VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D787/2007

CATCHWORDS

Domestic Building List; Claim by owners for defective and incomplete house; Finding that owners legally determined building contract; Builder liable for damages for defective and incomplete work; Director of building company liable for damages for misleading and deceptive conduct; Finding that owners would not have entered into contract with builder unless misled and deceived that director of building company was registered building practitioner and company entitled legally to undertake work under a major domestic building contract; Misleading and deceptive conduct quantum of damages.

APPLICANTS	Paul & Christine Serong
FIRST RESPONDENT	Dependable Developments Pty Ltd
SECOND RESPONDENT	Russell Symons
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	23-27, 31 March and 8 April 2009
DATE OF ORDER	30 April 2009
CITATION	Serong v Dependable Developments Pty Ltd (Domestic Building) [2009] VCAT 760

ORDER

1 Within 14 days of this day the parties must bring in short minutes to give effect to these reasons.

2 **Adjourned to further hearing 9.30 am 21May 2009 at 55 King Street Melbourne (allow two hours).**

3 Costs reserved.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant	Mr Gurr of Counsel instructed by Riordans Lawyers
For First Respondent	Mr Symons, director
For Second Respondent	In person

REASONS

BACKGROUND

1 Mr & Mrs Serong lived in Forbes Street, Essendon. In 2005 they decided to sell their existing house and purchase a new one. They wanted to remain in Essendon and have a brand new house which required no maintenance. They saw an advertisement for a property at 56 Edward Street where two townhouses were to be sold off the plan. The advertisement was placed by Brad Teal Real Estate Pty Ltd. The Serongs made contact with Mr McConnell of the Brad Teal agency who gave them a promotional pamphlet and a copy of some concept plans.

2 The Serongs then attended a meeting convened by Mr Simon Cookson who was Mr McConnell's superior at Brad Teal. The meeting on 16 August 2005 was also attended by Mr Symons who is the principal of Dependable Developments Pty Ltd, the first respondent in this proceeding and is himself the second respondent. According to Mr Serong, Mr Symons *'looked like a builder'*. Mr Serong said that Mr Symons was *'short and stocky and came to the meeting dressed in bib and brace overalls'*. Following the meeting the Serongs viewed properties at Coghlan Street, Niddrie and Toohey Street, Footscray which Mr Symons said he had built. Based on the exterior inspection that the Serongs were able to carry out Mr Serong judged that these houses seemed to be well built.

3 A number of possible options was discussed. The two townhouses as depicted were next to one another separated by a party wall and were to be constructed on adjacent allotments on a two lot plan of subdivision. Mr Serong felt it would be pointless for him to acquire one of the allotments and appoint his own builder to erect his house if Mr Symons were erecting an identical building immediately adjacent and on the other side of a party wall. Mr Serong said he would be happy to buy off the plan with an initial deposit and the balance of purchase price paid on completion. Mr Symons told him that he, Mr Symons:

> Needed money paid along the way in order to commence the construction and development'.

4 Mr Cookson then suggested that the Serongs buy the land and engage Mr Symons to erect the house at the same time. Mr Serong seemed attracted to this possibility.

5 Mr Symons said that the price for the house and land was $1.2m and that the payments would have to be made progressively. That seemed acceptable to the parties and Mr Serong asked that arrangements for this transaction should be put in hand.

6 According to Mr Serong, Mr Symons said he would be erecting these properties as an owner builder. Mr Serong asked why Mr Symons would not be erecting the houses as a registered builder. Mr Serong says he was

unwilling to deal with Mr Symons as an owner builder. Mr Serong said that his experience in the insurance market indicated to him that:

> The protection offered by warranty insurance in respect of registered builders is much better than the insurance attaching to arrangements with owner builders.

7 According to Mr Serong, Mr Symons then said that he had passed all the tests and examinations and:

> All he needed to do was to put in his application to be registered as a builder'.

8 The Serongs said they would consider their position and revert to Messrs McConnell and Symons.

9 Meanwhile Mr Serong referred the plans and specifications that he had received to contacts at Peddle Thorpe Interior Designers which had been doing work for Mr Serong's company relative to its city office. According to Mr Serong he was told that the building work should be priced around $900,000. Having regard to the likely value of the land, Mr Serong concluded that *'the asking price of $1.2m seemed to me to be fairly reasonable'*. He decided to enter into negotiations.

