

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D280/2013

CATCHWORDS

Domestic building contract; identity of contracting parties; contract between an owner-builder and a contractor for concrete works found to be a domestic building contract under the *Domestic Building Contracts Act 1995*; breach of contract and assessment of damages; dismissal of claim alleging misleading conduct on the part of the director of the concrete contractor.

APPLICANT	Mr Osei Owusu-Afriyie
FIRST RESPONDENT	Panoramic Structures and Pools Pty Ltd (ACN 124 601 298)
SECOND RESPONDENT	Mr Domenic Alberico
WHERE HELD	Melbourne
BEFORE	Senior Member M Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	22, 23, 24, 25 and 29 February 2016
DATE OF ORDER	31 March 2016
CITATION	Owusu-Afriyie v Panoramic Structures and Pools Pty Ltd (Building and Property) [2016] VCAT 485

ORDERS

- 1 The first respondent must pay the applicant \$17,186.
- 2 The applicant's claims against the second respondent are dismissed.
- 3 Costs reserved with liberty to apply. I direct the Principal Registrar to list any application for costs before Senior Member M Farrelly.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicant

Mr N Phillpott of Counsel

For Respondents

Mr R Harris of Counsel

REASONS

- 1 In 2005, the applicant and his wife purchased a block of land in Diamond Creek. The applicant subsequently drew architectural plans for a striking three level home, with feature concrete walls, to be constructed on the block of land. The applicant is not, and has never been, a qualified architect or a registered building practitioner. The applicant has experience in construction project management. The applicant and his wife intended to construct the new home as “owner builders”.
- 2 On 1 May 2006 a building permit for the proposed new home, noting the applicant and his wife as owner builders, was issued by the surveyor Mr K Basiri (“**the building surveyor**”). Construction commenced in early 2007, and although an Occupancy Permit was issued on 2 April 2013, construction of the home is not yet completed.
- 3 The applicant says that he engaged the second respondent, Mr Alberico, to construct the first and second floor suspended slabs and the concrete walls. Mr Alberico says that it was not himself, but rather the first respondent, Panoramic Structures and Pools Pty Ltd (“**Panoramic**”), which entered the contract with the applicant.
- 4 Mr Alberico is a director and shareholder of Panoramic. Panoramic was first registered in March 2007. It was a corporate vehicle established by Mr Alberico and his colleague, Mr Ferlaino, to run a formwork/concreting business. Mr Ferlaino was a director of Panoramic until around 2010, and he remains a shareholder. Mr Ferlaino and Mr Alberico each worked “on-site” on Panoramic jobs, along with other employees of Panoramic. Panoramic ceased trading in around early 2011. Although Panoramic is still registered, Mr Alberico says it has no assets and conducts no business.
- 5 The applicant says that the contract was a “domestic building contract” under the *Domestic Building Contracts Act 1995* (“**the DBC Act**”) and that the works under the contract are subject to the warranties under section 8 of the DBC Act (“**the section 8 warranties**”). The applicant says also that Mr Alberico did not meet the legal obligation to obtain domestic building warranty insurance for the works under the contract.
- 6 The concrete works were carried out by Mr Alberico/Panoramic from around mid September 2007 to March/April 2008. The applicant says that some of the works are of poor quality and some of the works have not been carried out as agreed. As such, the applicant says that these works do not meet the section 8 warranties.
- 7 In this proceeding, the applicant claims \$321,116 (not including GST) as the cost the applicant says he will now incur in engaging a builder to rectify the defective and non-compliant works. The claim is brought against Mr Alberico and, in the alternative, the claim is brought against Panoramic or Panoramic and Mr Alberico together.

- 8 Panoramic and Mr Alberico say that Panoramic, and not Mr Alberico, entered the contract with the applicant. They say that the contract was not a domestic building contract and, as such, the section 8 warranties are not implied into the contract and there was no obligation to obtain a warranty insurance policy in respect of the contract works.
- 9 The respondents say also that the applicant entered a domestic building contract with the builder “A.R. Cromb Developments Pty Ltd” dated 13 September 2007 (“**AR Cromb**”), and that the building works identified in the AR Cromb contract documentation, which include the concrete works carried out by Panoramic, are covered by a warranty insurance policy obtained by AR Cromb.
- 10 The respondents deny that the contract works are defective and/or non-compliant as alleged by the applicant.

Alternative claim against Mr Alberico

- 11 The applicant brings an alternative claim against Mr Alberico in the event the Tribunal finds that Panoramic, and not Mr Alberico, was the party who contracted with the applicant. The applicant says that, in entering the contract, he relied on representations made to him by Mr Alberico that:
 - a) Mr Alberico was a registered building practitioner; and
 - b) the quality and finish of the concrete works would be the same quality and finish as works being constructed [by an unrelated builder for an unrelated owner] at a home at 5 Bosc Court Templestowe (“the Bosc Court home”); and
 - c) the works would be carried out in a proper and workmanlike manner; and
 - d) the works would be carried out with reasonable care and skill.
- 12 The applicant says the representations were false and, that by making the false representations, Mr Alberico engaged in “misleading and deceptive conduct” in breach of section 9 of the *Fair Trading Act 1999*.
- 13 The applicant says that he is entitled to an award of damages against Mr Alberico by reason of Mr Alberico’s misleading and deceptive conduct. The damages claimed include compensation of \$200,000 for the lost opportunity to lodge an insurance claim under a warranty insurance policy.
- 14 Mr Alberico denies making the alleged representations and he denies the allegation as to misleading and deceptive conduct.

Summary of findings

- 15 For the reasons set out below, I find that:
 - a) the contracting parties were the applicant and Panoramic;
 - b) the contract was a *domestic building contract* within the meaning of the DBC Act, attracting the operation of the section 8 warranties;

- c) some of the works carried out by Panoramic do not meet the section 8 warranties. In respect of these works I assess damages, measured as the reasonable cost to the applicant to now engage a new builder to rectify defective works, as \$17,186; and
- d) the applicant's alternative claim against Mr Alberico fails.

THE HEARING

- 16 The hearing was conducted over five days from 22 to 29 February 2016. Mr Phillpott of counsel represented the applicant and Mr Harris of counsel represented the respondents.
- 17 The applicant gave evidence. He also called expert evidence from Mr Wiley, a quantity surveyor. Mr Wiley also produced a written report.
- 18 The respondents called evidence from Mr Alberico, Mr Ferlino, and Mr Stavridis, an ex-employee of Panoramic.
- 19 Concurrent expert evidence was given by Mr Phelan, an engineer called by the applicant, and Mr Atchison, a building consultant called by the respondents. Mr Phelan and Mr Atchison also produced written reports.

THE CONTRACT AND THE CONTRACTING PARTIES

- 20 The applicant first drew architectural plans for the new home in around September 2005. He subsequently engaged an engineer, Mr La Porta ("**the engineer**") to prepare structural engineering drawings in February 2006. He then applied to the [then] Building Commission for approval for himself and his wife to construct the home as "owner builders". The Commission's approval was granted and on 1 May 2006 the building surveyor issued a building permit, noting the applicant and his wife as owner builders.
- 21 In mid 2006, the applicant first saw the Bosc Court home, which was then under construction. In the applicant's words:

I noticed the house because of the smooth texture and consistent colouring of the concrete finishes, along with the uniform decorative dimples achieved by the insertion of cones at intervals across the entire concrete surfaces. I decided the Bosc Court finish was far superior in appearance to the tilt slab in my first design and that was the effect I wanted to achieve. At that time, I understood a specialist contractor would be required to complete such work.¹
- 22 The applicant then modified his architectural drawings to achieve a finish to the concrete walls similar to the Bosc Court home. He also had the engineer issue consequential amended structural engineering drawings. The applicant has been unable to produce those revised drawings or the amended structural engineering drawings.
- 23 The applicant is poorly organised in terms of retaining and collating documents associated with the construction of the home. He has produced

¹ Applicant's witness statement at paragraph 7

some architectural drawings, including his original drawings, and some engineering drawings, but it is apparent, on the applicant's own evidence, that further drawings noting various revisions to works have not been produced. As a result, one must be cautious in drawing any conclusions from the construction drawings/plans produced at the hearing.

