts Act 1995; *Victorian Civil and Administrative Tribunal Act 1998* (Vic.); *Insurance Contracts Act 1984* (Cth); Long delays; Application for damages for defective building work; Defects Claim denied; Swim Spa Pool; Dispute as to contracting parties; Dispute whether claim made within policy period; Analysis of Respondent's conduct; multiple bases for claim alleged; Damages awarded within limitation provided under Insurance Policy; Costs awarded under s 109 of the VCAT Act.

APPLICANT	Dr Panagiota Ula Milonas
RESPONDENT	Insurance Australia Limited ABN 11 000 016 722
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Senior Sessional Member
HEARING TYPE	Application
DATE OF HEARING	8, 9 and 10 November 2017; 18, 19 and 20 December 2017; 18, 19 and 20 March 2019; 11 April 2019; and 13 September 2019
WRITTEN SUBMISSIONS	Respondent's Outline of Submissions dated January 2018; Applicant's Submission dated 26 June 2019; Respondent's Submissions in Response dated 26 July 2019; and Applicant's Submission in Reply dated 26 August 2019
DATE OF ORDER	8 January 2020
CITATION	Milonas v Insurance Australia Limited (Building and Property) [2020] VCAT 26

ORDERS

1 Pursuant to s 60(1) of the *Domestic Building Contracts Act 1995*, the previous decision of the Respondent denying the Applicant's claim in respect of building defects is annulled.

2 Pursuant to ss 53(2)(b)(ii) and 59A of the *Domestic Building Contracts Act 1995*, the Respondent pay the Applicant, by way of damages on account of

defective building work, the sum of $200,000 plus interest pursuant to statute calculated from 18 May 2017 to date of payment.

3 The Respondent to pay the Applicant's costs of the proceeding from 21 December 2017 to date, such costs to be assessed by the Costs Court, in default of agreement, on the relevant County Court Scale applicable at the time when the costs were incurred and in each case on a solicitor-client basis.

Judge Jenkins
Senior Sessional
Member

APPEARANCES:

For Applicant	Mr P Marzella of Counsel
For Respondent	Mr S. Stuckey of Counsel

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REASONS

NATURE OF APPLICATION

1 This application is made by the Applicant (as a building owner) against the Respondent insurer in relation to an in-ground reinforced concrete swim spa pool and associated works (**Pool**) at her property at Unit 1, 56 Marine Parade, Elwood, Victoria (**Property**). The builder was Paramount Building Solutions Pty Ltd trading as Paradise Pools (**Paramount**). It left the Pool incomplete and with structural defects.

BACKGROUND

2 On 1 May 2016, the Applicant filed an application in the Tribunal against the Respondent claiming $42,906 compensation to complete the Pool.

3 In May 2017, the Applicant filed Particulars of Loss and Damage which listed specific building defects, including 'pool measurements incorrect'.

4 At the commencement of the Hearing, it became clear that the Applicant sought to allege defective building work and claim for a complete demolition and reconstruction of the Pool. In particular, the Applicant claims that the work performed or purported to be performed by Paramount is defective and constitutes a breach of the warranties implied into a domestic building contract by s 8 of the *Domestic Building Contracts Act 1995* (**DBC Act**).

5 The Respondent rejected the Applicant's initial claim made in 2014. At the commencement of the Hearing, the Respondent accepted the Applicant's claim in respect of incomplete works.[1] However, it refused to indemnify the Applicant in respect of defects, including breaches of warranty.

6 The Insurance Policy issued by the Respondent limits the amount of compensation available as follows:

a. The cost of the non-completion of building works is limited to 20% of the contract price; and

b. Compensation for all claims, including reasonable legal costs and expenses, is limited to $200,000.

7 The Hearing fell into two parts. The initial Hearing lasted six days and the Applicant appeared self-represented. The Applicant called one witness, namely John Wanet. She also gave evidence and was extensively cross-examined. The Respondent called six witnesses, namely building experts, Mr Alan Richardson and Mr Ian McNees; as well as Mr Michael Doukas; Mr Michael Meehan; Mr Bradley Meehan; and Mr Hugh Blethyn.

8 Notably, certain witnesses who could have been expected to confirm evidence given by a party were not called by either. In particular:

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[1] Paragraphs 55 and 79 of the Respondent's submissions, confirmed at the Hearing, Transcript (**T**) 168 lines 17-20.

a. Aaron Wyke of Construction Facilities Pty Ltd (**Construction Facilities**);

b. Gary Russel, John Buff and Frank Guppy of Paramount;

c. Ken Barnett of the Respondent; and

d. Alan Lorenzini and Sarah Haywood of Lorenzini Group.

9 At what should have been the conclusion of the Hearing on 20 December 2017, I indicated my concern that certain evidence, which may have been critical to the way in which the Applicant purported to put her claim, had not been addressed. Accordingly, I extended the significant indulgence to the Applicant to consider whether she wished to obtain further expert evidence. I also strongly encouraged her to obtain legal representation. The Applicant welcomed both opportunities which, after further delays for a variety of reasons, effectively led to a second Hearing which lasted a further five days. The Respondent cooperated in the second Hearing by obtaining further expert evidence. The Applicant called two expert witnesses, namely Mr Douglas Turnbull and Mr Branko Mladichek; and the Respondent called two expert witness, namely Mr Werner Pirella and Mr Alan Richardson.

10 In the second Hearing, further documents, not previously produced, were discovered and further evidence was given which had not been given in the first Hearing.

11 In consequence, in addition to competing legal contentions, the Tribunal is faced with conflicting evidence relating to:

a. The timing and nature of contractual relations between the Applicant and certain parties;

b. The timing and nature of the claims made by the Applicant against the Respondent; and

c. Evidence of various experts as well as the weight which can be given to certain expert evidence.

12 I am grateful for the detailed written submissions of Counsel on behalf of each party and the final oral submissions. Where appropriate I have adopted parts of those submissions. I propose to set out the bases of the Applicant's claims and then summarise relevant background before determining certain preliminary issues.

BASES OF CLAIMS AND ORDERS SOUGHT

13 The Applicant, in reliance upon the Tribunal's jurisdiction under ss 53, 59A, 60 and 61 of the DBC Act, seeks orders:[2]

a. Reversing the Respondent's decision to refuse indemnity of the Applicant's claim for defects and breach of warranties; and

b. Resolving the dispute, in the manner outlined below.

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2 Materials Folder Tab 1.

14 In particular, the Applicant seeks orders pursuant to s 53(2)(b)(ii) of the DBC Act,[3] that the Respondent pay damages to her for the cost of demolishing, removing and reconstructing the Pool and associated works.

15 Section 59A of the DBC Act gives the Tribunal jurisdiction to hear and determine any dispute concerning an insurance claim for domestic building work or an insurer's decision on such a claim.[4] The Tribunal may make any order it considers fair to resolve a dispute referred to it under s 59A(1).[5]

16 The Applicant relies upon her application to the Tribunal, in which she contests the decision of the Insurer, to invoke the Tribunal's jurisdiction to resolve it under s 59A.[6]

17 Section 60 of the DBC Act relevantly provides that:

> (1) VCAT may review any decision of an insurer with respect to anything arising from any required insurance under the **Building Act 1993** that a builder is covered by in relation to domestic building work. (emphasis added)
>
> …
>
> (3) After conducting a review, VCAT may confirm, annul, vary or reverse the decision and may make any order necessary to give effect to its decision.

18 Accordingly, the jurisdiction of the Tribunal under ss 59A and 60(1) requires the making of an insurance claim and a decision by the insurer in respect of that claim.

19 The Respondent initially objected to the effect that the Tribunal's jurisdiction to hear a claim in respect of defects and breach of warranties had not been invoked. However, on 8 November 2017 the Respondent, through its Counsel, advised the Tribunal that it:

> is prepared to proceed with this hearing as though a claim in respect of defects had been made and declined by the insurer, so that there can be agitation of that issue in this proceeding.[7]

20 However, I acknowledge that this concession by the Respondent is not an admission as to the Applicant's right to make such claim, but merely a preparedness to have such asserted claim ventilated.

21 The Applicant further relies upon the circumstance that more than one decision may be made the subject of an application to the Tribunal.[8]

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3 Materials Folder Tab 1.
4 DBC Act s 59A(1).
5 DBC Act s 59A(2).
6 *Great Lakes Reinsurance (UK) Plc v Branicki & Ors (Domestic Building)* [2009] VCAT 906 (29 May 2009) Senior Member Levine [21] [Materials Folder Tab 2].
7 T35 lines 37-40.
8 *Gendala v AAK Construction Group Pty Ltd* [2004] VCAT 1042 (24 May 2004) [Materials Folder Tab 3] per Deputy President Aird at [5].

22 If, and to the extent that it is necessary to do so, the Applicant also makes this claim pursuant to s 48 of the *Insurance Contracts Act 1984 (Cth)*[9] as a third-party beneficiary.

23 The Applicant also seeks further orders in respect of the following additional claims:

a. The Applicant claims that the Respondent has made misleading and deceptive representations to her regarding the Insurance Policy which the Applicant has relied upon and because of which she has suffered loss and damage;

b. The Applicant claims general damages, including exemplary damages, for the emotional and financial stress and anguish, loss of amenity and inconvenience she has endured as a result of this ordeal; and

c. The Applicant claims interest pursuant to statute and costs.

THE APPLICANT'S CREDIT

24 The credit of the Applicant, as an honest and/or reliable witness, has been a major focus of the Respondent. It is appropriate to address this issue at the outset.

25 The Applicant is clearly an intelligent and accomplished professional. She presented in a respectful and personable manner throughout the Hearing which appeared to underlie an earnest endeavour to assist the Tribunal. At the same time, she could be frustrating when giving evidence and under cross-examination. She also clearly struggled with a number of matters. In particular, whilst self-represented, she appeared not to fully appreciate:

a. The need to organize the volume of paperwork in a logical sequence;

b. The relevance or lack of relevance of certain evidence;

c. Whether certain witnesses might have assisted her case; and

d. Certain legal objections being raised by the Respondent.

26 In the process of giving evidence and under cross-examination, evidence was given of matters not previously raised or documents not previously produced. Furthermore, when giving evidence under cross-examination, the Applicant was inclined to give long, sometimes rambling answers, which did not directly address the question asked, until pressed. In some instances, she purported to rely upon documents which she did not produce or conversations with parties whom she did not call. In addition, her evidence ranged from precise and detailed accounts to vague and confused accounts. However, in making these observations, I do not suggest that the Applicant has been dishonest.

27 The Applicant was cross-examined extensively in relation to two matters which I do not propose to deal with in any detail:

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9 Materials Folder Tab 4.

a. First, her medical practice. Although the Applicant is not currently practising as a general practitioner, whilst in practice, she did confess to maintaining minimal clinical notes but nevertheless remembering relevant details about her patients for years into the future. This tendency for self-reliance was apparently also applied to her business dealings; and

b. Secondly, in relation to her role in property development with her brother, the Respondent's Counsel sought to establish that the Applicant and her brother were in the business of property development and the Applicant was not in fact an owner builder. I am satisfied that, at least in relation to her current residence and the associated Pool, the Applicant was an owner builder at all relevant times.

28 Taking the Applicant's evidence as a whole, I am left with concerns as to the Applicant's reliability, particularly where her oral evidence conflicts with documentary evidence. I will address these concerns in more detail shortly.