10 The Serongs made a counter offer of $1.1m for land and buildings. Their letter dated 19 August proposed two options, one entailed them purchasing from Mr Symons as owner builder and the other purchasing from him as registered builder. In the owner builder option Mr Symons would not be paid the contract balance until completion of the work. Mr Serong was aware that in light of Mr Symons earlier statements as to his need for progress payments this was in effect a non-option. Following consultation with Mr Symons, Mr Cookson despatched a response to Mr Serong. There was a to be a $10,000 deposit with five stages of payment respectively, foundations, frame, lock-up, fixing and final. The land was to be sold for $350,000. The building contract was to nominate a price of $800,000. The fax concluded:

> I am now working on the building contract, my licence has been approved and after my exam in about four weeks I will be approved.

11 It is clear that the maker of this statement was Mr Symons not Mr Cookson. Mr Cookson it seems cut and pasted from instructions he had received from Mr Symons. Late in the hearing the original e-mail from Mr Symons to Mr Cookson from which Mr Cookson was working was produced. The concluding paragraph of that e-mail said:

> What I am now working on is the building contract. (My licence has been approved and I will be accepted after my exam which will be in about four weeks – I have to wait for the next board meeting.)

12 On 13 December 2005 the Serongs attended a meeting at the office of their solicitors, Riordans. Riordans were represented by Stephen Harvey, Mr Symons attended as well as Messrs McConnell and Cookson from Brad

Teal. The first step was to execute a sale contract for the land. Mr Serong paid a $10,000 deposit relative to that contract. Messrs McConnell and Cookson then left. At a meeting the previous day the Serongs had complained that the planning permit as then approved for the project would not allow for balconies on the north side at the window of the master bedroom nor did it provide for a rear balcony which was depicted in the concept plan. The Serongs said that they wanted these balconies. According to Mr Serong, Mr Symons agreed to their provision at no extra cost. Mr Serong observed that Mr Symons *'also appeared slightly uneasy in relation to this discussion'*. Mr Symons said he would have to go back to the Council. Asked if this would be a problem he said it was *'simply a matter of getting the neighbours on side'*. The form of special conditions catering for the balconies was discussed at the meeting on 12 December and Mr Symons was given a form of special conditions. Yet a further meeting was held at Riordans on 14 December to sign the building contract. Mr Serong says he signed the building contract in the belief that the steps which Mr Symons had previously said he needed to complete to achieve registration had been carried out. Mr Serong says he signed the contract:

> In the belief that Symons was a registered builder who would have personal responsibility for the construction and supervision of the works'.

13 The building contract showed *'Dependable Developments'* as the builder giving its address as 36 Daisy Street, Essendon which is also the residential address of Mr Symons. Dependable Developments is shown as having registration *'DBU 12889'*. The contract referred to warranty insurance policy 103047X issued by Exporters Insurance Company Limited with a start date 26 October 2005 and a completion date 26 October 2006. By Special Condition SC3 Dependable agreed to do all things necessary and at its cost to obtain necessary amendments or variations to the planning permits issued by Moonee Valley City Council providing for the two extra balconies. Special Condition SC4 obliged Dependable to:

> Use its best endeavours to obtain the amended permits with all due expediency'.

14 Dependable was to lodge the application for amended permit:

> As soon as practicable after the signing of this contract and, in any event, no later than 1 June 2006, unless otherwise agreed by the vendor.

15 Special Condition SC5 provided that if the permits had not issued by the completion date or if the builder was waiting on a decision of Council or a Tribunal then as at the date of such decision the builder would pay the owner compensation of $10,000.