- 24 Later in 2006, the applicant engaged various contractors to carry out site excavation/cut works, initial drainage and electrical installations, and laying the base concrete slab. The applicant says that one of those contractors, Mr Dean who laid the concrete base slab, told him that he would be unable to complete the rest of the concrete work. Accordingly, the applicant went searching for a suitable new concrete contractor.
- 25 Initially, the applicant made enquiries of the Bosc Court contractors, however they told him that they were "disbanding" after the Bosc Court home was completed.
- 26 In mid 2007, Mr Alberico and his wife were constructing their new home in Eltham, and they were living on site in a granny flat. Mr Alberico had worked in the construction industry since 1986, and he had specialised in formwork and concrete structures since 1993. The new home he was constructing with his wife was to be largely constructed of concrete.
- 27 The applicant happened to see the home being constructed by Mr Alberico and his wife. In around August 2007, the applicant dropped in unannounced at the Eltham site. The applicant and Mr Alberico discussed concrete constructions and the applicant's search for a new concreter for his new home in Diamond Creek. Mr Alberico says that at this meeting he told the applicant about Panoramic, namely that Mr Alberico carried out concreting works through the Panoramic business. The applicant says, on the other hand, that Mr Alberico made no mention of Panoramic.
- 28 Mr Alberico subsequently met the applicant at the Diamond Creek site, looked at some drawings provided by the applicant, and prepared a rough quotation for the construction of two suspended slabs and concrete walls. The precise quantum of the quotation is unclear, however it is not important because the applicant considered the quotation to be too expensive, and he informed Mr Alberico of that fact.
- 29 Mr Alberico and the applicant subsequently met again at Eltham on 1 September 2007, and they succeeded in negotiating an agreed price. The agreement was confirmed in a two page handwritten document prepared by Mr Alberico and signed by the applicant and Mr Alberico on each of the two pages. The document is produced in full below:

[first page]

1/9/07

No 20 Diamond Ck Rd

SLABS

FORM ONLY INCL ALL PLYWOOD FRAMES / BEARERS JOISTS, ETC

ALSO PUMP PLACE & FINISH CONCRETE

(EXCLUDES PLACE CONC TO POOL)

ALSO BLOCKWORK TO U/S OF POOL

LUMP SUM 90K 45K INVOICE

45K CASH

OSEI [the applicant] TO SUPPLY FOLLOWING

CONCRETE

REINFORCEMENT SUPPLY & TIE

[signature of Mr Alberico]

[signature of the applicant]

[second page]

1/9/07

No 20 OLD DIAMOND CK RD.

WALLS AS MARKED YELLOW ON ARCH DRAWINGS

FORM ONLY MAX / APPROX 43.5K

\$43,000 (CASH)

THIS IS BASED ON 6 WEEK 3 MEN @ \$1200 / DAY

SHOULD TIME FRAME DECREASE THEN

SAVING FOR OWNER. ALTERNATIVELY

TIME FRAME MAY INCREASE.

OSEI [the applicant] TO SUPPLY – PUMPING

CONCRETE

REINFORCING

SCAFFOLD

PLYWOOD

PANORAMIC SUPPLY LABOUR & TOOLS

NAILS ETC & "Z" TIE BARS &

BRACING & BEARING TIMBER

[signature of Mr Alberico]

[signature of the applicant]

- 30 As confirmed in the document, a portion of the agreed price was to be made by way of cash payment, with the remainder to be paid "on invoice". This meant that there would be no invoices issued in respect of the portion of the works for which payment was to be made in cash.
- 31 The document does not expressly state who the contracting parties are.
- 32 The applicant submits that the signatories to the document, namely the applicant and Mr Alberico, are the parties to the contract. The applicant says that there is nothing in the document to suggest that Mr Alberico signed the document in his capacity as director or representative of Panoramic.
- 33 The applicant says that, prior to entering the contract, he was aware from his discussions with Mr Alberico that Mr Alberico had a business association with two other companies, one of which was Panoramic and the other "Synergy Projects", and that those other companies "may assist with parts of the project" [the project being the proposed concrete works to the applicant's new home].²
- 34 There is one reference to Panoramic in the document, toward the bottom of the second page where it is written: "Panoramic supply labour & tools etc & "Z" tie bars & bracing & bearing timber".
- 35 In his witness statement, the applicant speaks about the cash payment components of the contract price and the reference to Panoramic:
- ... Mr Alberico stated that the amount was to be paid in cash, directly to Mr Alberico as he would be undertaking the works and he would make arrangements for Panoramic to "supply labour/tools".
- I asked Mr Alberico who Panoramic was. Mr Alberico, as he had previously said, told me that he was also involved in some other businesses, one of which was a company called Panoramic. He said he would source labour and tools through Panoramic.
- ... Mr Alberico stated that he needed to invoice 50% of these works through one of his other business, either Synergy Projects or Panoramic, as the monetary amount was higher than what he wanted to receive in cash.³
- 36 Mr Alberico says that the two pages of the document should be read as one agreement, and that the reference to Panoramic towards the bottom of page

² Applicant's witness statement at paragraph 26

³ Applicants witness statement paragraphs 32-34

2 is a reference to what Panoramic, as one of the contracting parties, agreed to supply in respect of the concrete works. Elsewhere in the agreement, at the bottom of page 1 and towards the bottom of page 2, reference is made to what “Osei” [the applicant] is to supply.

- 37 The applicant submits a different interpretation. He says that page 1 of the agreement deals with slabs and page 2 deals with walls. He says that the reference to Panoramic only at the bottom of page 2 should be taken as being a reference to what Panoramic will supply in respect of the walls only.
- 38 Of the two interpretations, I prefer Mr Alberico’s. It seems very unlikely to me that Panoramic would supply labour and tools for the construction of the walls, but not for the construction of the slabs. In my view, the notation at the foot of page 2 of the agreement references the supply contribution of Panoramic for the whole job, slabs and walls.
- 39 It still leaves open the interpretation, as put by the applicant, that the reference to Panoramic in the agreement simply confirms that Mr Alberico, as the contracting party, would be outsourcing work to Panoramic. I do not accept this interpretation.
- 40 The document appears to have been quickly drawn and signed to confirm the essential agreement reached as to the price for works and the parties’ respective supply obligations in respect of labour, tools, materials, scaffold and pumping. It is not a detailed document that carefully sets out the various rights and obligations of the parties. It does not even expressly state who the parties to the contract are.
- 41 In my view it is logical and sensible that, in a brief written concrete works agreement between two parties, the parties would identify what each was to supply in respect of the works. In my view, this is the logical and sensible interpretation of the two-page agreement. It identifies what the applicant is to supply and what “Panoramic” is to supply. It does not express what Mr Alberico will himself supply or state that Mr Alberico will be outsourcing works to Panoramic.
- 42 To suggest that the reference in the document to Panoramic should be read as a reference to what Mr Alberico will outsource to Panoramic is, in my view, to read words and meaning into the document which are simply not there. In my view, having regard to the brief nature and purpose of the document, it is logical and sensible to interpret the reference to Panoramic as being a reference to Panoramic as a party to the contract.
- 43 Identifying Panoramic as a party to the contract is also consistent with the fact that Panoramic was formed by Mr Alberico and Mr Ferlaino to carry on a concreting/formwork business. Mr Ferlaino gave evidence that he was aware that Mr Alberico was negotiating the new contract for Panoramic.
- 44 I do not consider it critical that Mr Alberico did not expressly reference his signature on the document to his capacity as director or representative of

Panoramic. There is no suggestion that Mr Alberico was not authorised to sign the agreement on behalf of Panoramic. In my view, the document speaks plainly enough as to the agreement reached between two parties, those parties being the applicant and Panoramic.