PRELIMINARY FINDINGS

29 The following is a summary of the key findings, reasons for which are set out below.

30 The contracting parties for the construction of the Pool were Construction Facilities and Paramount pursuant to an HIA contract dated 17 October 2006.

31 The engineering design and specification for the Pool to be built by Paramount were those prepared by Thomas Chapman, which shows the dimensions of the Pool as being 4,300mm in length and 2,400mm in width.

32 The contract was terminated no later than April 2012.

33 There were defects in the construction of the Pool including structural defects.

34 There was a valid claim by the Applicant for defects within the Policy Period.

35 There is evidence of unconscionable conduct by the Respondent in dealing with the Applicant's initial claim.

36 The Applicant is entitled to compensation for the cost of demolition and construction of the Pool, limited to $200,000 provided in the Insurance Policy.

37 The Applicant is entitled to costs of the proceeding which costs are not limited by the terms of the Insurance Policy.

EVIDENCE AND ANALYSIS

38 Since 21 April 2006, the Applicant has been the registered owner of the Property. The Pool is located on the Property.

39 Bread and Butter Investments Pty Ltd is the registered proprietor of Units 2 and 3, 56 Marine Parade Elwood, Victoria. The Applicant is the sole director and shareholder of that company.[10]

40 Prior to the circumstances pertinent to the construction of the Pool, the Applicant had been engaged in various building projects, initially in conjunction with her brother. For most of this time, she was also engaged full time in a busy medical practice as a private general practitioner.

41 The Applicant gave extensive evidence of peripheral problems which sometimes seriously affected her capacity to deal with her building projects, in a timely manner and maintain detailed record keeping. These problems included: a falling out with her brother; serious illnesses of her sister and parents; and major disruption to her medical practice caused by flood damage.

The Insurance Policy

42 On 20 October 2006, Lumley General Insurance Limited (**Lumley**) issued a Certificate of Insurance number MEBW-0046-6190 (**Certificate of Insurance**) to Paramount Building Solutions Pty Ltd trading as Paradise Pools (**Paramount**) in respect of the construction of the Pool by Paramount. It also issued a Policy wording (**Policy**).[11]

43 On 1 August 2017, Lumley, then called WFI Insurance Limited, transferred its insurance business to the Respondent, Insurance Australia Limited, with the effect that the Respondent is now liable under and in relation to the Policy as if it were WFI Insurance Limited. Accordingly, references to the Respondent include references to Lumley where the context requires.

44 The Certificate of Insurance refers to the Ministerial Order made under s 135(1) of the *Building Act 1993* on 23 May 2003,[12] with effect from 1 July 2003.[13]

The Insurance Cover

45 The Applicant now claims indemnity for loss or damage resulting from all or any of the events in clause 1 (on page 2) of the Policy.

46 As the owner for the time being of the Property, where the building work for the Pool was carried out, the cover under Clause 1 of the Policy is extended to the Applicant:[14]

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10 An ASIC search of that company is at Tab 1 of the Applicant's further witness statement (exhibit T).

11 A copy of the Certificate of Insurance and Policy is part of exhibit R.

12 Materials Folder Tab 5.

13 Subsequently amended by Ministerial Order on 22 May 2014 with effect from 1 July 2014.

The cover in the policy extends:

(a) to each person who becomes entitled to the benefit of the warranties referred to in section 8 of the Domestic Building Contracts Act 1995;

(b) to the owner for the time being of the building or land in respect of which the work is or was being carried out.

Pool Contract

47 A critical issue in this case is whether the Applicant is now entitled to make her claim for the cost of demolition and reconstruction of the Pool, predicated upon a claim for alleged substantial defects as distinct from a claim for completion. Accordingly, evidence has focused upon the timing of contract documentation and parties to such documentation; the direct involvement of the Applicant in giving instructions to various parties; the timing of cessation of building work and/or termination of contractual relations; and the timing and nature of the initial and subsequent complaints made by the Applicant to the Respondent and other parties. Regrettably, as already indicated, there has been conflict in the oral evidence given and inconsistencies in the documentation produced.

48 The Applicant contends that she contracted with Paramount directly for the construction of the Pool and that such contract was not terminated until an order was made for Paramount to be wound up, namely 1 July 2013.

49 The Respondent contends that the relevant Pool contract was between Construction Facilities and Paramount and that such contract was terminated by November 2008, when the Applicant entered into a new contract with another builder;[15] or alternatively, at the latest by February 2011, by which time the Pool contract was abandoned.

50 The Respondent acknowledges that although it contends that the Applicant is not a party to the contract between Paramount and Construction Facilities, by operation of s 9 of the DBC Act she is entitled to the benefit of those warranties that were imported into that contract for the benefit of Construction Facilities.

51 It is not in dispute that the work that Paramount agreed to perform in respect of the Pool was "*domestic building work*" as defined in s 3 of the DBC Act.

52 It is appropriate to set out in some detail the chronology of events relating to the Pool contract.

53 On 31 August 2006, Aaron Wyka of Construction Facilities emailed to Lorenzini Group a 'Scope of Works' for 56 Marine Parade, Elwood.[16] Item 7 of the 'Scope of Works' states that:

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14 Page 3 of the Policy.
15 Contract dated 21 November 2008 with Essential Construction Services Pty Ltd.
16 Exhibit 2.

The Builder is to undertake the following-

…

g. All external paving and landscaping and to obtain a separate building permit for the pool.

h. The supply and installation of the plunge pool and associated landscaping.

54 On 1 September 2006, Lorenzini Group issued a building permit to the Applicant and her company for building work comprising additions to an existing building and construction of two units at 56 Marine Parade, Elwood. This permit expressly excludes the construction of the Pool.[17]

55 On 24 September 2006, the Applicant contends[18] that she signed, by way of acceptance, a quotation addressed to her[19] for work to be performed by Paramount (**Quotation**). It was presented to her at a meeting she had with Gary Russell, a representative of Paramount, at the Property together with a drawing of a water feature drawn by Gary Russell.[20] She also states that at the same meeting she paid an initial 5% deposit. The Applicant could not produce the original signed Quotation or evidence of such payment.

56 The Respondent relies upon the copy of the Quotation which is addressed to Construction Facilities.[21]

57 The Quotation also specifies:

a. The dimensions of the Pool as 'Pool (approx. measurements) 4.5m x 2.3m depth 1.1m to 1.5m';

b. Paramount to obtain 'Insurance, Building permits, Plans and Computations, Public Liability and guaranteed completion Insurance';

c. Paramount to arrange for the 'Plans and Computations' to be prepared; and for the Building Permit to be obtained for the Pool. [22]

58 Thomas Chapman prepared and signed plans and computations for the Pool dated 14 October 2006, which included a swimming pool plan, a swimming pool site plan, swimming pool details, a design including computations for a reinforced concrete swimming pool, skimmer box detail and general specifications (the **Chapman Plans**). It consists of seven pages including a cover sheet 'Proposed Concrete Swimming Pool'. His Certificate of Compliance Design bears the same date.[23]

59 The Chapman Plans show the dimensions of the Pool as 4,300mm in length and 2,400mm in width.

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17 Applicant's document No. 4. This permit was issued for completion of works commenced under a previous permit, now expired [Permit Condition 2].
18 Paragraph 3 of the Applicant's further witness statement.
19 T300 line 46-T301 line 2; T379 lines 10-12.
20 A copy of the water feature is the first page of exhibit AA.
21 Appendix C to Mr Preller's supplementary report dated 5 April 2019 (Exhibit 16).
22 This was confirmed in evidence by Mr John Wanet, T568 lines 44-47.
23 Exhibit 11.

60 On 17 October 2006, Construction Facilities 'as Owner' and Paradise Pools 'as Contractor' entered into an HIA contract to construct a 'Steel Reinforced Concrete Swim Spa' at 56 Marine Parade, Elwood. This contract nominated: Lumley as the warranty insurer for Paramount; and 84 calendar days as the time for completion.[24]

61 In my view, there are unanswered questions as to the legal capacity of the persons signing the HIA contract to bind the party on whose behalf they purported to represent. No satisfactory evidence was given in this regard. I note for instance that Gary Russell appears to have witnessed the signature of the person (unidentified) signing on behalf of Construction Facilities; and has also signed on behalf of Paramount, although he was never a Director of Paramount. I note also that Gary Russell's name and signature appear on the Quotation. Furthermore, John Wanet is named in the HIA contract as the 'Registered Building Practitioner' for Paramount, although he was not appointed a Director of Paramount until 10 June 2007.[25]

62 As at 17 October 2006, Paramount's sole director and secretary was John Buff.[26] Neither John Buff nor Gary Russell were called as witnesses.

63 On 20 October 2006, the Respondent issued a Certificate of Home Warranty Insurance in respect of the construction of the 'Reinforced Concrete Pool' which is expressed to be carried out by 'Paramount Building Solutions Pty Ltd trading as Paradise Pools' for 'Construction Facilities Pty Ltd';[27]

64 On 3 November 2006, a Building Permit No. BS-1068/2007000136/0 (**Building Permit**) for the Pool was issued by Marie Walker, then a private building surveyor.[28]

65 The Building Permit refers to the Applicant as 'Owner'; and Construction Facilities P/L as 'Agent'. Attached are the Chapman Plans. The site plan is stamped 'Berwick Building Permits Permit No. 07/0136 Approved'. The pool plan is also stamped with an endorsement 'Pool Safety Fencing in accordance with AS 1926.1 and BCA 3.9.3 are required to be installed prior to filling the pool (see attached specification)'.

66 The Building Permit states that a 'Certificate of Final Inspection is required before use or occupation'; and prescribes the mandatory inspection requirements as:

> Steel Reinforcement
>
> Inspection for Final.

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24 Exhibit 3.
25 Ibid.
26 Exhibit T; Tab 28 to the Applicant's further witness statement.
27 Exhibit 11.
28 A copy of the Building Permit and the stamp approved documents is part of Exhibit 11. A copy of the covering letter dated 5 May 2010 from Berwick Building Permits is part of Exhibit 4.

67 In regard to any change to the dimensions on the stamped approved plans, the Building Permit states:

> Note: No alteration to or variation from the stamped Plans and Specifications may be made without written consent of the Building Surveyor.

68 In regard to payment for the building work performed by Paramount:

a. Invoices appear to have been issued by Paramount and addressed to Construction Facilities on 28 November 2006[29] and on two further undated occasions;[30] and

b. Details of the charges issued by Construction Facilities against the Applicant for the amounts being charged to it by Paramount.[31]

69 The Applicant's evidence relating to the effect of her signing the Quotation is not consistent with the following:

a. No documentary evidence was produced to support the alleged payment of the deposit upon signing of the Quotation. In particular, the Applicant did not produce an invoice for the initial deposit or evidence of her payment; and

b. To the extent that there appeared to have been a double payment for the deposit by the Applicant, a credit appears to have been given as between Paramount and Construction Facilities, consistent with a contract between those two parties.[32]

70 However, the import and effect of the HIA contract is not self-evident, without regard to other extraneous evidence. I am satisfied that the Applicant's evidence:

a. is consistent with her approving the Quotation and the engagement of Paramount to build the Pool;

b. is consistent with a contract between Paramount and Construction Facilities, for the purpose of Construction Facilities coordinating building work on site;

c. confirms that there was no other written contract between the Applicant and Paramount for the construction of the Pool;

d. confirms the performance of work by Paramount occurring substantially by December 2006 and that she had not seen Paramount on site after April 2007; and

e. supports her ongoing involvement with Paramount both during its construction and beyond, in an attempt to enforce its contractual obligations, that is, the Applicant never saw the enforcement of

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29 Respondent's documents page R37.
30 Respondent's documents pages R38 and R39.
31 Respondent's documents pages R31, R32, R33, R34, R35 and R36.
32 Exhibit R32 indicates that Construction Facilities allowed a credit of 10% deposit in favour of the Applicant.