16 Clause 9 of the contract stipulated an anticipated commencement date of 14 December 2005 with 250 days required for construction, 48 days were added for foreseeable breaks and continuity and a further 30 days were

added for delays caused by weather, holidays, sickness etc. This left a total construction period of 328 days with a *'calculated completion date'* of 7 November 2006. Clause 5 of the contract provided at Clause 5.1 that Dependable was required to *'obtain the required insurance under the Building Act 1993'* before carrying out any works. Clause 5.2 provided that the builder was not entitled to enforce any terms of the contract if it did not obtain the insurance before entering into the contract and until the insurance was obtained no moneys were payable to Dependable under the contract. Clause 5.4 required Dependable within 21 days of commencement to provide the Serongs with:

> A copy of the relevant insurance policy, certificate of currency or certificate of insurance setting out the details of the required insurance under the Building Act 1993 applying to the **Works**. (emphasis in original)

17 The Serongs had arranged a $900,000 construction loan from Homeside Lending. Payments were made by Homeside directly to Dependable upon Mr Serong delivering Dependable's invoice to Homeside and requesting that payment be made. Dependable rendered its first invoice to the Serongs dated 23 March 2006. It sought payment of $160,000 inclusive of Goods and Services Tax for the deposit, site cut, slab and foundation work. Dependable's letterhead included some graphics. On the left was a drawing of two figures, one male, one female both in hard hats scrutinising what appeared to be a plan. On the other side was a drawing of a figure in a trench coat and deer stalker (presumably a reference to the famous fictional detective, Sherlock Holmes) scrutinising the roof of a building with a magnifying glass. Mr Symons told me this graphic was intended to illustrate Dependable's attention to detail. The letterhead included a slogan *'we work hard so you can enjoy'* and included the name of Mr Russell Symons and Mr Subi Lika to whom reference will be made later. The invoice was paid in the ordinary course.

18 On 14 June a further progress claim invoice was submitted seeking a total payment inclusive of Goods and Services Tax of $120,000. The covering e-mail from Mr Symons described this as *'a part payment for the frame stage'*. The invoice items included an item styled *'window deposit'* which was said to be 42% of the total and *'frame part (basement, ground sub-floor, ground, first floor sub-floor)'*. This amount was paid to Dependable.

19 In September 2006 the Serongs departed Australia for an overseas holiday but they remained in contact with Mr Symons by e-mail. Mr Symons sent an e-mail to Mr Serong stating, inter alia:

> Trouble with Council.
>
> They have requested that the plans be re-advertised.
>
> I don't know where you are with your house but it means at least a further four week delay. I told them I was going to VCAT. This they really got worried about and have allowed me to complete all framing.

> I am then going to tarpauline the roof and basically complete everything I can do without showing structural changes.
>
> So I don't know where you are with your house but getting in before Xmas may be an issue. I know what the contract says and all of that but I am hoping we can work something out. As soon as I am able I will be working flat out on your side. It may mean fencing, garden etc may have to wait and you may have to put up with me working next door for a couple of months but I will endeavour to get you in as early as possible. Basically I have everything so waiting for materials in December will not be an issue.
>
> Sorry for the news but that Council is really bad. At least it looks as though we will get the rooftop garden and balconies because I have spoken to all the neighbours, shown them the plans and they are not concerned.
>
> I still have to a further submission (sic) but Council are very positive.

20 It will be recalled that the Serongs had asked for an amended permit catering for additional balconies. The rooftop garden was apparently Mr Symons' initiative. It seems that despite the provisions in the contract, Dependable and Mr Symons never lodged an application for an amended permit which was to include balconies. Mr Symons told me that at some point he had a preliminary consultation with Council Planning Officer, Mr Stainsby who was very negative; accordingly, no application was ever lodged either by Dependable or Mr Symons.

21 Mr Serong responded in an e-mail dated 27 September 2006 expressing willingness to *'go to VCAT'*. He advised that the Serongs existing house was *'up for auction on 11 November, with 60 day settlement'*.

22 Under cover of an e-mail dated 14 October 2006 Dependable submitted a further progress claim for $108,000 inclusive of Goods and Services Tax. This included charges for *'window full payment'* and for *'frame (first floor, roof trusses)'*. The covering e-mail described continuing negotiations with Council. It said:

> Next step is re-advertising, re-stamping, so by 30th October we will be able to start works again. Eleven weeks this has taken.

23 Mr Symons said that he was able to achieve:

> Approval to complete the frame and to put tarpaulins over everything. So this week we have completed the frames. Once I have the tarpaulins over everything I am going to prepare for everything so that we will be able to have a start on finishing. I am also going to rough in plumbing …

24 Toward the end of the e-mail Mr Symons said:

> Plan is lock-up Nov fit-out early December. This is the hitch of people like cabinet makers, tilers etc go on holidays we are going to have further delays. Anyway I am aiming for Xmas. So we have about eight weeks to finish. Going to be tough.