- 45 For the above reasons, I find that Panoramic, and not Mr Alberico, was the party that contracted with the applicant to carry out concrete construction in the construction of the applicant's new home. The contract was confirmed in the document dated and signed 1 September 2007 ("**the Panoramic contract**"). I note, for completeness, that the conduct of the parties after the Panoramic contract was entered, including the issuing and payment of various invoices, is not inconsistent with my finding in this regard.

DOMESTIC BUILDING CONTRACT?

- 46 There is no dispute that there were a number of agreed variations to the scope of works under the Panoramic contract. In early September 2007, for example, it was agreed that Panoramic would lay the infill garage slab as extra work. The variations increased the Panoramic contract price to well in excess of \$200,000.
- 47 Was the Panoramic contract a *domestic building contract* under the DBC Act? Before referring to the relevant legislation on this issue, I will discuss further factual matters.
- 48 On 13 September 2007, 12 days after the applicant signed the Panoramic contract, the applicant and his wife entered a domestic building contract with AR Cromb dated 13 September 2007 ("**the Cromb contract**"). The Cromb contract is in the form of a standard form Master Builders New Homes fixed-price contract. The contract price is \$392,574.60. The works are described in the Cromb contract: "Construction of new home, in situ concrete to C of O. Footings and base slab completed prior."
- 49 Specifications annexed to the Cromb contract identify the works to be carried out by AR Cromb in more detail. The identified works include the structural concrete works which Panoramic was contracted to carry out, and did in fact carry out, under the Panoramic contract. The applicant says that the inclusion of such work in the specifications to the Cromb contract was an error of his, as he drew the specifications.
- 50 Peculiarly, the Cromb contract notes an anticipated commencement date of 9 July 2007, that is slightly more than two months *before* the date of the Cromb contract. The applicant has no explanation for this.
- 51 The applicant says that AR Cromb was really engaged to do carpentry, windows and various other internal works, all to be done after the structural concrete works were completed. The applicant says this is in fact what AR Cromb did.
- 52 The applicant has not produced documents, such as progress payment claims, invoices and records of payment, which may shed more light on the

actual works carried out by AR Cromb. The applicant cannot even remember approximately what he paid AR Cromb.

- 53 In any event, AR Cromb obtained warranty insurance in respect of the works identified in the Cromb contract (“**the Vero insurance**”). The insurance certificate was issued by Vero Insurance Limited on 19 September 2007. The certificate identifies the Cromb contract and the Cromb contract price.
- 54 On 26 February 2008, by which time Panoramic had completed most of its contract works, the building surveyor issued an amended building permit. The amended permit notes the builder as “Andrew Cromb”. It also notes that the permitted works are the construction of a dwelling and garage, and that the permit covers “all” stages of work. The amended permit also notes the Vero insurance. The applicant says the amended permit was necessary to recognise the engagement of AR Cromb and that the permit was also necessary to extend the permitted time for completion of the building works.
- 55 On 18 August 2008, the building surveyor issued a further amended building permit. This further amended permit identifies the permitted works as “frame stage to completion”. The applicant says this further amended permit was necessary to obtain an extension of time for the latter stages of the building works.
- 56 The applicant confirmed in evidence that, prior to the Panoramic contract, he had engaged a number of contractors to carry out various works including site surveying, excavation and site cut, initial drainage and electrical installations and laying the base concrete slab. The applicant also confirmed in evidence that, for the life of the construction project (which is still ongoing), he has continued to engage various contractors to carry out various works. For example, he engaged a contractor (not AR Cromb) to install the kitchen. He engaged a different contractor for the installation of the swimming pool on the first floor of the home, and the swimming pool has not yet been finally commissioned.
- 57 In short, since early 2007 the applicant has engaged many contractors, Panoramic and AR Cromb being two of them, to carry out various works associated with the construction of the new home. To the applicant’s knowledge, of all the contractors engaged only AR Cromb obtained domestic building warranty insurance.
- 58 There is no suggestion that Panoramic was engaged by AR Cromb as a subcontractor. Panoramic was engaged directly by the applicant.

Warranty insurance

- 59 Under Division 3 of Part 9 in the Building Act, the Victorian government may prescribe *required insurance* in respect of building practitioners and building works.

- 60 Victorian Government Ministerial Order No S98 dated 23 May 2003 (“**the Ministerial Order**”) provides that a builder who is entering an *insurable domestic building contract* must obtain a warranty insurance policy which covers the building work to be carried out under the contract. An *insurable domestic building contract* means a domestic building contract, as defined under the DBC Act, where the contract price is greater than the prescribed sum. In 2007, the prescribed sum was \$12,000. The current prescribed sum is \$16,000.
- 61 In general terms, the mandatory warranty insurance prescribed by the ministerial order provides indemnity to owners in respect of loss or damage resulting from incomplete and defective building work.
- 62 The requirement to obtain warranty insurance is different for owner-builders. Where an owner has himself constructed a home or carried out renovation works with a value of more than the prescribed sum, that owner is obliged to obtain warranty insurance in respect of the works he has carried out, but only if he sells the home.
- 63 The Ministerial Order provides that the total indemnity available under a warranty insurance policy may be capped at a prescribed sum. In 2007, the prescribed sum was \$200,000. The Ministerial Order also provides that a warranty insurance policy may provide that indemnity is only available if and when the builder dies, becomes insolvent or disappears. Warranty insurance policies issued in 2007 invariably included these two indemnity limitations.

The Domestic Building Contracts Act

- 64 Section 3 of the DBC Act defines various terms:

builder means a person who, or a partnership which—

- (a) carries out domestic building work; or
- (b) manages or arranges the carrying out of domestic building work; or
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;

domestic building contract means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor;

domestic building work means any work referred to in section 5 that is not excluded from the operation of this Act by section 6;

major domestic building contract means a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$5000 (or any higher amount fixed by the regulations);

sub-contractor means a person who enters into a contract with a builder to carry out part of the work that is to be carried out under a domestic building contract.

65 Section 5 of the DBC Act sets out the work to which the DBC Act applies. Such work includes:

the erection or construction of a home, including any associated work including, but not limited to, landscaping, paving and of the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas) [section 5(1)(a)(i)]

and

any work associated with the construction or erection of a building... on land that is zoned for residential purposes under a planning scheme under the Planning and Environment Act 1987; and ... in respect of which a building permit is required under the Building Act 1993 [section 5 (1)(e)]

66 Section 6 of the DBC Act prescribes building work to which the DBC Act does not apply, including:

(a) any work that the regulations state is not building work to which this Act applies;

67 Section 6 of the *Domestic Building Contracts Regulations 2007* provides:

For the purpose of section 6(a) of the Act [the DBC Act], work is not building work to which the Act applies if the work is to be carried out under a contract in relation to one only of the following types of work—

- (a) attaching external fixtures (including awnings, security screens, insect screens and balustrades);
- (b) electrical work;
- (c) glazing;
- (d) installing floor coverings;
- (e) insulating;
- (f) painting;
- (g) plastering;
- (h) plumbing work as defined in section 221C of the **Building Act 1993**;
- (i) tiling (wall and floor);
- (j) erecting a chain wire fence to enclose a tennis court;
- (k) erecting a mast, pole, antenna, aerial or similar structure.