Paramount's contractual obligations as a matter only for Construction Facilities.

71 Accordingly, for further reasons set out below, I am persuaded that the role of Construction Facilities under the (HIA) Pool contract was limited to the coordination of building works on site and that otherwise it effectively acted as the Applicant's agent.

72 I am not satisfied that any of the matters raised by the Applicant contradict the HIA contract per se or at the very least the intention of the parties, which appear to that contract, to enter into contractual relations in relation to the construction of the Pool. In particular:

a. The Applicant disputes that the HIA contract is the relevant Pool contract. The Applicant remained adamant in cross-examination that she, not Construction Facilities, entered into an agreement with Paramount and that she had not seen the HIA contract before it was presented to her in cross-examination;[33]

b. The Applicant gave evidence that her contractual arrangements with Construction Facilities in respect of the Property was limited to coordinating its work with Paramount's work during the construction of the Pool. As indicated above, I am satisfied that the extraneous evidence supports this contention:[34]

> They were only to get 10 per cent of the building works that required their assistance and supervision at the boundaries because these people were doing – well, I've since realised that they were actually doing the footings of the front and boundary fence which abuts the common ground. And Construction Facilities were doing the fence and these people were – were taking the pool up to the boundary where they needed to know her (sic) – coordinate trades in terms of putting the gasworks to the common services area so they wouldn't be in the way.

c. The Applicant contends that her signing of the Quotation and payment of the initial 5% deposit on 24 September 2006 effectively amounted to part performance of the Pool contract prior to the date of the HIA contract, namely 17 October 2006.[35] The date of the HIA contract is after the date on which Thomas Chapman prepared the Chapman Plans pursuant to the Quotation, namely 14 October 2006. In my view, neither of these contentions contradicts or is inconsistent with the existence of the HIA contact;

d. John Wanet, who was engaged by Paramount to oversee the construction of the Pool to be built by Paramount, stated in evidence

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33 T303 line 28; T304 lines 30-39; T380 lines 9-20.
34 T250 lines 4-10.
35 T252 lines 34-39.

that he was not aware of an arrangement between Paramount and Construction Facilities, referred to in the Certificate of Insurance:[36]

> Just prior to that one day, there is a certificate of insurance that was issued to Paramount, citing Paramount as the builder and another company to which they have a contract between Paramount and another company that have engaged Paramount to construct a pool. Are you aware of that arrangement?---No. No.

e. Mr Wanet also said that his contact was only with "Paradise Pools" and he received his instructions from "John Buff"[37] and "Paradise Pools".[38] He made no mention of Construction Facilities.

73 On balance, I am satisfied that the HIA contract is the relevant Pool contract. Furthermore, I am satisfied, by reason of the nature and extent of the Applicant's involvement prior to the date of such contract and confirmed by her actions subsequently, that Construction Facilities entered into the HIA contract subject to the direction of the Applicant.

74 In relation to the Chapman Plans, the Respondent contends (in its submission) that because they are not attached to the HIA contract the Tribunal cannot be satisfied that the contract in fact refers to the documents prepared by Thomas Chapman which nominate the dimensions of the pool as being 4,300mm in length and 2,400mm in width.[39]

75 In my view, the Respondent's submission on this point is untenable.

76 The Applicant contends that if (contrary to her submission) the relevant contract for the Pool is the HIA contract (rather than the Quotation signed by the Applicant), the documents referred to in the Particulars of Contract opposite "building works" are those which form part of the Building Permit and are stamped approved by the Building Surveyor. For the reasons further outlined in the Applicant's submissions, I agree.

77 The only documents produced in this case which correspond in description to those in the Particulars of Contract to the HIA contract are the Chapman Plans. Furthermore, no other engineering design, plans or specifications prepared by Thomas Chapman or anyone else have been presented to the Tribunal.

78 If it is correct that the documents were neither annexed nor initialled they were, nonetheless, specifically and effectively identified in the HIA contract so as to bring about their incorporation by reference.

79 I further agree with Applicant's Counsel that neither physical attachment nor specific language is necessary to incorporate a document by reference to make them a part of the HIA contract. Ultimately it is a question of

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36 T565 lines 4-7.
37 T565 lines 24-26.
38 T581 line 26.
39 Respondent's submission [43], [48].

construction, examining the contract document objectively and not subjectively to ascertain the true intent of the parties.[40]

80 Furthermore, I note that in the HIA contract:

a. The specification and plans are expressed to have been "prepared and supplied";

b. The "7 sheets in the Engineer's Design/s" are expressed to have been prepared … by Thomas D Chapman" and can sensibly be viewed as being a reference to the following seven pages in exhibit 11:

"SWIMMING POOL SITE PLAN" – 1 page (corresponds to R13 in the Respondent's Tribunal Book)

"POOL PLAN" – 1 page (corresponds to R14 in the Respondent's Tribunal Book)

"SWIMMING POOL DETAILS" – 1 page (corresponds to R15 in the Respondent's Tribunal Book)

"SKIMMER BOX DETAIL" – 1 page (corresponds to R16 in the Respondent's Tribunal Book)

"DESIGN FOR REINFORCED CONCRETE SWIM POOL" – 2 pages (corresponds to R17 and R18 in the Respondent's Tribunal Book)

"AS 1926-1993 Construction Requirements for Fences and Gates Summary of Provisions" – 1 page (corresponds to R19 in the Respondent's Tribunal Book).

81 Accordingly, I am satisfied that the reference to the documents in the Particulars of Contract included the Building Permit drawings and therefore a reference to the Chapman Plans which shows the dimensions of the Pool as being 4,300mm in length and 2,400mm in width and with a seat specified to be 400mm wide and 450mm deep. Both the Building Permit and Engineer's Design documents were in existence and clearly identified and answer the description given in the HIA contract. There is no textual consideration which would prevent the incorporation.

82 I accept that on either version of what the Applicant and the Respondent contend is the relevant contract for the purposes of the Policy, the engineering design and specification for the Pool to be built by Paramount (namely the Chapman Plans) were exactly the same.

Did Paramount perform defective building work?

83 In my view, the building work that Paramount carried out or purported to carry out is 'defective' within the meaning of the Policy.

84 The Policy provides in the definition section, the following:[41]

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[40] The principle was conveniently described by Pembroke J in *Charltons CJC Pty Ltd v Fitzgerald* [2013] NSWSC 350 (24 April 2013) [Materials Folder Tab 8].

Defective in relation to domestic building work includes:

a) a breach of [sic] any warranty listed in section 8 of the Domestic Building Contracts Act 1995;

b) a failure to maintain a standard or quality of building work specified in the relevant contract.

85 The s 8 warranties referred to include a warranty:

a) 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.

Did the Pool dimensions conform with Chapman Plans?

86 I am satisfied that the evidence clearly establishes that the dimensions of the Pool as constructed do not conform to the dimensions of the Pool in the Pool plan prepared by Thomas Chapman (part of Exhibit 11), namely 4,300mm long by 2,400mm wide.

87 The Respondent's building expert, Mr Alan Richardson, states in his report[42] that the length of the Pool is approximately 3,700m (instead of 4,300mm) and the width is 2,340mm (instead of 2,400mm).

88 The Applicant's building expert, Mr Branko Mladichek, agrees with Mr Richardson.[43]

89 Both Mr Mladichek (page 5) and Mr Richardson (pages 8-10) state that the Pool length and width exceed the permitted tolerances and therefore constitute a defect.

90 Both Mr Mladichek (page 9) and Mr Richardson (page 9) are of the opinion that in order to rectify the undersized construction, the reinforced concrete structure would need to be completely demolished, removed and replaced.

91 The discrepancy in dimensions is properly characterised as a defect in a structural element of the Pool. However, the deficiency in the Pool dimensions carry a more important consequence. This was not merely a plunge pool but was always designed and intended to operate as a Spa Pool. Compliance with the measurements provided in the Chapman Plans was critical. The discrepancy in the measurements, as built, has rendered the Pool critically deficient and unable to perform its primary function. The uncontested evidence of the Respondent's expert attests to this consequence. In my view, this is a matter which the Respondent has consistently ignored or failed to acknowledge in a timely manner. I will return to this point below.

92 The Pool is a "*building*" as defined in s 3 of the DBC Act.[44]

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41 Section F Definitions.
42 Dated 28 June 2017, Exhibit 8 page 8.
43 In his report dated 13 July 2018, Exhibit P page 5.

Was there an authorised or permitted change to the Pool dimensions?

93 In my view, the Respondent's contention in its submissions (paragraph 48) that the "*dimensions had changed prior to construction commencing*" is untenable.

94 The Applicant was emphatic that she had no knowledge of, did not authorise or otherwise consent to, any change to the dimensions of the Pool either prior to or during construction.[45] I accept that the Applicant's evidence is consistent with the absence of:

a. any amended specifications, plan or engineering drawing in respect of the Pool dimensions;

b. any notice of variation given by or to Paramount pursuant to s 37 of the DBC Act;[46]

c. any change in the contract sum for the Pool; or

d. any evidence of a variation to the Building Permit.

95 During the Hearing,[47] reference was made to two facsimiles between John Wanet of Paramount and Sarah/Lorenzini:[48]

a. A facsimile dated 1 November 2006 bearing a handwritten notation on page 2: "Pool 2.4 x 3.6 long"; and

b. A subsequent facsimile dated 6 November 2006 containing two drawings showing footing details for the front fence and the rear of the pool beam. In a response addressed to John of Paradise Pools, there is a drawing and a note saying:[49]

> Approved plans show plunge pool adjacent to front fence. NB – we are not RBS – the registered building surveyor – for the pool. Due to adjacent pool structure, fence footings shown on approved plans as beneath pool. Pool company is digging fence footings as well as pool structure while they have the machine on site. Wants to know what depth the fence footing needs to be now that the pool will not be located adjacent.
>
> Town planning permit shows pool adjacent to fence. We're not aware of any subsequent amendments to this position approved by council, however, we are not RBS for pool. So this would be a pool building surveyor's issue. Given 30 degree angle of repose, and sand, the footing needs to be at least 1.42 metres down. So 1.5, to be safe…

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44 [Materials Folder Tab 7]. A "*building*" is defined to include a "*structure … and also includes any part of a …structure*".

45 T361 lines 38-43.

46 Materials Folder Tab 11.

47 T361 line 47.

48 Part of Exhibit 10. The reference to "Lorenzini" is to Alan Lorenzini, the Private Building Surveyor for the construction of units 1 (excluding the Pool), 2 and 3. The reference to "Sarah" is a reference to Sarah Haywood.

49 Part of Exhibit 10.

1. Town planning permit shows pool adjacent to fence.
2. We are not aware of any subsequent amendments to this position approved by Council.
3. However, we are not RBS for pool, so this would be pool building surveyor's issue.
4. given 30º angle repose (sand), the footing needs to be a least 1.42 down-say, 1.5m to be safe

96 A further note of a telephone conversation between 'John' and 'Sara' deals with the distance between the rear of the front western fence at the Property and the back of the edge beam for the Pool and confirms that they (Lorenzi) are not the RBS (registered building surveyor) for the Pool.