25 The invoice was paid. Mr Serong says that in authorising payment he was unaware that payment need not be made for the frame stage *'until such time as the frame has been completed and certified by a building surveyor'*. No such certification was given at the time of rendering the invoice and none was given during Dependable's time in control of the site. Mr Serong says that had he known at the time that he was not obliged to make this payment or the earlier payment for the frame stage he *'would not have paid either invoice'*.

26 The Serongs returned to Melbourne on Cup Eve. In light of the *'trouble with Council'* reported by Mr Symons, Mr Serong telephoned Mr Stainsby of Moonee Valley City Council's Planning Department. Mr Serong says Mr Stainsby told him there had been objections from the neighbours and that Mr Symons *'had been working on the site when he was not supposed to be'*. Mr Serong said he paid little heed to this last element because he was unaware that a stop work order had been issued in July.

27 Following Cup Day Mr Serong arranged a meeting with Mr Stainsby and the objecting neighbours, Mr and Mrs Murphy. Mr Stainsby told Mr Serong that the proposed balconies would not be approved and the Serongs' only alternative was to seek review at this Tribunal. According to Mr Serong:

> We agreed that there would be no balconies. We also agree that we would replace the doors that were heading out onto the proposed balconies with windows, would put film up on the windows to prevent us from being able to look out through them where they overlooked the neighbours, would erect privacy screens, and would install film on the ground floor windows where these windows overlooked the neighbouring properties.

28 Mr Stainsby said that a new permit would issue including those conditions. On that basis the Murphys agreed to withdraw their objection. Mr Symons sent an e-mail to Mr Stainsby confirming the outcome of the meeting and dealing with certain other issues.

29 On 13 November Mr Serong sent an e-mail to Mr Symons noting that the Serongs had sold their house with settlement due 22 December. He asked *'any chance of you finishing by then …'*. Mr Symons said:

> Completion date won't be too far away from 22 Dec. I am hoping early Feb. Firm completion date can be given as soon as I know when we can start.

30 Earlier in the e-mail Mr Symons had said:

> I have been with the draftsman all day so I feel great. We have nearly finished everything.

31 Mr Serong said that had he known of the stop order around this time he would have withdrawn his existing house from sale:

> So that we would not have incurred the additional expenses of paying rent whilst the property at 56 Edward Street was being completed.

32 Toward the end of November or early December the Serongs and Mr Symons had a meeting. It was apparently postponed on a number of occasions so Mr Serong was uncertain of exactly what day the meeting took place. At the meeting the Serongs noted their entitlement to claim liquidated damages stating they would not press the point *'but only if we receive from* [Mr Symons] *a firm revised completion date'*. The Serongs say that no such firm revised completion date was ever given. Nothing more than what Mr Serong described as *'vague promises'* were offered.

33 About this time Mr Serong says he learned for the first time of the stop work order. This was in a telephone conversation with Mr Symons while he was returning from visiting a friend at Monash Medical Centre. Mr Serong says he was furious and admits that he became *'quite abusive'*. Mr Serong said that Mr Symons told him:

> That notwithstanding the stop work order he [Mr Symons] was continuing to work behind the scenes, during such things as finishing the frame for the building.

34 Mr Serong says that it was only following termination of the contract that he obtained from the building surveyor a copy of the stop work order dated 10 July 2006. At that stage it was still in force. When a copy of Mr Stainsby's response to the plans which Mr Symons had submitted on 27 November 2006 came to Mr Serong by facsimile transmission there was a handwritten notation in the margin *'stop work order issued July 06'*.

35 It seems by that stage that confidence and cordiality between Mr Serong and Mr Symons was breaking down. Mr Serong sent an e-mail on 8 December seeking a copy *'of the policy and certificate of currency for the warranty insurance'*. Mr Symons response seems to ignore the request. Meanwhile a facsimile transmission from Council dated 2 January 2007 declined to approve amended plans stating *'there remain several outstanding concerns requiring additional attention'*. On 21 December Mr Symons acknowledged receiving an $80,000 payment against the $108,000 invoice which he had originally rendered. On 23 January 2007 Mr Serong sent a lengthy e-mail to Mr Symons dealing with issues such as selection of stove and so forth. He also sought a finishing date complaining:

> It is costing us in excess of $7,500.00 per month at the moment with rent and interest payments on a construction loan.