68 Notably, concreting is not mentioned in the Regulations.

69 Having regard to the above legislative provisions, I have concluded that:

- a) the concreting work under the Panoramic contract is work associated with the construction of a home and, as such, is “domestic building work”;

- b) the work is not expressly excluded from the operation of the DBC Act; and
- c) accordingly, the Panoramic contract is a “domestic building contract” within the meaning of the DBC Act.

- 70 The respondents submit that the Panoramic contract is, in effect, a “sub-contract” rather than a “domestic building contract” under the DBC Act. I do not accept the submission for two reasons.
- 71 First, there is no contractual intermediary between Panoramic and the applicant. The applicant contracted directly with Panoramic. There is no basis upon which the contract might be characterised as a “sub-contract”.
- 72 Second, Panoramic does not meet the definition of “sub-contractor” under the DBC Act. To meet that definition, Panoramic would need to have entered a contract with a builder to carry out the concrete works, and the concrete works would need to have been *part* of the works under a domestic building contract. It might be arguable that the applicant, as an owner builder, meets the definition of “*builder*” under the DBC Act. However, in my view it cannot be said that the Panoramic contract works were *part of works* under a domestic building contract. Had Panoramic been engaged by AR Cromb to carry out the concrete works, Panoramic would certainly fit the definition of sub-contractor. But that was not the case.
- 73 It might be argued that Parliament did not intend to create the situation where, on one “owner builder” home building project, there could be numerous domestic building contracts. If those domestic building contracts have a contract price in excess of \$5000, they will attract the more stringent obligations under the DBC Act for “*major* domestic building contracts”. For example, the contractor [builder] in a *major* domestic building contract must be registered as a builder under the Building Act [section 29 DBC Act]. Section 31 of the DBC Act also sets out numerous mandatory provisions in respect of *major* domestic building contracts, some of which will have questionable application to various works contracts.
- 74 However, in my view these are not clearly unintended consequences.
- 75 As noted above, the Regulations exclude a number of single trade work contracts, such as plumbing, electrical, glazing, painting and plastering from the operation of the DBC Act. The list may be expanded if it is felt the need arises.
- 76 In Victoria there are numerous classes of “limited” builder’s registration available for specific components of building work, such as “general concreting”.
- 77 To the extent some provisions in section 31 of the DBC Act may be unworkable in respect of some domestic building contracts, section 31 may be

construed with the implied qualification that its provisions apply “where applicable”.⁴

- 78 The greater complexity lies, in my view, with warranty insurance. Where the domestic building contract price is above the prescribed sum (currently \$16,000), warranty insurance covering the works must be obtained. This means that there may be multiple warranty insurance policies covering a range of works within the one home construction project. This may well be an intended consequence, for why should owner-builders not have the protection of warranty insurance in respect of works carried out under works contracts which, under the legislation, are classified as domestic building contracts? The availability warranty insurance policies in the marketplace may, however, be a problem.
- 79 As noted earlier, an owner-builder is obligated to obtain warranty insurance when selling the home that the owner-builder has constructed. Having regard to the expansive definition of “construct” under section 137B (7) in the Building Act, it seems to me that the owner-builder may be obliged to obtain warranty insurance in respect of all of the works “constructed”, regardless of whether any of those works are covered by warranty insurance policies previously obtained by contractors engaged by the owner-builder. It is somewhat confusing and I am not sure this was an intended consequence.
- 80 In any event, complexities in construing legislation and any perceived practical difficulties in the marketplace do not outweigh the plain language of the legislation.
- 81 For the reasons set out above, I find that the contract between the applicant and Panoramic was a *domestic building contract* as defined by the DBC Act.

DEFECTIVE / NON- COMPLIANT WORKS

- 82 Section 8 of the DBC Act provides:

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

- (a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;
- (b) the builder warrants that all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;
- (c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without

⁴ See decision of Kaye J, as he then was, *Director of Consumer Affairs Victoria v Glenville Pty Ltd* [2009] VSC 76

limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act;

- (d) the builder warrants that the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified by the contract;
- (e) the builder warrants that if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;
- (f) if the contract states the particular purpose for which the work is required, or the result which the building owner wishes the work to achieve, so as to show that the building owner relies on the builder's skill and judgement, the builder warrants that the work and any material used in carrying out the work will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.

83 The applicant says there are a number of defects in the works carried out by Panoramic which amount to a breach of one or more of the section 8 warranties.

Chimney wall

84 The living room is on the ground level. Its high ceiling is the underside of the second level suspended slab. It is a striking room that features a fireplace housed within a concrete chimney spanning the full height of the room. The chimney is flanked by floor-to-ceiling windows.

85 Panoramic constructed the in situ "off form" concrete chimney wall in two stages. An aesthetic feature of the chimney wall, as with other feature concrete walls, is holes or dimples of approximately 40 mm diameter set in a geometric pattern throughout the wall. The holes extend through the chimney wall, from the interior face to the exterior face, and are formed following the removal of "Z" bars and proprietary plastic surface cones. When a cone is removed, a neat hole should be left in the surface of the chimney.

86 There is a void within the length of the chimney which acts as a flu for the fireplace. The void was created with the use of polystyrene formwork. During the concrete pour, the polystyrene formwork is held in place by the "Z" bars. After the concrete has set, a petrochemical is poured into the void to disintegrate the polystyrene.

87 The finished chimney wall is, from an aesthetic point of view, disappointing. I viewed the wall during the course of the hearing. The dimple holes, while uniformly spaced, are far from uniform in appearance. Some of the dimple holes are surrounded by chipped concrete. Some of the dimple holes still contain the plastic cones. As I understand it, some cones could not be removed after the chimney was set without further damaging

the surrounding surface of the wall. The dimple holes, generally, vary in size.

- 88 The concrete colour to the lower section of the chimney wall is slightly, but noticeably, different to the upper section. The difference is explained by a slight difference in the concrete mix in the two stages of the pour.
- 89 Some small areas of the chimney wall also have an unsightly “honeycomb” finish where the surface is rough.
- 90 Mr Alberico says that some of the issues with the chimney wall, such as chipping around dimple holes and the honeycomb areas, may have been caused or contributed to by the manner in which the formwork was removed. He says that workers engaged by the applicant, and not Panoramic, removed the formwork.
- 91 I do not accept Mr Alberico’s evidence in this regard. I prefer the evidence of Mr Ferlaino, who was himself involved in stripping the formwork. He says that employees of Panoramic and workers engaged by the applicant were both involved in stripping the chimney formwork. I also accept the expert evidence of Mr Atchinson and Mr Phelan, who agree that the aesthetic defects in the chimney wall would not have been caused by the stripping of the formwork.
- 92 Mr Alberico concedes that it is likely that the interior polystyrene formwork for the flu shifted during the course of the concrete pour, and this contributed to the problem with cones and dimple holes.
- 93 The applicant says that the chimney wall finish ought to have been of similar quality finish to the concrete walls finish at the Bosc Court home. He says that he and Mr Alberico together viewed the Bosc Court home for the specific purpose of showing Mr Alberico the desired concrete wall finish. The applicant says also that he provided photos of the Bosc Court home to Mr Alberico.
- 94 As noted earlier, the applicant alleges that in entering the Panoramic contract he relied upon representations made by Mr Alberico, including that the quality and finish of the concrete walls would be the same quality finish as the Bosc Court home.
- 95 Mr Alberico denies ever viewing the Bosc Court home prior to Panoramic completing the concrete works for the applicant. He also denies receiving photos of the Bosc Court home.
- 96 For reasons discussed later, I do not accept that the applicant relied upon representations made by Mr Alberico. But it makes little difference to my finding in respect of the chimney wall.
- 97 Having viewed the chimney, I am satisfied that the poor quality finish constitutes a breach of the section 8 warranties that the works would be carried out in a proper and workmanlike manner and with reasonable care

and skill. Panoramic should bear the reasonable cost of rectifying the defects.