97 I note that neither Alan Lorenzini nor Sarah Haywood were called by the Respondent to give evidence.

98 The relevant Building Permit for the Pool was issued on 3 November 2006. There is no evidence that the Pool dimensions attaching to the Permit were ever changed or that any changes were agreed to by the Applicant or anyone on her behalf or the relevant Building Surveyor, Marie Walker.

99 As already identified, the Building Permit issued by Lorenzini Group states:

> Construction of the swimming pool does not form part of this building permit.

100 John Wanet gave evidence of his understanding that any change to the dimensions could not be made unilaterally and that would have had to be with Gary Russell (of Paramount) because "*he was the contact chap to Dr Milonas*".[50] There is no evidence that Gary Russell or anyone else at Paramount agreed to any change to the dimensions to the Pool or to the setback.

101 Accordingly, I am satisfied that no variation was agreed or authorised to be made to the dimensions of the Pool.

Other Alleged Defects

102 The Applicant has sought to rely upon a series of other building defects. I will refer to each of these briefly as they do not ultimately affect the outcome of this case.

Defective Pool Design

103 The Applicant seeks to rely upon expert opinions contained in the reports of Mr Turnbull[51] and Mr Mladichek[52] to the effect that the Pool design by Thomas Chapman is generic rather than site-specific and that such design deficiency represents a structural defect.

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50 T575 lines 35-37.
51 Report dated 18 September 2018 (exhibit O pages 2-3).
52 Report dated 13 July 2018 (exhibit P pages 6-8].

104 In my view, this is an alleged defect which the Applicant has first sought to rely upon since the Hearing commenced and is not a matter for which the Respondent had any opportunity to prepare or reply. Accordingly, it is not a matter properly to be considered.

105 The Applicant relies upon a series of further alleged defects and incomplete work,[53] namely:

a. The Pool has been set above the ground higher than specified in the Pool Site Plan which forms part of the Building Permit drawings;[54]

b. The swim spa jets in the Pool have not been installed in accordance with the Quotation and the requirement that "*The swim spa is powered by the SPEC Badu system*";[55]

c. Plumbing and electrical fittings were not supplied by Paramount;[56]

d. The corners of the pool are not the radius corners as shown in Swimming Pool Details drawn by Mr Chapman, which is part of exhibit 11;[57]

e. No edge beam as shown in the Swimming Pool Details Plan;[58]

f. The side brick fence foundations were not constructed along the line shown in the Fence & Site Plan;[59]

g. No mandatory inspections were performed. If an inspection had been done at the steel reinforcement stage, the incorrect dimension of the pool as framed and the radius would have been detected. There is no evidence that that occurred;

h. Pool steps have not been constructed in accordance with the plans and specifications;[60] and

i. Automation control equipment was not installed.[61]

106 I do not propose to deal with each of the above items in any detail. The written expert reports and oral evidence are extensive and contain some differences of opinion, particularly by reference to compliance with the Chapman Plans. However, I am satisfied that there is sufficient consensus in such opinions to support the conclusion that:

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53 Some of these defects were also identified by Mr McNees in a report prepared for but not relied upon by the Respondent, referred to below.
54 Mr Richardson, page 9 of his initial report.
55 Exhibit 8, Mr Richardson's initial report; and Exhibit 14 Mr Richardson supplementary report dated 30 November 2018 page 8 – paragraph 8.26.
56 This is referred to in defect No. 7 on page 16 of Mr Richardson's initial report (exhibit 8).
57 Evidence of Mr Turnbull: report Exhibit O pages 2 & 3; T948 lines 22-27 cf evidence of Mr McNees T496 lines 27-30.
58 Mr Mladichek gave evidence (T839 lines 5-16).
59 Applicant's Further Witness Statement [66]-[67], advised to Mr McNees as part of the November 2014 claim.
60 Mr Mladichek report dated 13 July 2018 (exhibit P page 5); and T767 lines 10-12.
61 First dot point on the third page of the Paramount contract.

a. The Pool, as constructed, is fatally defective in its measurements, such that it cannot operate as a Spa Pool as originally designed and intended; and

b. There are a number of other defects in the construction of the Pool and associated works which are structural in nature, do not comply with the Chapman Plans and cannot be rectified without a complete demolition and reconstruction.

Expiration of Policy Period

107 The Policy provides (on page 2) that:

> The indemnity provided by clauses 1, 2, 3 and 4 only applies if the builder dies, becomes insolvent or disappears.

108 It is not in issue that Paramount became insolvent on 1 July 2013, when a Court Order was made to wind up Paramount and appoint a liquidator.

109 The Applicant filed and served her Particulars of Loss and Damage, in this proceeding, specifying defects, by email dated 18 May 2017.

110 The Respondent contends[62] that the Applicant lodged her claim outside the six year period of cover afforded under clause 6B of the Policy. In this case the Policy Period commenced[63] on the date of the relevant Pool contract and expired six years from the date of termination of that contract.

111 The signed Quotation, which the Applicant relies upon, is dated 24 September 2006. The HIA contract is dated 17 October 2006. Both pre-date the date on which the Building Permit for the Pool was issued on 3 November 2006. Therefore, the commencement day for the purposes of the Policy is either 24 September 2006, as the Applicant contends or 17 October 2006, as the Respondent contends. Nothing turns on either date for the purpose of determining the expiration of the Policy period.

112 There is no dispute in this case that the date of termination of the relevant contract is the date from which the six year period runs.

113 Clause 6C of the Policy defines the "*date of termination*":

> 6C. The date of termination of the relevant Contract for the purposes of clauses 6A and 6B shall be taken to be the date on which either the Builder or the Insured purported to bring the Contract to an end whether pursuant to the terms of the Contract or pursuant to general principles of law.

114 Furthermore, there is no dispute that neither Paramount nor the Applicant:

> purported to bring the Contract [whether it be the Quotation, as the Applicant contends, or the HIA contract, as the Respondent contends] to an end … pursuant to the terms of the Contract …

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62 In paragraph 83 of the Respondent's submission, relying upon the HIA contract.

63 "*commencement day*" is defined in Schedule 1 Defined Terms (page 12) of the Ministerial Order [Materials Folder Tab 5].

When was the Pool Contract Terminated?

115 There is no question that the Applicant as building owner is entitled to the benefit of the s 8 warranties under the DBC Act, which are imported into the HIA contract between Paramount and Construction Facilities. However, it is necessary to determine when such contract was terminated and the period for which the insurance cover operated.

116 The Respondent contends that the relevant Pool contract was terminated either no later than November 2008, when the Applicant terminated her engagement of Construction Facilities,[64] or at the very latest by February 2011, when the contract must be taken to have been abandoned.

117 As indicated above, notwithstanding the contractual framework evidenced by the HIA contract, the Applicant dealt with Paramount directly from the outset and continued to deal with Paramount directly, having initially approved the plans and contract price and thereafter monitored the progress of construction. There is no suggestion from any evidence that either Paramount or Construction Facilities complained of the role which the Applicant assumed vis a vis Paramount. As already indicated, in my view the HIA contract should be properly read and interpreted, in context, as a contract between Paramount as builder and Construction Facilities as agent for and on behalf of the Applicant.

118 Furthermore, and significantly, for reasons set out below:

a. The Applicant had reasonable grounds to believe that Paramount considered that it remained contractually bound to perform its contractual obligations well beyond the time when Construction Facilities appears to have ceased work on site; and

b. The Respondent represented to the Applicant to the effect that Paramount was bound to perform its contractual obligations up until the time it was deregistered.

119 Failing evidence of any express agreement, I endorse the Respondent's submission that the termination of the Pool contract arises by implication, where it is plain from the conduct of the parties that they may be regarded as having abandoned the contract such that neither intends that the contract should be further performed. Necessarily, such date cannot be later than 1 July 2013.

120 Abandonment is a matter of fact to be inferred from an objective assessment of the conduct of the parties.[65]

121 The principles are easily stated. However, again the circumstances of this case are far from straight forward.

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64 The Applicant states that she had no written contract with Construction Facilities.

65 The principles regarding abandonment were referred to by Member Edquist in *Strong* v *Eco Smart Concept Builders Pty Ltd* (Building and Property) [2016] VCAT 391 (15 March 2016) [Materials Folder Tab 13].

Was the contract abandoned?

122 The Respondent claims the relevant contract, being the HIA contract, was terminated by the relevant parties by abandonment and that this should be taken to have happened by the end of 2008, by which stage neither stood to make substantial benefit from further performance.[66]

123 The Respondent further contends that, at the very latest, the Applicant abandoned any further performance by Paramount by February 2011, when she was seeking a new contract with a different contractor to complete the works, which would only extend the Policy Period to February 2017.[67]

124 I am satisfied that there is sufficient evidence, set out below, to indicate that the Applicant had not abandoned further performance by Paramount. Indeed in February 2011, being advised that Paramount was not insolvent after contacting the Respondent, she lodged a complaint with the Building Commission.[68]

125 The evidence indicates that the Applicant did make enquiries of other builders and obtain quotations for the completion of the pool. However, I am satisfied that the Applicant continued to seek enforcement of the Pool contract, with the encouragement of the Respondent. The preliminary enquiries with other potential contractors were not acted upon.

126 The Respondent contends, based on the evidence given by the Applicant,[69] that loss or damage claimed by the Applicant did not occur until the Applicant became aware of the defects in March 2017, and that is outside the six year period in clause 6B.

127 The Applicant claims that the Pool contract was not terminated until 1 July 2013, when there was a Court Order for the winding up of Paramount; alternatively not before 20 April 2012 up to which time the Applicant, through the Building Commission, was still attempting to have Paramount return to complete the Pool.

128 Six years from 20 April 2012 expires 20 April 2018, which is after the date on which the Applicant filed her "Particulars of Loss and Damage Claimed", namely 18 May 2017.

129 The Applicant also relies upon the expressed intention of Paramount, directly or indirectly communicated to her, to return on a number of occasions up to April 2012:

a. On 20 November 2008, a meeting occurred between Mr Frank Guppy of Paramount and Mr Anthony Guicas on behalf of the Applicant to discuss the outstanding work in respect of the Pool. The meeting was acknowledged in an email from Frank Guppy to Anthony Guicas

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66 Respondent's submission [64].
67 Respondent's submission [75]-[76].
68 Exhibit T [16]-[17].
69 At T141 line 38.

dated 21 November 2008.[70] Frank Guppy appears to express an intention to return to complete the Pool, consistent with the contract still being on foot at that time:

> we can discuss this further when we get closer to the return date.

b. A further email from Frank Guppy to Greg Tsambos dated 30 April 2009 states:[71]

> Copy of accepted quotation (Please note this includes solar which is not approved by local council and will be an adjustment required by signed variation).

c. The Applicant refers to numerous attempts to contact Paramount to have Paramount return to the site:

   i. In about mid-2009, she contacted Lumley to make a claim regarding the incomplete Pool when Paramount had not returned, despite all efforts.[72]

   ii. In her Points of Claim filed in February 2017[73] the Applicant observed in relation to April/May 2009 that:

> no phone calls were answered, regardless of who I got to make the calls, so it was obvious Paradise Pools were not coming back.[74]

d. The Applicant gave evidence that when she contacted the Respondent's office by phone on 14 February 2011 and was told, she believes, that her only option was to:[75]

> go to the Building Commission to get them to come back on board because they were not insolvent…And they actually said to me that they can't provide me with the policy or any other information other than what I've already verbally been given until the builder has been insolvent and I'm in a position to take ownership of the policy.

e. On 21 February 2011, the Applicant sent a Domestic Building Complaint dated 15 February 2011 (**Building Complaint**) to Building Advice and Conciliation Victoria (**Building Commission**),[76] which also referenced her telephone contact with the Respondent's office. This complaint was acknowledged by letter dated 23 February 2011.

f. The Applicant subsequently received a telephone call from a person whom she believed to be from the Building Commission who told her

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70 Document 11 in the Applicant's Tribunal Book; and referred to in paragraphs 7 and 33 of the Applicant's further witness statement, Exhibit T.
71 Part of exhibit 11.
72 Referred to in the Applicant's initial claim to the Tribunal dated 11 May 2016: Applicant's document 21 at page 4 line 3; also referred to in the complaint to the Financial Ombudsman.
73 Pursuant to orders of Senior Member Farrelly made 1 December 2016.
74 Page 6 paragraph [7].
75 T67 lines 34-43; and see also T327 lines 31-38.
76 Exhibit T [16]-[17]. Building Complaint is in Tab 3 to Applicant's further witness statement.

that they had contacted a person at Paramount called "John Buff or Bust" and he "was willing to come back and fix the job". She wrote that name on the back of her copy of the letter dated 23 February 2011 together with his address, "22 Taunton Street Doncaster East" and his number, "0412045034". The Applicant was also given the name of "James Alsvury" and an address "42-44 Malvern Street, Bayswater" which she also wrote down.[77]

g. The Applicant produced redacted phone records indicating the dates when she telephoned the Building Commission (15 March 2011, 19 April 2011, 14 June 2011 and 20 April 2012), enquiring, amongst other things, as to what else she could do to force John Buff to come back and complete the Pool.[78]

h. The Applicant's evidence is corroborated by a letter she received from Consumer Affairs Victoria (**CAV**) dated 22 March 2011 which states, amongst other things:[79]

> I have been advised by Mr John Buff of Paramount Building Solutions P/L that they **are prepared to complete the pool** but have not received advice from Construction Facilities P/L to complete the unfinished works, citing that the contract for the pool was with that company. (emphasis added)

i. The Applicant did not receive a copy of that letter until it came from CAV with an email dated 18 February 2015,[80] which she received following a call she made to CAV to say that she had not received an outcome letter and that her claim against the Respondent had been rejected.

130 I am satisfied on the balance of probabilities that up to 20 April 2012, the Applicant had made every effort to procure the performance by Paramount of its contractual obligations and had not conducted herself so as to evince an intention to abandon the contract.

131 Accordingly, I am satisfied that the Policy Period did not expire before 20 April 2018.

Winding up

132 Although it is unnecessary to make a specific finding, in the circumstances of this case there is credible evidence that the six years did not commence until the winding up of Paramount, for which a Court Order was not made until 1 July 2013.

133 It was only when that event occurred that the Applicant believed that the contractual obligations of Paramount were terminated and she was

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77 T56 line 1-T57 line 10; and Applicant's further witness statement [24].
78 Applicant's further witness statement [28].
79 Applicant's further witness statement [25] and Tab 7.
80 Applicant's further witness statement [26]-[27] and Tab 8.

permitted to make a claim under the Policy, in which case the Policy Period did not expire until 1 July 2019.

134 The Policy provides (on page 2) that:

> The indemnity provided by clauses 1, 2, 3 and 4 only applies if the builder dies, becomes insolvent or disappears.

135 It is not contested that when the Applicant first contacted the Respondent she was told that she could not make a claim until Paramount was insolvent. Indeed, she gave evidence that the Respondent initially did not provide her with any documents in their possession relating to the Policy.

136 In my view, it would be unconscionable for the Respondent to now rely upon any asserted delay in making a claim or identifying defects with specificity when such delay flowed from the position taken by the Respondent, compounded by its initial rejection of the Applicant's November 2014 Claim, referred to below.

Applicant's Initial Claim

137 The Applicant's primary position is that the Policy Period, for the purpose of making a claim for defects, did not expire until April 2018 (that is six years from 20 April 2012). As indicated, I accept this position.

138 However, for the reasons set out below, the Applicant also contends that her initial claim under the Policy, made in November 2014, in substance alerted the Respondent and therefore amounted to a claim for defects. Accordingly, the claim fell within the Policy Period nominated by the Respondent, whether the Pool contract termination date is taken to be the end of 2008 or February 2011.[81] In my view, there is credible evidence to support this alternative position.

139 The following is a brief chronology of the evidence relating to the Applicant's initial lodged claim under the Policy.

21 May 2013

140 By letter dated 22 May 2013 from the Respondent, in response to her telephone enquiry the previous day, the Applicant received a claim form, a copy of the Insurance Certificate and the Policy.[82]

141 The Applicant stated that she:[83]

> may have been waiting for the company to go under administration because they had basically already said that I couldn't. And I hadn't seen the policy so I actually didn't know that I could actually claim if I've tried to contact the builder and he was supposedly – and he disappeared or gone. I didn't know it was my right. I only knew what I was being told over the phone. I had to wait until all companies

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81 Respondent's submissions [64] and [76] respectively.
82 Exhibit T, Tab 12.
83 T71 lines 1-8.

> attached to his name had to – or attached to Paradise Pools had to go under administration. I couldn't actually do it otherwise. That's what I was verbally told.

142 The Applicant wanted to be ready to make a claim when she believed she was entitled to do so:[84]

> And you can see that's the first time they've given me any policy wording, anything else. I basically said if the company is in strife, they're going to be insolvent. At least send me the paperwork because sometime soon they're going to be and I want to have it ready to be able to claim immediately when they do …

27 May 2014

143 On 27 May 2014 the Applicant telephoned the Respondent's office and spoke to Ken Barnett.

144 The Respondent has produced an internal record of that conversation.[85] It is expressed to have been prepared by "barnettk", a reference to Mr Ken Barnett who was then in the National Builders Home Warranty Claims Administration.

145 That note records, amongst other things:

> I will post out a new claim form as **she is able to lodge a claim** & had been since mid last year & that we **will look into having** the incomplete works/**defects assessed** etc" (emphasis added).

146 Mr Doukas, a senior claims officer at the Respondent, confirmed in evidence:[86]

> that's a note that was made by Ken Barnett, who's one of the administration officers in our team. And that – that's – that's a record of a discussion it appears that he had with Dr Milonas on or around the time, I believe, that she had lodged the claim.

147 By letter dated 27 May 2014, the Respondent acknowledged that the Applicant made an enquiry regarding defects:[87]

> Refer to your enquiry of today in relation to making a claim on **defective** residential building works at the above property. (emphasis added)

148 I am satisfied that, at least by this stage, the Applicant had clearly notified the Respondent that her potential claim extended to "defective residential building works" and that the Respondent would make the necessary assessment of all defects in the Pool.

149 I note that Mr Barnett was not called as a witness by the Respondent.

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84 T72 lines 17-21.
85 Part of exhibit Z; and also referred to in Exhibit T [22] (Applicant's further witness statement).
86 T536 lines 43-46.
87 Exhibit T, Tab 6.

24 November 2014

150 The Applicant stated in evidence that on 24 November 2014 she telephoned the Respondent's office and sought advice on how to fill out the claim section. At the time her sister was critically ill and passed away in May 2015:[88]

> DR MILONAS: 25th of November, my sister was in a very critical state of health. I was finding it very hard to actually do anything, let alone fill it out, so I called and asked, "How do I fill this out? I don't know what the defects are. I've got no idea, but I do know it's all wrong." And I was told, "You can't say there's a defect if it's incomplete, and you don't know what they are." So I was told to tick the box, and the assessor would work it out. Now, the assessor has come along, and he's completely ignored structural defects in his report. He's mentioned some of those, but he's not actually made comment on any of the structural defects, which were very obvious at the time, and the assessor saw the property, assessed the property, before anybody else had actually touched it. I explained to the assessor what I have put in since, which is basically a timber wall to ensure that no one fell in the pool, instead of a safety fence, and there was no tiling. There was no other works that had been done to the rest of my property.

151 The Applicant also stated that she was:[89]

> basically told – I had left it empty and I was basically told that if I can't fill out the defects, I can't tick the box with the defects. I can only tick the – I – if I tick the box with the defects, I have to list the defects. So I said I don't know what to do. And they said look, just – just – the assessor will sort it all out. You just tick it so that we can process it and get an assessor out there.
>
> So I said I don't know what to do. And they said look, just – just – the assessor will sort it all out. You just tick it so that we can process it and get an assessor out there. You just tick it. And I said – and on the page where it said – this is, I guess, essentially the level of time that I was spending on the phone. It wasn't very long that I spent on the phone with Lumley's in providing that information because I've asked her if it's okay if I just say as per Building Commission complaint. And I faxed through what I had from 2011 from the Building Commission – that I sent to the Building Commission in terms of their complaint.

152 The Respondent did not provide any objective evidence refuting the Applicant's version of events. The Respondent's Counsel advised the Tribunal[90] that there are no records of that conversation on the Genetica system operated by the Respondent at the time.

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88 T19 line 39, T20 line 4, T24 lines 23-24.
89 T80 lines 22-25.
90 At the directions hearing on 15 October 2018. Respondent's document 8.

153 On 24 November 2014, the Applicant faxed a copy of the Building Complaint to Mr Barnett following a telephone conversation that she had with him earlier that day.[91]

154 Following the advice she was given, the Applicant said that she filled out a claim form provided by the Respondent as follows:

a. She ticked the "No" box opposite "Defects" and the "Yes" box opposite "Incomplete" on page 2 of the claim form in "Section 4. Type of Claim";

b. Under "*Section 8. Detailed list of items being claimed*" she wrote "AS PER PROVIDED TO THE BUILDING COMMISSION", a copy of which had already been emailed to Mr Barnett; and

c. She also sent an email to Mr Barnett on 25 November 2014 at 7.23pm attaching three photos,[92] which were taken by her on 18 July 2013 and sent by email to the Victorian Building Authority on that day. In that email she told the Victorian Building Authority that the Pool was not a usable structure.[93]

155 The Applicant filed the claim with the Respondent on 25 November 2014 (**November 2014 Claim**),[94] which she understood also encompassed a claim for defects:[95]

> my initial claim to Lumleys was never just for completion. It was for the entire thing …
>
> Because there's not just completion of costs that I was claiming; there was loss of progress payments, and **there was also defects as well** (emphasis added).

156 The Respondent acknowledged receipt of the November 2014 Claim by letter dated 26 November 2014 sent by Mr Barnett. Thereafter, the Applicant and Mr Barnett corresponded by email.

157 In my view, the November 2014 Claim clearly encompassed a claim for defects, having incorporated by reference the Building Complaint. In particular:

a. The claim specifically referred to:

   (a) without filter/heater pumps etc

   (b) no lighting & plumbing

   (c) no automation equipment controls.

b. On page 1 in the section "*5. Building permit details*", none of the stages of work are listed as having been inspected or approved by the

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91 Exhibit T [18], Tab 3.
92 A copy of the email is part of exhibit 12.
93 Exhibit T [20], Tabs 4 and 5.
94 Exhibit S.
95 T168 lines 39-40; T169 lines 8-9.