- 98 As to rectification cost, the applicant relies upon a cost estimate prepared by the quantity surveyor Mr Wiley. The respondents rely upon costings prepared by Mr Atchinson. Mr Atchinson prepared alternative costings, one being the cost to Panoramic to carry out rectification works and one being the cost of engaging a new builder to carry out the rectification works.
- 99 Having regard to the passage of time since the works were carried out, and the history of disputation between the applicant and Panoramic, I am satisfied that it would be unreasonable to require the applicant to now accept Panoramic as the rectifying builder. Accordingly, I am satisfied that the applicant should be awarded damages measured as the reasonable cost to the applicant of now engaging a new builder to carry out any necessary rectification works. From now on, whenever I refer to Mr Atchinson's costings, I am referring to his cost estimates of engaging a new builder to carry out rectification works.
- 100 Initially, Mr Atchinson allowed a total cost of \$4757 to repair the interior surface only of the chimney wall. His estimate allowed for the patch repair of the various defects in the wall, and suitable protective works. His estimate includes an allowance of 30% for preliminaries, overheads and builder's margin. It also includes an allowance for GST.
- 101 Mr Wiley provides a cost estimate of \$52,918.80, which includes 10% for preliminaries and 20% for builder's margin/contingency. He allows for the patch repair of both the interior and exterior of the chimney wall, to be followed up with the application of a thin cement skim finish to the entire wall to achieve a uniform finish. As with all of Mr Wiley's cost estimates, the estimate does not include GST.
- 102 Mr Wiley's estimate allows \$7,860 for protection works, including laying two layers of plywood over 68 m² of living room floor, canvas matting to 80 m² of driveway and a single layer of plywood over 86 m² grassed external areas. Having viewed the home, I consider Mr Wiley's allowance for protection works to be grossly excessive.
- 103 Mr Wiley's estimate allows \$20,300 for the cost to remove any remaining polystyrene within the fireplace. I do not accept that any allowance should be made for the removal of polystyrene from within the chimney. Mr Wiley inspected the home on one occasion on 13 March 2014. At that inspection he looked up the chimney and noticed remnants of the polystyrene formwork. Although possessing no expertise in the matter, he considers that the remnants of the polystyrene should be removed. Without knowing how such works might actually be carried out, he allows a somewhat arbitrary sum of \$350 per square metre for 58 m² of chimney, for a total of \$20,300.
- 104 The applicant gave evidence that after Mr Wiley inspected the home, the fireplace was installed in the chimney. He says that during the course of the

installation, the fireplace installer scraped remnants of polystyrene from the inside of the chimney. The applicant does not know whether there is any remaining polystyrene within the chimney or whether any special procedures will be required to remove any remnants of polystyrene. There is no expert evidence on this issue (I do not accept that Mr Wiley has expertise or experience in relation to this issue).

- 105 On the evidence before me, I am not satisfied that allowance should be made for the removal of any remnants of polystyrene formwork within the chimney.
- 106 Mr Wiley provides an alternative costing of \$57,406.80 which allows for tiling the chimney in place of applying the final thin cement skim finish.
- 107 Having viewed the chimney, I am satisfied that rectification should include the patch repair and application of a thin cement skin finishing coat to both the interior and exterior faces of the chimney.
- 108 Generally, I have more confidence in Mr Atchison's costings than Mr Wiley's. This is because Mr Wiley makes what I consider to be grossly excessive allowances for protection works, and in some cases (such as the polystyrene within the chimney) he makes assumptions in respect of works which are not justified.
- 109 At the hearing, Mr Atchison produced an amended costing, \$12,567, which allows for repairs to both the interior and exterior of the chimney wall, inclusive of the application of a skim cement finishing coat. As with all of Mr Atkinson's cost estimates, the estimate includes allowance of 30% for preliminaries, overheads and builder's margin and it also includes allowance for GST.
- 110 I am satisfied that Mr Atchison's amended costing is a reasonable allowance for the cost the applicant will now incur in engaging a builder to attend to the rectification of the chimney walls finish, interior and exterior, and accordingly I allow **\$12,567**.

Feature wall first floor

- 111 There is a swimming pool on the first floor of the home. The concrete wall on the west side of the pool is a feature wall in the sense that it acts as a visual backdrop to the swimming pool. The wall has a number of surface defects including some areas of unsightly honeycomb effect.
- 112 Having viewed the wall, I am satisfied that the poor quality finish constitutes a breach of the section 8 warranties that the works would be carried out in a proper and workmanlike manner and with reasonable care and skill. As with the chimney wall discussed above, I am satisfied that Panoramic should bear the reasonable cost to the applicant of engaging a builder to rectify the defects.
- 113 Mr Atchison provided an initial costing, \$1525, that allows for patching of the defective areas, inclusive of protection works.

- 114 Mr Wiley's cost estimate is \$4422. As with the chimney wall, Mr Wiley allows for the cost to patch repair together with a thin cement skim coat to provide a uniform finish. He also provides an alternative cost estimate which allows for tiling the wall.
- 115 Having seen the wall, I am satisfied that the rectification work should include, in addition to the patch repairing the affected areas, application of a cement skim finishing coat to achieve a uniform appearance.
- 116 Mr Wiley's estimate also allows for the removal and reinstatement of an aluminium framed window. I agree with Mr Atchison that the rectifications can be carried out without the need to remove the window.
- 117 At the hearing, Mr Atchison produced an amended costing, \$2,685, which includes allowance for a finishing skim cement coat. I am satisfied that Mr Atchison's costing is a reasonable allowance for the cost to engage a builder to attend to the rectifications, and accordingly I allow **\$2,685**.

Column rebates

- 118 There are 3 concrete columns along the first floor hallway. The first column has a neat rebate/shadow line cut into the base of the column just above floor level. The second column has a similar rebate/shadow line which has been cut on the rear wall side of the column, but not the face of the column. The third column has a rebate, but the finish is very poor with noticeably chipped concrete.
- 119 Panoramic has no explanation for the differences in the rebates to the three columns.
- 120 I am satisfied on the applicant's evidence that Panoramic attended to the rebate cuts on all three columns. Having viewed the columns, I am satisfied that the rebate works on the second and third columns are not satisfactory and constitute a breach of the section 8 warranty that the works would be carried out with reasonable care and skill.
- 121 Mr Wiley provides a rectification cost estimate of \$18,361.20, inclusive of preliminaries and builder's margin. The estimate includes an allowance of \$7965 to sand and polish the entire 177 m² of surrounding timber floor, \$1040 to remove and replace furniture in the room, and \$1200 for canvas matting to protect 80 m² of driveway.
- 122 I consider Mr Wiley's costing to be grossly excessive. I accept Mr Atchison's evidence that the rectification works are not difficult and only a small portion of flooring will need to be removed and reinstated. I am satisfied that Mr Atchison's cost estimate, **\$1632**, is a reasonable allowance and I will allow that sum.