Building Surveyor Marie Walker and the only inspection recorded is one on "*18/1/2011 to ADDRESS BUILDING ORDER*".

c. On 1 December 2014, Mr Trevor Hewitt of the Respondent engaged Mr Ian McNees to carry out an inspection and to provide a report (exhibit 12). In the instruction Mr Hewitt stated "*it appears to be a somewhat complex matter and I must admit I'm unsure who did what and when*".

Mr McNees

158 Mr McNees was engaged by the Respondent on 1 December 2014, and on 5 December 2014 he inspected the Pool in the presence of the Applicant and Mr Meehan of Hire a Hubby.

159 He prepared a report dated 19 January 2015.[96] It was contained in the Respondent's Tribunal Book but not tendered by the Respondent:

> MR TSAKIS: (a) We were not relying – at this trial, we're not relying on the report, because what Dr Milonas is now complaining about is something quite different from that which Mr McNees attended for, but, in any event, we did discover, I'm instructed, the letter of instructions to Mr McNees. So, by the discovery process, Dr Milonas has had access to it.[97]

160 Mr McNees refers to the documents he viewed, which included:[98]

> 3 BACV - Domestic Building Complaint Form 15/02/11 Pages 3
>
> 5 Paradise Pools Paramount contract 24/09/2006 Pages 3
>
> 6 Pool design and associated documents Various Pages 7
>
> 9 Correspondence from Victorian Building Authority 15/07/2013 Pages 21

161 Mr McNees understood and treated the "items" in the Building Complaint as if they had been filled out in the November claim:[99]

> In this particular instance my recollection is that the **claim form items** actually **hadn't been filled out but in their place** – and I have got it listed on the top of my items of claim – is as per items listed on the BACV Building Commission complaint form dated 15.2.2011. So rather than Dr Milonas filling out set items of what she was unhappy about or wished to claim, … **There were a list of items that had been previously submitted to BACV which were then** – that that list was just **replicated and sent to Lumleys who in turn sent it to me**. And if you like I will read out what those items were. The first one reads: The pool was left uncompleted and without filter, heater, pump, etcetera.

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96 Exhibit X.
97 T482 lines 26-30.
98 On page 4 (R305).
99 T491 lines 1-16.

> Number 2 was no coping tiles. Number 3 was no lighting and plumbing. Number 4 was no automation control equipment. Number 5, damage to fence, fencing unfinished. Number 6 was no boundary tiling. That – they were the descriptions provided on the claim form in that list that had previously been submitted to BACV." (emphasis added)

162 Mr McNees had regard to a number of the defects referred to above.

No mandatory inspections

163 There was a failure to comply with and complete the Building Permit including the mandatory inspections.

164 In his report, on page 7, Mr McNees refers to correspondence from the Victorian Building Authority dated 15 July 2013 (part of exhibit S) and states:

> The VBA has no record of this building permit being finalised". On page 3 of his report Mr McNees states "**Council Inspection required –Yes**– The permit for the construction of the subject Pool has now expired-the status of the RBS (who was previously suspended) is yet to be established" (emphasis added).

165 The suspension of Marie Walker, the Building Surveyor, is confirmed in the letter from the VBA to the Applicant dated 15 July 2013 (part of exhibit S).

No recess had been constructed in the "shell" of the pool for the lighting and plumbing outlets not installed or commissioned

166 Mr McNees noted that no recess had been constructed in the "shell" of the pool for the lighting (two low voltage LED lights and transformers); and underwater plumbing outlets have not been installed or commissioned. Tiling of the Pool had already occurred at the time Mr McNees inspected:[100]

> The Owner reports and **inspection confirms** that the pool **shell lighting** and **underwater plumbing outlets have not been installed or commissioned** (emphasis added)

167 Mr McNees also notes, "Scope of Work (for rectification)":[101]

> Complete any missing pipework … Supply, connect and commission swimming pool and spa electrics including **recessed niche lighting** and transformers to a current equivalent of that originally specified … (emphasis added)

168 The lighting and the plumbing constituted structural components of the work because they formed part of the structure of the concrete wall of the pool. The plumbing was an essential part of the Pool.

169 The noted defects regarding lighting and plumbing constitute a failure to complete the pool in "*accordance with the plans and specifications*" and

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100 Page 7 of his report.
101 Page 9 of his report.

constitute a breach of the warranty in clause 8(a) and therefore a "defect" for the purposes of the Policy by virtue of the definition of "defective" in the Policy.

170 The Applicant told the Tribunal that during that inspection she said to Mr McNees "*that there was lots of things wrong, I just can't identify them*". Mr McNees stated in cross-examination "*No, I don't recall us having that discussion*".[102]

171 Nevertheless, Mr McNees acknowledged a number of other defects during his inspection of the Applicant's property although he does not appear to have made a thorough investigation:

Radius of the pool not as shown in the Chapman Plans

a. In cross-examination, Mr McNees said that he noticed that the corners on the pool as constructed were square rather than radius as shown in the drawings:[103]

> Well, the standard details are different in that they all show **radius corners** where the corners on the pool as constructed are square. It doesn't mean that there's anything untoward about it. It's a fairly normal situation where it's more the size and spacings of the reinforcing mesh in the shell above, the shape of it. (emphasis added)

b. Mr Turnbull measured the radius at the base of the pool wall and prepared a drawing showing that the radius as built is 300mm instead of 750mm required by the Chapman Plans.[104]

Swim jets not installed as specified in the BADU Manual

c. The swim jets were part of the BADU system required to be installed in accordance with the BADU Manual and finished flush with the inner surfaces of the pool, with no protruding parts. The defects with the swim spa jets were evident at the time of inspection by Mr McNees. In cross-examination, Mr McNees conceded that he may have had a general conversation with the Applicant about the **swim jets** and the pool being much closer to the columns on the plans:[105]

> DR MILONAS: My recollection is that I said to you the pool is a mess. There's lots of things wrong. **Look at the jets**. That back wall, there's obviously something wrong with its site and I recall the pool to have been much closer to the columns on the plans if you look. You don't recall any of that conversation?--- **There may well have been a general conversation on those issues**, but I don't recall you bringing up any specific item that was significantly specific enough to form an item of claim that I

102 T491 lines 41-43.
103 T496 lines 27-30.
104 Exhibit FF, The drawing is attached to his email dated 10 April 2019.
105 T501 lines 40-46.

> would then be required to, or reasonably required, to address or add to the list.(emphasis added)

Air regulators not installed

d. Mr McNees took a photo of the air regulators dangling near to the swim spa jets[106] and accordingly could readily identify that they were not installed as specified. Mr Richardson confirmed in cross-examination[107] that they are figure D in the BADU Manual, adjust the amount of air bubbles in water flow and are meant to be installed in the "*body of the pool*".

Lip of the pool shell too thin not 300mm

e. The Applicant raised with Mr McNees the thinness of the Pool shell near the front fence. The Chapman Plan specified 300mm as specified in Thomas Chapman's Swimming Pool Details. That part of the Pool shell is depicted in a photo which the Applicant she sent to Mr Barnett in her email dated 25 November 2014 at 7.23pm:[108]

> I did raise the assessor that there's obviously something going wrong at that back wall because it's so thin and it's not thin on the others and there's obviously – I don't know what else is wrong.

f. Any defect in the width of the pool lip would have been evident when Mr McNees inspected the Pool. He conceded in cross-examination that he and the Applicant may have had a "general" discussion about the "back wall" but stated that he presumed that the wall was:[109]

> constructed in accordance with the engineering design … its density –your thickness–may difference from other areas, but that may be because it's engineered in a different fashion …

g. Mr McNees acknowledged possession of the "*Pool design and associated docs*" which would have revealed that there was no engineering difference.

Side fence not constructed where drawn on Fence & Site Plan

h. The Applicant also pointed out to Mr McNees that the fence did not run along the property boundary line. Mr McNees had a copy of the marked up Fence & Site Plan which had been enclosed as part of the November 2014 Claim[110] Mr McNees also confirmed that he had with him at the time of his inspection the "*documents that Lumleys had provided to me*".[111] He also took a photo of the fence depicted on pages 19 and 20 of his report.

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106 They are shown on page 20 of his report (exhibit X).
107 T890 lines 14-15; and T891 lines 16-17.
108 Exhibit T, a copy of that photo appears at Tab 22; T106 lines 18-28.
109 T503 lines 15-28.
110 Exhibit T [66]-[67].
111 T478 lines 31-32.

172 In my view, the failure to make provision for and install Pool lighting and plumbing constitutes a failure to complete the pool in "*accordance with the plans and specifications*" and constitutes a breach of the warranty in clause 8(a). Each are structural defects for the purposes of the Policy by virtue of the definition of "defective" in the Policy and each were expressly identified to the Respondent through its inspector/assessor Mr McNees as early as 5 December 2014.

173 In my view, there are a number of structural defects, in addition to those which Mr McNees specifically noted in his report, which he nevertheless observed. Accordingly, the Respondent was also put on notice in respect of these defects, through Mr McNees inspection, as early as 5 December 2014 (and therefore well before the end of 6 years from the "end of 2008" or "February 2011"). These defects include the failure:

a. To install swim spa jets flush into the concrete wall of the Pool;

b. To construct the corners of the pool in accordance with the drawings; and

c. To construct part of the Pool shell and locate the side fence in accordance with plan and specifications;

174 Notwithstanding that the Respondent elected not to deal with Mr McNees report it is relevant as follows:

a. It shows that the Respondent was alerted to certain identified defects, no later than Mr McNees report dated 19 January 2015;

b. The defects listed or observed were also confirmed in reports of subsequent exports; and

c. Most significantly, the Respondent was alerted to the absence of any mandatory inspections required by the Building Permit.

Notice of all defects taken to be given

175 The Applicant submits that to the extent that she gave notice of one or more defects in her November 2014 Claim, she is taken to have given notice of all defects to which the defect notified is directly or indirectly related.

176 The Applicant relies upon the operation of clause 20 of the Policy (where second appearing), which provides:

> 20. If a person gives the insurer notice of a defect, that person is taken for the purposes of the policy to have given notice of every defect to which the defect notified is directly or indirectly related, whether or not the claim in respect of the defect that was actually notified is settled.

177 In my view, the defects the subject of the Applicant's "Particulars of Loss and Damage" filed in the Tribunal in May 2017, are either:

a. Expressly encompassed by the November 2014 Claim;

b. Identified by Mr McNees on 5 December 2014; or

c. otherwise directly or indirectly related to the failure to complete the Pool in *"accordance with the plans and specifications"*.

178 It is not in dispute that Paramount did not complete the Pool. The Respondent was also on notice by the November 2014 Claim that Paramount had failed to obtain any mandatory inspections which could have identified building work not performed in accordance with the Chapman Plans and any readily observable defects. In my view, it was not incumbent upon the Applicant to identify defects with such specificity, indeed, in the circumstances that would have been an entirely unrealistic expectation. Furthermore, the Applicant was never advised by the Respondent to obtain her own expert or that only those incomplete items and defects listed would be considered. I accept the Applicant's evidence to the effect that she advised the Respondent that she could not identify everything that was wrong and was led to believe that the Respondent's assessor would conduct a thorough assessment having regard to the plans and specifications.

179 I am satisfied that in giving notice of incomplete work, the Applicant gave notice of a "defect" within the meaning of clause 20.

180 The word "defective" is defined in the Policy to include:

> a) a breach of **[sic]** any warranty listed in section 8 of the Domestic Building Contracts Act 1995.

181 Section 8 provides in part:

> 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 … (emphasis added)

182 Paramount was required to complete the Pool.

183 In failing to complete the Pool, Paramount failed to "*carry out*" the "*work*" in "*accordance with the plans and specifications*".

184 By giving notice of that defect to the Respondent, the Applicant is taken to have given notice to the Respondent of all defects to which the defect notified (the failure to complete) is directly or indirectly related.

185 The defects the subject of the Applicant's "Particulars of Loss and Damage" are either directly related or indirectly related to the failure to complete the Pool in "*accordance with the plans and specifications*".

Respondent's Denial of the Applicant's November 2014 Claim

186 By letter dated 3 February 2015, the Respondent denied the Applicant's claim on the basis that the contract with the Applicant was not insured by the Respondent and she was considered a "Developer" and as such unable to claim indemnity under the Policy.

187 The position adopted by the Respondent at this point is completely inexplicable. In my view, the Respondent's denial was inconsistent with its prior dealings with the Applicant and was made without any sound basis. In any event, the Respondent reversed its position at the commencement of the Hearing. In the meantime, the Applicant's position was seriously compromised and her capacity to progress her complaint delayed.

188 By letter dated 23 February 2015 the Applicant's solicitors, Ferraro & Company, sought a review of the Respondent's refusal to indemnify the Applicant and in particular pointing out why the Applicant could not be considered a developer and why she was entitled to the benefit of the Policy.

189 By email dated 20 March 2015 the Respondent confirmed its previous denial of the Applicant's claim, maintaining its position that the builder viewed by it to have a contract with the Applicant was not insured by the Respondent and went further to claim that the Applicant's claim was lodged outside the period of cover afforded by the Policy. The Respondent advised that the Applicant had 28 days to take the matter to VCAT.

190 The Applicant sought a further review.

191 On 3 June 2015 John Hawkins of the Respondent wrote a letter to Paul Cott of Ferraro & Company regarding the Respondent's final internal review and stating, amongst other things, that if the Applicant wished to pursue the complaint further by taking it to the Financial Ombudsman Service she "*will need to do this within 2 years of the date of this letter*".[112]

Financial Ombudsman Complaint

192 On 21 December 2015, the Applicant filed a complaint with the Financial Ombudsman (**Financial Ombudsman Complaint**), which included a copy of the Building Complaint.[113]

193 By email dated 5 January 2016, the Respondent objected to the Financial Ombudsman's jurisdiction[114] and by email to the Applicant on 14 June 2016, John Hawkins for the Applicant stated that the appeal was lodged out of time.[115]

194 On 11 May 2016, the Applicant commenced this proceeding by application to the Tribunal, in which she referenced both the Building Complaint and

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112 Exhibit T [35].
113 Document 20 in the Applicant's Tribunal book.
114 Exhibit T [37] and Tab 15; T23 lines 3-9.
115 Exhibit T [39] and Tab 16.

the Financial Ombudsman Complaint.[116] Both of these Complaints were emailed to the Tribunal on 12 May 2016.

195 By doing so, the Applicant included within her claim in this proceeding the defects referred to in her Building Complaint and the Financial Ombudsman's Complaint.

196 Therefore, on that basis, the Applicant contends that she made a claim for defects well within six years of "February 2011".

Did the "loss or damage" claimed by the Applicant occur during the Policy Period?

197 Clause 6B of the Policy states that the Policy provides indemnity "*in respect of loss or damage occurring during the period*", that is the Policy Period.

198 The parties have presented markedly different interpretations of this provision which I will now summarise.

199 The Respondent contends that:[117]

> loss encompasses "physical deprivation" and "damage" encompasses a physical alteration or change…which impairs the value or usefulness of the thing said to have been damaged.
>
> 94. What is the '**loss or damage or expense**' claimed by Dr Milonas in this proceeding? She claims the cost of removing the swimming pool and re-building it 60cm larger. Plainly she did not incur that expense during the relevant period of six years because she has never incurred that expense. It is doubtful that she would ever incur that expense.
>
> 95. There was no diminution in the value of unit 1, 56 Marine Parade during the relevant period of six years because the defect was unknown to Dr Milonas or any other relevant person. The use of the pool was not impeded in any way during the relevant period because, for reasons very peculiarly her own, Dr Milonas has refused to put water in it. (emphasis added)

200 The Respondent further contends that:[118]

> there can be no loss, damage or expense unless and until the departure from the contract … either manifests itself … or actually becomes known to the owner of the building.

201 In support, the Respondent refers to the analysis of Senior Member Davis in *P & J Simone Holdings Pty Ltd & Ors v QBE Insurance (Australia) Limited*.[119] In upholding QBE's denial of the claims, Senior Member Davis found that the Applicants' loss in that case did not occur at the time the

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116 Exhibit T [39] and Tab 17.
117 Respondent's submission [84], [86]; and [94]-[96].
118 Respondent's submission [97].
119 (Building and Property) [2017] VCAT 1683 [31]-[33], Materials Folder Tab 16].

works were completed but rather when the Applicants became aware of the existence of the alleged defects.

202 In my view, the QBE case is distinguishable on its facts from the present case:

a. First, the Policy refers in Section A to 'loss or damage' whereas the policy wording in QBE refers to 'loss, damage or expense';

b. Secondly, I concur with the Applicant that care must be exercised importing common law concepts into breaches of implied warranties under the DBC Act;

c. Thirdly, I also concur with the Applicant that the builders warranty insurance scheme is remedial legislation and, in principle, where any ambiguity arises in the interpretation of any provision, primary regard should be had to affording relief to the building owner, particularly where the insurer cannot demonstrate prejudice.

203 I concur with Deputy President Aird[120] who accepted in principle:

> *that the builders' warranty insurance scheme being remedial legislation should be interpreted to give the fullest relief possible to the owners. ... as it relates to the interpretation of any ambiguity in the legislation ...*

204 In my view, for reasons further developed below, I am satisfied that the defects occurred within the six year period in clause 6B of the Policy.

205 The Applicant contends that the proper test for when the Applicant's loss or damage occurs is when the relevant "*event*" in Clause 1 of the Policy occurred, namely when the works became "*defective*" and any of the "*warranties*" implied by s 8 of the DBC Act were breached.

206 The Applicant relies upon the following definitions in the Policy:

> "Occurrence" … "means an event (including continuous or repeated exposure to the same general conditions) which results in Personal Injury or Property Damage not expected nor intended by the Builder or Building Owner.
>
> "Personal Injury" is defined. It means "bodily injury, death, sickness, shock, fright, **mental anguish**, false arrest or imprisonment, wrongful eviction, wrongful detention, malicious prosecution, humiliation, libel, slander or assault or battery. (emphasis added)
>
> "Property Damage" is defined. It "means physical injury to or destruction of tangible property including **the loss of use of the property**, and/or **loss of use of tangible property** which has not been physically injured or destroyed, provided that the loss has been occasioned by the Occurrence." (emphasis added)

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120 *Rosalion v Allianz Australia Insurance Limited* (Domestic Building) [2005] VCAT 138 at [40] (4 February 2005).

207 Applying those definitions to the present case, the principal "*event*" is represented by the purported construction of the Pool which is not:

a. a swim spa pool;

b. a pool constructed in accordance with the stamp approved plans in the Building Permit, including the dimensions in the pool plan prepared by Thomas Chapman.

208 The Applicant responds to the Respondent as follows.

209 First, the relevant event has resulted in "*Property Damage*" by reason that it has resulted in the loss of use of "*tangible property*" represented by the:

a. loss of practical use and functionality;

b. the loss of safe use; and

c. physical deprivation,

of a swim spa pool and a pool not constructed in accordance with the dimensions in the stamped approved plans in the Building Permit, including the dimensions in the pool plan prepared by Thomas Chapman.

210 The Applicant's use of the Pool was clearly impeded during the Policy Period.

211 The Applicant also lost the use of that part of the property on which the Pool is situate and the loss of use of the progress payments made during the Policy Period to Paramount.

212 The Applicant also suffered "*mental anguish*" during the Policy Period and stated that she has been *"deeply distressed*".[121]

213 Secondly, in the present case, there is no reference to the expression "l*oss, damage or expense*" in clause 1 or clause 6B of the Policy. Rather, there is only a reference to the expression "*loss or damage*".

214 Therefore, that the Applicant did not incur any "*expense*" in "*removing the swimming pool and re-building it 60cm larger*" is irrelevant.

215 Thirdly, "*loss*" under the Policy does not have to "*result*" in expense.

216 Nowhere in the Policy does it say that "*loss*" must "*result*" in expense.

217 This makes commercial sense. One does not have to incur an expense before the Policy responds.

218 To the extent that defects within the meaning of the Policy were included within the November 2014 Claim, the Applicant can be said to have been aware of them within the Policy Period. Furthermore, the Applicant was aware that there were defects which she raised during her meeting on site with Mr McNees, as outlined above. It was not until March 2017 that she

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121 T93 line 36-T94 line 3 and the email dated 5 February 2015 there referred to.

actually measured the Pool against a copy of the Pool permit drawings which she obtained on discovery.[122]

219 However, even if the Applicant is taken to have become aware of defects in March 2017, that was nonetheless within the Policy Period which expired on 20 April 2018 for the reasons referred to above.

FURTHER CAUSES OF ACTION

220 In Counsel's final written submissions, the Applicant has sought to rely upon a number of alternative courses of action.

221 The Respondent objects on the basis that these causes had not been articulated by the Applicant during the Hearing and accordingly, the Respondent has been denied the opportunity to prepare and respond and, in particular, call rebuttal evidence where appropriate.

222 In my view, except as indicated below, it is not appropriate for the Applicant to now invoke alternative causes of action and in particular thereby seek to extend bases for compensation beyond the limits provided for in the Policy.

Estoppel

223 The Applicant submits to the effect that by reason of certain behaviour of the Respondent, upon which the Applicant relied to her detriment, the Respondent is estopped from relying upon clause 6B of the policy or any other any restriction in the Policy purporting to limit the period within which a claim could be brought by the Applicant in respect of the defects.

224 In support, the Applicant relies on the principles referred to by Brennan J in *Waltons Stores (Interstate) Ltd v Maher*[123] and by Deputy President Aird in *Worontschak v Allianz Australia Insurance*.[124]

225 In my view, as indicated above, the Respondent's conduct and dealings with the Applicant properly inform the Tribunal as to the extraneous evidence which can be applied to the Applicant's conduct in continuing to enforce the Pool contract up to April 2012; and in the interpretation of the November 2014 Claim.

226 I accept the Applicant's evidence to the effect that, relying upon the advice received from a representative of the Respondent, she reasonably believed that she could make the claim for incomplete and defective works in the November 2014 Claim by filling out the form in the way that she did and that the Respondent's assessor would investigate the problems with the Pool, including defects.[125]

227 I am satisfied that the Respondent:

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122 T141 lines 36-38.

123 (1998) 164 CLR 387; [1988] HCA 7, 428 – 429 [34] [Materials Folder Tab 15], where Brennan J sets out the criteria for establishing equitable estoppel.

124 (Domestic Building) [2006] VCAT 447 (27 March 2006) [20] [Materials Folder Tab 16].

125 T80 lines 22-25; Exhibit T [22]; T168 lines 39-40; T169 lines 8-9.

a. Has not presented any evidence to rebut such reasonable belief, assumption or expectation;

b. Through its representatives dealing with the November 2014 Complaint, including its assessor Mr McNees, the Respondent was aware that the Applicant's claim in substance included a claim for defects, including structural defects; and

c. At no stage indicated to the Applicant that she would be precluded from relying upon defects which had not been specified but which nevertheless contravened the Pool plans and specifications.