Bondeck rust

- 123 A small section of the bondeck metal formwork to the underside of the slab above the garage/workshop is showing signs of rust/corrosion. The affected area is approximately half a metre long and 50mm wide.

- 124 As Panoramic installed the bondeck formwork and the slab, and as it is a relatively minor defect, Panoramic does not seriously challenge its liability on this item.
- 125 Mr Atchison's rectification allowance, \$302, allows for cleaning the corroded area and treating it with a protective coating.
- 126 Mr Wiley's rectification cost estimate is \$8,593.20. He allows for repair/replacement of a plasterboard ceiling when there is in fact no plasterboard ceiling. He allows for a mobile scaffold when clearly a ladder will suffice. He allows \$1200 for canvas matting protection to 80 m² of driveway. He allows for protective treatment to the entire bondeck area, not just the small affected area. In my view, Mr Wiley's estimate for this item is grossly excessive and unreliable.
- 127 I am satisfied that Mr Atchison's allowance is reasonable, and I allow **\$302**.

Zypex treatment to slab

- 128 Zypex is a waterproofing additive which can be added to concrete at mixing stage.
- 129 Mr Atchison says that zypex will improve the water resistance of concrete, particularly around movement cracks, but it should not be relied upon as a complete waterproofing system. If one were to tile a concrete patio, for instance, Mr Atchison says that it would be prudent to install a waterproof membrane before installing the tiles, rather than simply relying on the waterproofing qualities of the zypex within the concrete slab.
- 130 Mr Phelan has more confidence in the waterproofing quality of zypex. He says that a concrete slab infused with Zypex will be waterproof, and it would not be necessary to lay a waterproof membrane between the concrete and tiles.
- 131 The applicant says that he directed Panoramic to include zypex in the concrete mix for the first floor suspended slab and the second floor suspended slab. Random bore tests analysed by "Zypex Australia" indicate that zypex crystals are present in the first floor suspended slab, but not the second floor suspended slab. Panoramic's invoices confirm the same. That is, Panoramic's invoices confirm that zypex was ordered on the day of the first floor slab concrete pour, but not on the day of the second floor slab concrete pour.
- 132 Mr Alberico says that Panoramic simply followed on site instructions from the applicant. That is, if the applicant directed the inclusion of zypex in a concrete mix, Panoramic would arrange for its inclusion. Panoramic says that the applicant requested zypex only for the concrete mix for the first floor slab, primarily because that slab is particularly exposed where it forms the roof to the garage.
- 133 As Mr Atchison says, and it is not disputed, it is not standard building practice to include zypex in residential suspended concrete slabs. It is an

additive that is sometimes used, however suspended slabs without zypex have been performing perfectly well for many years.

- 134 The construction documentation available on this issue is inconclusive. The applicant produced one set of structural drawings which include, on the level 1 plan, a note which states *“All concrete to have Zypex water – proofing additive mixed in accordance with manufacturers’ specification and requirements. Waterproofing membrane over to architects specification.”* In my view the document has limited probative value for several reasons. First, the notation could be construed as being applicable to the first floor slab only. Second, and more importantly, the building surveyor’s date stamp appearing on the drawings is 18 August 2008. That is 4 to 5 months *after* Panoramic ceased works at the site. There is no evidence that these drawings were, even in their pre-certified form, provided to Panoramic. Thirdly, other drawings produced by the applicant have no similar notation. And finally, as noted earlier, the general disorganisation surrounding the documents is such that one must be cautious in drawing any conclusions from the construction drawings/plans produced at the hearing.
- 135 There is one small sign of water ingress to the underside of second floor suspended slab. The underside of the slab is the ceiling of the living room. There is a small line of white calcification, approximately half a metre long, in the living room ceiling adjacent to the chimney.
- 136 The upper side of the slab is the patio area outside the master bedroom. The applicant had this patio area tiled approximately two years ago. He says a waterproof membrane was laid before the tiles were installed.
- 137 The applicant also says that the white calcification mark on the underside of the slab has not changed in about five years.
- 138 The applicant brings a claim for the cost of waterproofing the remaining exposed areas of the second floor slab. The claim is made on the basis that, with no zypex in the slab, the applicant must now look to other means to waterproof the slab. The alternative method proposed is to apply a waterproof membrane and tiles to the remaining exposed sections of the second floor slab. Mr Wiley costs the works at \$67,973.40. Like his costings on other items, it is excessive. However, I need not examine his costing in detail as I am satisfied that this claim must fail.
- 139 The applicant bears the burden of proving his claim, namely that Panoramic failed to comply with its contractual obligation. With conflicting evidence as to what instructions were provided on site, and a lack of site records or other documents to support the applicant’s allegation, I find that the applicant has failed to meet the burden of proving, on the balance of probabilities, that Panoramic was contractually obliged to include zypex in the second floor suspended concrete slab.
- 140 Even if the applicant was able to prove a breach of contract on the part of Panoramic, the applicant has failed, in my view, to prove the alleged loss.

Save for the small white calcification mark on the living room ceiling, which according to Mr Phelan and Mr Atchison can simply be scrubbed clean, there is no evidence of water leaks through the second floor slab.

141 For the above reasons, the applicant's claim in respect of this item fails.

Chimney wall misalignment

142 The exterior face of the chimney wall sits proud, by approximately 40 mm, of the ground slab and the second story suspended slab. The window adjacent to the chimney on the south side extends from ground level to the second floor slab. The window is noticeably misaligned. While there are no concerns as to the structural integrity of the chimney and the window, when viewing the home from outside the combination of the misaligned window and the "proud" chimney wall at the level of the second floor slab is aesthetically unpleasing. To my eye, the misaligned window is more disturbing than the proud chimney wall.

143 From the inside of the home, the misaligned window is not readily noticeable from the middle of the living room, but it becomes particularly noticeable when one stands close to it and looks upwards.

144 Panoramic did not install the ground concrete slab. It was installed by a different contractor, Mr Dean, in around early 2007. After Panoramic was engaged in September 2007, Mr Alberico discovered that the slab laid by Mr Dean was slightly misaligned along its eastern boundary. The edge of the slab was supposed to be 2 metres in from the eastern boundary of the property. The slab edge, at its southern end, is 2.03 metres in from the eastern boundary of the property. At its northern end, where the chimney wall is located, it is 2.04 metres in from the boundary.

145 There is conflicting evidence as to when the misalignment of the slab was first discovered and discussed the applicant and Panoramic. The applicant says the misalignment was discovered shortly after Panoramic commenced works on site, and that at that time construction of the concrete block wall which runs along part of the eastern edge of the slab had not commenced. Panoramic says that the misalignment was discovered when Panoramic employees began "setting out" the positioning of the chimney wall, and that at that time the concrete block wall was at least partially constructed.

146 In my view the exact timing of the discovery is not critical. What is not in dispute is that the misalignment created an issue as to where the chimney wall should be set, and that this issue was discussed by the applicant and Mr Alberico. It may also have been discussed by the applicant and other employees of Panoramic.

147 There is no dispute that the applicant instructed Panoramic to install the chimney wall in the position identified in construction drawings, that is with its exterior edge 2 metres in from the eastern boundary of the property. This meant that the chimney wall would sit 40 mm proud of the ground slab edge, which was 2.04 metres in from the eastern boundary.

- 148 It also meant that the western wall of the property would necessarily have a slight the diversion in direction. The concrete block wall commences at the southern end and runs along the edge of the slab for approximately two thirds the length of the slab. Where the concrete block wall terminates, the final third of the wall is constructed of glass and in situ concrete wall including the chimney wall. Because the chimney wall was to be placed 40 mm proud of the slab, the final third of the wall, from the point where the concrete block wall terminates, would be slightly diverted to accommodate the proud chimney wall.
- 149 The applicant says that he and Mr Alberico discussed ways of concealing the diversion in the wall. He says they agreed that, at the point where the concrete block wall ends, Panoramic would install a concrete column. The column would then become the starting point for the diversion of the wall as it progresses towards the chimney. The concrete block wall was always to be rendered. The point of diversion would be concealed by extending the render over the concrete column. The applicant says that it was for this reason only that the concrete column was constructed.
- 150 Mr Alberico agrees that the applicant intended to disguise the wall diversion by continuing the render from the block wall over the concrete column. However, he says that the concrete column was always a structural component of the home. That is, the concrete column was not “added” to the construction as part of a solution to deal with the misaligned slab.
- 151 Mr Alberico says that the outcome of his discussion with the applicant was that Panoramic was instructed to construct the chimney wall where it is now positioned. He disputes any suggestion that Panoramic somehow accepted responsibility for “solving” the issue created by the misaligned slab. He says Panoramic simply sought and received instructions from the applicant as to where to set the chimney wall.
- 152 The applicant says that Panoramic should now bear responsibility for the misaligned window. He says he was told by the window installer that the misalignment was unavoidable having regard to the positioning of the chimney wall and the concrete column, between which the window is installed. The window installer was not called to give evidence.
- 153 The applicant says Panoramic should also bear responsibility for the aesthetically unpleasing outcome at the level of the second floor suspended slab, where the chimney wall sits 40 mm proud of the slab edge. Although the chimney wall has been constructed in the position as instructed by the applicant, the applicant considers that Panoramic ought to have made adjustments when laying the second floor suspended slab, so that the chimney did not sit noticeably proud of the slab edge at that level.
- 154 Panoramic says it bears no responsibility because it has constructed the concrete column in accordance with construction plans, and it has constructed the chimney wall in accordance with the applicant’s on-site instructions.

- 155 Mr Wiley has costed rectification works at \$25,581.60. Those rectification works include installing, at the level of the second floor slab, a 200 mm wide flashing along the northern section of the west wall and along the entire front (north) of the home. The flashing would conceal the “proud” chimney wall and create a uniform finish. As with his costings, I consider Mr Wiley’s estimate is excessive. However, I need not examine his cost estimates in detail as I am satisfied that the applicant’s claim fails.
- 156 First, having viewed the home, I agree with Mr Atchison that the window appears to have been installed out of alignment. That is, it is not the position of the concrete column relevant to the chimney wall that has caused the misalignment of the window, but rather the poor installation of the window. The applicant says that the cause of the misaligned window is the positioning of the column and the chimney wall, however he has produced no expert evidence to support such a conclusion and the window installer was not called to give evidence.
- 157 Second, there is merit in Panoramic’s submission that it has done no more than construct the concrete column and the chimney wall in accordance with the construction plans and the on-site instruction of the applicant.
- 158 The applicant faced the issue as to where to set the chimney wall having regard to the misaligned ground slab. When he instructed Panoramic to set the chimney wall where it now sits, he was aware that this would create a diversion in direction of the west wall and that he would need to somehow disguise that diversion. It may be that the “solution” was not particularly well thought out, and that unforeseen repercussions arose which have led to the misalignment as it appears today. In my view the applicant, and not Panoramic, bears responsibility for the “solution”. While the applicant may have discussed the issue with Mr Alberico and other Panoramic employees, it was the applicant who provided instructions as to the works to be carried out as part of the “solution”. As owner-builder, the applicant bore that responsibility. It is not a responsibility which was passed over to Panoramic.
- 159 On all the evidence, I am not satisfied that the chimney wall/window misalignment is the result of any breach by Panoramic of its contractual obligations. The applicant’s claim fails.

Core filling concrete block walls

- 160 There are a number of concrete block walls in the home, including the west wall, the northern wall, a portion of the east wall and a number of internal walls. These walls were constructed by contractors other than Panoramic.
- 161 The interior cavities to these block walls were to be filled with concrete. Although concrete filling was carried out, it was not always carried out with due care and skill because, in a number of places, voids remain in the walls. That is, the concrete did not penetrate fully into all of the voids in the walls.

- 162 Relatively recently, the applicant arranged for “The Concrete Scanning Company” to scan the block walls using penetrating radar as a means of detecting the areas where voids remain. Mr Phelan and Mr Atchison accept the scanning method as accurate and the parties do not dispute the existence of the voids within the walls. Mr Phelan and Mr Atchinson agree that, while not all areas of the voids pose a structural concern, the block walls should be filled with concrete to at least 200 mm above ground level to protect steel reinforcement.
- 163 If the block work core filling was the contractual responsibility of Panoramic, the failure to carry out the works with due care and skill would constitute a breach of warranty.
- 164 Panoramic says, however, that it was never its contractual responsibility to carry out the block work core filling, and that it did not in fact carry out any of the core filling.
- 165 Panoramic agrees that it ordered and paid for the concrete pump and the concrete that was poured into the block work, but it says it did so as part of its arrangement with the applicant that it would hire equipment and materials on its account. The applicant does not dispute that arrangement, but he says that Panoramic also carried out the concrete core filling works.
- 166 Throughout the course of its involvement in the project, Panoramic issued invoices to the applicant at regular intervals, and those invoices were accompanied by schedules which identified the charges making up the invoiced amount. Several of those schedules refer to the filling of block work. Some of those references relate to the cost of hiring the pump. There are, however, two schedule references which, on their face, appear to indicate a charge for labour for block work filling. The first reference, dated 12 November 2007 references a charge of \$300 for “*2 MEN HALF DAY BLOCK FILL (lab only)*”. The second reference, dated March 2008 references a charge of \$750 for “*5 CONCRETTERS BLOCK FILL 3 HR*”
- 167 Mr Alberico says that the charges are for the cost of Panoramic’s labourers waiting on site while the applicant and his own workers were carrying out block core filling. It is not disputed that the first floor slab was poured on 15 March 2008. Mr Alberico says that, on that day, the applicant and his own workers were utilising the scaffold installed by Panoramic to assist them in filling the concrete block walls. He says Panoramic workers had to wait on site while the applicant and his workers completed the block work filling, and that this is what the March 2008 charge relates to.
- 168 Mr Ferlino and Mr Stavridis each gave evidence that Panoramic employees, including themselves, did not carry out block work core filling. Mr Stavridis says that on one occasion, he saw the applicant and a man whom he believed to be the applicant’s cousin carrying out block work core filling works. He says he assisted the applicant to manage the hose through which concrete was pumped to the block work, because the applicant was

not managing it on his own. This assistance, he says, is the only involvement he had with block work core filling.

- 169 Having regard to the evidence of Mr Ferlaino and Mr Stavridis, which I accept, I am satisfied with Mr Alberico's explanation as to the charge for Panoramic's employees in relation to core filling. It is a plausible explanation, particularly having regard to the fact that there are only two modest charges made by Panoramic in respect of block work filling. If Panoramic employees had carried out core filling to all the block work walls in the home, or if not all then at least a substantial portion of those walls, Panoramic's charges would have been significantly greater.
- 170 There is no contract document which confirms that Panoramic was engaged to carry out the blockwork core filling, and save for the two limited charges referred to above, there is no evidence that Panoramic was paid in respect of block core filling works.
- 171 On all the evidence, I find that Panoramic was not contractually obliged to carry out blockwork core filling, and that it did not in fact carry out blockwork core filling. Accordingly, the applicant's claim fails.