228 Accordingly, I accept that the Respondent is estopped from asserting that the November 2014 Claim is limited to a claim for completion only.

Utmost good faith

229 The Applicant also sought to invoke sections 13 and 14 of the *Insurance Contracts Act 1984* [Materials Tab 17].

230 Each of those sections require a contract of insurance to be based on "*the utmost good faith*" and apply to the conduct of an insurer in the handling or settlement of a claim or potential claim under the contract of insurance.

231 Section 13(1) provides:

> A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with utmost good faith.

232 Section 14(1) provides:

> If reliance by a party to a contract of insurance on a provision of the contract of insurance would be to fail to act with the utmost good faith, the party may not rely on the provision.

233 There is no statutory definition of the requirement to act in utmost good faith. It has been held by the Courts that it means to act with scrupulous fairness and honesty and the Courts have interpreted this concept broadly.

234 In *CGU Insurance Limited v AMP Financial Planning Pty Ltd*[126] the High Court discussed "*utmost good faith*" in detail. Gleeson CJ and Crennan J stated that the concept of good faith is not limited to dishonesty. Further, their Honours stated:

> 15. We accept the wider view of the requirement of utmost good faith adopted by the majority in the Full Court, in preference to the view that absence of good faith is limited to dishonesty. In particular we accept that utmost good faith may require an insurer to act with due regard to the legitimate interests of an insured, as well as to its own interests. The classic example of an insured's obligation of utmost good faith is a requirement of

126 (2007) HCA 36 at [15] [Materials Tab 18].

> full disclosure to an insurer, that is to say, a requirement to pay regard to the legitimate interests of the insurer. Conversely, an insurer's statutory obligation to act with utmost good faith may require an insurer to act, consistently with commercial standards of decency and fairness, with due regard to the interests of the insured. Such an obligation may well affect the conduct of an insurer in making a timely response to a claim for indemnity.

235 Kirby J stated (at paragraph 178):

> The duty is more important than a term implied in the insurance contract, giving rise to remedies for breach, although, by the express provision of s 13, it is certainly that. The duty **imposes obligations of a stringent kind** in respect of the conduct of insurer and insured with each other, **wherever that conduct has legal consequences.** (emphasis added)

236 I concur with the submissions made by Applicant's Counsel. In my view, the Respondent's conduct in its dealings with the Applicant did not demonstrate utmost good faith. Indeed, as indicated above, at various times the Respondent's advice to the Applicant was confusing, inadequate and/or contradictory. As a consequence, the Applicant's ability to comply with the terms of the Policy and adequately prepare for and support her claim, have been severely compromised and caused avoidable delay. Furthermore, I am satisfied that the conduct of this proceeding by the Respondent, particularly whilst the Applicant was self-represented, caused unnecessary delay by focusing on matters not relevant to the claim.

237 In relation to the November 2014 Claim, the Applicant was entitled to the reasonable understanding and expectation that the Claim not only encompassed defects explicitly referenced in the Building Commission Complaint but also those matters which the Applicant advised to Mr McNees and such other defects as the assessor could reasonably identify exercising due diligence.

238 In relation to the question of the costs of this proceeding, I will deal with the application of s 109 of the VCAT Act below.

Other Claimed Causes of Action

239 I do not otherwise propose to address the remaining causes of action advanced by the Applicant, namely:

a. Section 54 of the *Insurance Contracts Act 1984;*

b. Sections 9 and 12 of the *Fair Trading Act 1999*;

c. Misleading or deceptive conduct under s 18 of the Australian Consumer Law (**ACL**);

d. False or misleading representations under s 29(1) of the ACL;

e. Unconscionable conduct under ss 20 and 21 of the ACL; or

f. Negligent misstatement.

PROPER MEASURE OF THE "LOSS OR DAMAGE"

240 In the circumstances of this case, the proper measure of "loss or damage" is represented by the cost of demolishing, removing and reconstructing the Pool.[127]

241 Although the parties' experts, in some respects, have each recommended a different approach, I am satisfied that they have not identified any technical or operational impediment to the demolition and reconstruction of the Pool and associated works.

242 Below I have included certain observations contained in the written submission of Applicant's Counsel.[128]

The proper quantification

243 The Policy provides that:[129]

> The maximum aggregate liability of the Insurer shall not exceed $200,000 for all claims in respect of any one home, including reasonable legal costs and expenses incurred by the insured (not being the builder) associated with the successful claim against the insurer.

244 Both the Applicant and the Respondent obtained expert reports in respect of the likely cost of demolishing, removing and reconstructing the Pool, including all associated works.

245 The Applicant obtained a report from Mr Mladichek.[130] The Respondent obtained a report from Mr Preller.[131] Both gave evidence.

246 Mr Preller's allowances are set out in his Trade Detail. His estimates do not include a percentage for preliminaries, a builder's margin and overheads or GST. He has added a margin and overheads and GST to the construction sub-total in his Trade Summary.

247 Mr Mladichek's allowances are set out in his Estimate Elements. They are expressed to include a mark-up of 43%. That is explained in item 15 on page one as being derived by applying 30% of the builder's margin plus 10% GST.

248 The principal difference between the two estimates is represented by the difference in the methodology adopted by them for demolishing and removing the Pool and their pricing for the Pool reconstruction.

249 At the outset, the Applicant states that she does not rely upon Mr Mladichek's methodology for estimating the cost of reconstructing the Pool to Paramount's specification. In my view this concession is appropriate having regard to the criticisms which I made of Mr Mladichek's

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127 Refer *Bellgrove v Eldridge* (1954) 90 CLR 613 which sets out the relevant principles.
128 Submission dated 26 June 2019, refer pages 82-116.
129 Section B Clause 7.
130 Exhibit Q, report dated 22 October 2018.
131 Exhibit 15, report dated 30 November 2018.

methodology during the Hearing. However, the Applicant submits that Mr Preller's estimate of $24,825 is far too low.

250 Mr Mladichek's costing estimate is based on the construction methodology propounded by Mr Turnbull, a consulting structural engineer, in his report dated September 2018 (exhibit O).

251 Mr Turnbill's qualifications and experience are impressive and very appropriate to the task. He was an impressive witness who provided a sound explanation for his opinions.

252 Regrettably, Mr Mladichek was not an impressive witness. His methodology, as indicated during the Hearing, was seriously deficient in certain respects and he could not explain the bases for many of his estimates.

253 Mr Preller's pricing estimate is based on the construction methodology propounded by Mr Richardson in his report dated 30 November 2018 (exhibit 14).

254 Mr Richardson has extensive experience as a Building Surveyor and Loss Adjuster and was also an impressive witness. However, unlike Mr Turnbull, he is not a structural engineer. Mr Turnbull also has experience with similar site conditions. Accordingly, there are certain recommendations made by Mr Turnbull which I prefer, based upon his particular expertise.

255 Mr Preller is an experienced Quantity Surveyor. He was an impressive witness who gave considered evidence and also made appropriate allowances.

256 Having regard to the cost estimates made by the Applicant's experts, the Applicant claims a total of $327,068.87 inclusive of GST for the reasonable cost of demolishing and reconstructing the Pool in accordance with the plan and specification and drawings, made up as follows:

(1) Preliminaries $35,607;

(2) Demolition $17,518.07;

(3) Excavations & Earthworks $120,873.70;

(4) Pool Construction $90,500;

(5) External Works $47,165.87;

(6) Gas services $10,256;

(7) Electrical Services $2,574.15; and

(8) Plumbing sewer and stormwater $2,574.15.

257 In marked contrast, the estimate prepared by the Respondent's expert is $123,731 (inclusive of a retention allowance).

258 The above totals are not directly comparable. In written submissions, Applicant's Counsel has provided a comprehensive analysis and breakdown

of the differences. For some items, Mr Preller did not provide a specific estimate in his report but gave an estimate in oral evidence. Mr Preller was also instructed to assume that all equipment supplied could be reused. In my view this is an unrealistic assumption and for the reasons advanced by Applicant's Counsel, an allowance should be made for the supply of new equipment which will carry current warranties. Finally, I accept the reconstruction methodology recommended by Mr Turnbull, which will entail removal and replacement of the front fence; access from the front and underpinning by way of bore piers.

259 Accordingly, taking Mr Preller's estimate (excluding retention allowance) as a baseline ($108,791), I would add:

a. $18,090 for Preliminaries, in accordance with the Applicant's estimate;

b. $2,218 for Demolition, in accordance with the Applicant's estimate;

c. The Applicant's estimate for Excavation and Earthworks ($120,873) is substantially greater than the corresponding item in Mr Preller's report ($2,090) by reason of the differing methodology. As indicated, I accept Mr Turnbull's evidence and would therefore add $118,783 in accordance with the Applicant's estimate.

260 At this point the reasonable estimate of the cost of demolition and reconstruction of the Pool is $247,181, which already exceeds the $200,000 Policy limit.

261 I do not propose to deal any further with the expert evidence or competing cost estimates. I am satisfied that the reasonable cost of demolition and reconstruction of the Pool far exceeds the Policy limit.

262 Accordingly,

a. Pursuant to s 60(1) of the DBC Act, I propose to order that the previous decision of the Respondent denying the Applicant's claim in respect of building defects is annulled; and

b. Pursuant to ss 53(2)(b)(ii) and 59A of the DBC Act, I propose to order that the Respondent pay the Applicant damages for the cost of demolishing and reconstructing the Pool and associated works in the sum of $200,000.

Interest

263 The Applicant is entitled to interest pursuant to statute from the date of her amended claim filed in the Tribunal, namely 18 May 2017.

COSTS

264 The Applicant seeks an order that the Respondent pay her costs of and incidental to this proceeding.

265 Clause 7 of the Policy purports to limit the amount of any claim for defects to $200,000, inclusive of reasonable legal costs and expenses. However, in this case, in my view, the Respondent has abrogated its right to rely upon such limitation by reason of its reprehensible behaviour toward the Applicant in dealing with her inquiries and initial November 2014 Claim, which behaviour amounts to a significant breach of its duty to act with utmost good faith. In particular, for the reasons outlined above, the Respondent:

a. Failed to act with due regard to the legitimate interests of the Applicant;

b. Failed to make adequate disclosure to the Applicant;

c. Failed to act fairly toward the Applicant; and

d. Failed to give a timely and informed response to the Applicant's initial Claim.

266 In my view, all of these failures have directly contributed to the prolongation and complexity of this proceeding. Accordingly, to enable justice to be done and to compensate the Applicant in circumstances where it would be unjust and unfair for her to bear all her legal costs, I am satisfied that there are grounds pursuant to ss 109 (3)(a)(ii); 109(3)(b) and 109(3)(e) to award the Applicant's costs of the proceeding for the period commencing immediately after 20 December 2017 to the date of this judgement.

CONCLUSION

267 The Respondent is ordered to pay the Applicant, by way of damages on account of defective building work, the sum of $200,000 plus interest pursuant to statute calculated from 18 May 2017.

268 The Respondent pay the Applicant's costs of the proceeding from 21 November 2017 to date such costs to be assessed by the Costs Court, in default of agreement, on the relevant County Court Scale applicable at the time when the costs were incurred and in each case on a solicitor-client basis.

Judge Jenkins
Senior Sessional
Member