Conclusion on defective/non-compliant works

- 172 For the above reasons, I will order that Panoramic pay the applicant a total sum of **\$17,186**. As the sum is my assessment of the cost to the applicant to now engage a new builder to rectify defects in the works, there is no additional award for interest on the sum.

ALTERNATIVE CLAIM AGAINST MR ALBERICO

- 173 The applicant says he was induced to enter the Panoramic contract by the false representations made to him by Mr Alberico, and that the false representations amount to misleading and deceptive conduct entitling the applicant to an award of damages against Mr Alberico. The alleged false representations are:
- (a) that Mr Alberico was a registered building practitioner; and
 - (b) that the quality and finish of the concrete works would be the same quality and finish as the Bosc Court home; and
 - (c) that the works would be carried out in a proper and workmanlike manner; and
 - (d) that the works would be carried out with reasonable care and skill.
- 174 The representations (a) and (b) are alleged to have been made orally by Mr Alberico to the applicant. The representations (c) and (d) are alleged to be implied from representation (a) and also "*from the facts and circumstances*", whatever that means.
- 175 The applicant claims loss and damage against Mr Alberico, including the lost chance to bring a claim for defective works under a warranty insurance policy. The applicant says that, but for the representations, he would have

entered a contract with a registered building practitioner who would have met the obligation to procure a warranty insurance policy.

(a)-Alleged representation as to “registered building practitioner”

- 176 Mr Alberico is not, and has never been, a registered building practitioner. I am satisfied, on his evidence, that he did not know that he may have been required at law to be a registered building practitioner to carry out concrete works of the sort he has carried out throughout his working life. I am also satisfied that he did not know that Panoramic’s contract with the applicant was, at law, a “domestic building contract” and that, because of that, Panoramic was required to obtain warranty insurance in respect of the works and also that at least one of the directors of Panoramic was required, under section 29 of the DBC Act, to be a registered building practitioner.
- 177 Mr Alberico denies telling the applicant, or otherwise representing to the applicant, that he was a registered building practitioner.
- 178 The applicant’s evidence on this issue is equivocal.
- 179 In his witness statement, the applicant says that he told Mr Alberico that he was looking for a “*building practitioner who specialises in in-situ concrete walls...*” and that Mr Alberico told him that he was a building practitioner⁵. The applicant does not say that he told Mr Alberico he was looking for a *registered* building practitioner and he does not say that Mr Alberico told him that he was a *registered* building practitioner.
- 180 Later in his witness statement, the applicant says that when he signed the Panoramic contract, he “*understood*” on the basis of his discussions with Mr Alberico that he was engaging Mr Alberico as a registered building practitioner.⁶
- 181 There is merit in the respondents’ submission that the applicant’s own witness statement indicates that Mr Alberico did not represent to the applicant that he was a registered building practitioner, but rather that the applicant may have [wrongly] presumed that Mr Alberico was a registered building practitioner.
- 182 The applicant confirmed in evidence that he engaged numerous contractors, other than Panoramic and AR Cromb, to carry out building works associated with the new home including:
- a) site survey,
 - b) site cut/excavation,
 - c) initial, base slab stage, plumbing and electrical works
 - d) base concrete slab to the home
 - e) concrete block walls

⁵ Applicant’s witness statement paragraphs 18 and 19

⁶ Applicant’s witness statement paragraph 36

- f) supply and installation of kitchen,
- g) general joinery works,
- h) specialist electrical contractor for data/security/remote controls,
- i) construction of the swimming pool, and
- j) tiling and paving.

183 The applicant is unable to say whether any of these other contractors were registered building practitioners, or whether he asked any of them if they were registered building practitioners. It seems odd to me that the applicant says it was important to him that Mr Alberico be a registered building practitioner, yet he seems to have no similar concern in respect of other contractors including the contractors who constructed the base slab and the concrete block walls.

184 When asked, in cross examination, whether he would have engaged Mr Alberico had he known that Mr Alberico was not a registered building practitioner, the applicant answered that he did not know.

185 On all the evidence, I am not satisfied that the applicant sought Mr Alberico's confirmation that Mr Alberico was a registered building practitioner. Nor am I satisfied that Mr Alberico represented to the applicant that he was a registered building practitioner.

186 Perhaps the applicant presumed that Mr Alberico was a registered building practitioner. If he did, I am not satisfied on the evidence before me that the applicant would not have entered the contract had he known the truth.

(b) Alleged representation as to Bosc Court home quality finish

187 The applicant says that in August 2007, that is before he entered the contract with Panoramic, he discussed the Bosc Court home with Mr Alberico, that he and Mr Alberico together visited and viewed the Bosc Court home, that he provided to Mr Alberico digital photos of the Bosc Court home, and that Mr Alberico told the applicant that he could achieve a finish of the same texture and quality as the concrete walls at the Bosc Court home.

188 Mr Alberico denies all of this. He says he first became aware of the Bosc Court home in around mid 2008, after Panoramic had finished works at the applicant's home.

189 In short, it is the word of one man against the word of another man. The fact that the applicant was able to locate and produce, during the course of the hearing, copies of digital photos of the Bosc Court home is of no assistance as it remains one man's word against the other as to whether the applicant provided the photos to Mr Alberico.

190 In my view, there is insufficient evidence to find that Mr Alberico made the alleged representation as to the Bosc Court home quality finish.

- 191 If the representation was made, I am not satisfied on the evidence before me that the applicant relied on it in entering the Panoramic contract.
- 192 If the quality of the Bosc Court home finish was as important as the applicant says, one might reasonably expect that there would be some reference to it in the Panoramic contract. There is no such reference.
- 193 Even if I found that the alleged representation was made, and if I also found that the applicant relied on it in entering the Panoramic contract, I would not be satisfied, on the evidence before me, that the representation was false. The applicant points to the fact that the works are defective. As noted above, I have found that some of the works carried out by Panoramic are unsatisfactory, and I have awarded damages for the cost to rectify the works. But this does not substantiate a finding that the representation, if it was made by Mr Alberico, was false.

(c) and (d) Alleged implied representations that the works would be carried out in proper and workmanlike manner and with reasonable care and skill

- 194 The applicant pleads that these representations were implied:
- from the fact that Mr Alberico told the applicant that he was a registered building practitioner; and
 - “from the facts and circumstances”
- 195 I have found that Mr Alberico did not represent to the applicant that he was a registered building practitioner.
- 196 The applicant offers no explanation as to how the representations were implied “from the facts and circumstances”.
- 197 The requirement that works be carried out in a proper and workmanlike manner and with reasonable care and skill is, in respect of a domestic building contract, implied into the contract by the law. Even if not a domestic building contract, the common law will imply similar conditions.
- 198 In my view, any person entering a building works contract with a contractor will expect that the works will be carried out in a proper and workmanlike manner and with reasonable care and skill. What else could be expected? Of course the applicant expected that the works would be carried out in a proper and workmanlike manner and with reasonable care and skill.
- 199 On all the evidence, I do not accept that the applicant entered the contract partly in reliance on the implied *representations* that the works would be carried out in a proper and workmanlike manner and with reasonable care and skill. The applicant was simply entitled to expect such standard of workmanship.

Conclusion on alternative claim against Mr Alberico

- 200 For the above reasons, I find that the applicant’s alternative claim as against Mr Alberico fails.

CONCLUSION

201 I will order Panoramic to pay the applicant \$17,186. There will be no order for interest. I will order that the applicant's claims against Mr Alberico be dismissed. I will reserve costs with liberty to apply.

SENIOR MEMBER M. FARRELLY