36 Mr Serong also sought copies of the builder's warranty insurance. In his response dated 25 January, Mr Symons said:

> I am meeting with electrician next week. It looks as though I am going to have to find another or the Council will have to agree

> because he want [sic presumably won't] do anything unless the stop order is removed. Plumber is the same. Plasterer is okay but guess what.

37 The electrician referred to was Mr Lika. Mr Lika told me that he was unaware in January 2007 of the existence of any stop work order. He only worked at weekends; not because of any apprehension about a stop work order but because he is a full time employee at the Mobil Refinery in Altona and was only available to do work on building sites at the weekend.

38 On 4 February 2007 the Serongs visited the site. Mr Symons and Mr Lika were working, on site with their two sons believed by the Serongs to be aged 13 and 15, running electrical cable through the house. Mr Serong said at this stage he began entertaining doubts as to the quality of the workmanship. He told his wife as they drove home *'this house is being wired up by 15 year olds, I wonder how safe it will be'*. During the course of an exchange relative to the payment of a progress claim, Mr Symons said on Wednesday 14 February 2007 *'I want to start plastering Friday'* presumably 16 February. In an e-mail of 7 February Mr Serong repeated the statement:

> Electrician will only work weekends and late to avoid any inspections by the officer and Bernie [that is the plumber] is just doing it himself as a friend.

39 On 25 February 2007 Mr Serong sent an e-mail to Mr Symons referring to discussions which Mr Symons had had with Council and stating:

> We are not prepared to pay for windows in these areas and then have them replaced by the existing doors once the approval finally comes through for the balconies.

40 This is difficult to fathom since at a meeting attended by Council's Planning Officer and objecting neighbours, Mr and Mrs Murphy, just after Cup Day the previous year, according to Mr Serong *'we agreed that there would be no balconies'*.

41 In his statement Mr Serong said that at that time, that is 25 February 2007:

> I was still under the impression that Symons had submitted a request for Council to amend the permit, allowing the upper floor balconies.

42 I am at a loss to understand how in light of what transpired at the meeting in November he can still have entertained that belief. In a previous telephone conversation on 23 February, Mr Symons had told Mr Serong that Council was holding up removal of the stop work order until the doors adjacent to the area proposed for the balconies had been removed.

43 Also on 25 February 2007 the Serongs pressed for production of certificate of currency for the builder's warranty insurance and also contract works policy.

44 In an e-mail dated 10 March 2007 Mr Symons made reference to speaking to *'George'* about the insurance. Mr Serong was aware that the George in question was Mr George Iliov of Instra, an insurance broker. His own business interests gave Mr Serong contacts in the insurance industry and he spoke to Mr Iliov. Mr Iliov told him that the warranty insurance:

> Was an owner builder policy only [according to Mr Serong] he also told me that neither Christine nor I was listed as an interested party in the policy.

45 Mr Iliov provided Mr Serong with a copy of the policy. Relations between Mr Serong and Mr Symons had further soured. Apparently there was an unpleasant discussion between them which led Mr Symons to send an e-mail on that day stating, inter alia:

> Sorry it has come to this … in all honesty you are making a big mistake. I tried to go over why this has come this far. Two weeks ago you shook my hand and said lets work together. Your comments today about treating me like a fool etc, could not be further from the truth.

46 At a meeting on 5 March between the Serongs and Mr Symons, Mr Serong said he challenged Mr Symons with the question *'are you a builder'*. Mr Symons, he said, responded *'no I am not'*. According to Mr Serong, he Mr Serong continued:

> You mean to tell me that after all this time and what you have said previously you are not in fact a builder.

and Mr Symons replied:

> No I am not. What are you going to do about it?

47 As I understood his *viva voce* evidence, Mr Symons denied saying *'I am not a builder'*, he asserted he was a builder though he admitted he was not a registered builder.

48 Mr Serong began engaging consultants to assess the quality of the work around this time. The amended planning permit which Mr Serong eventually obtained showed that the endorsed amended plans were approved by Council on 21 March 2007.

49 The Serongs instructed their solicitors, Riordans to write to Mr Symons. The lengthy letter alleged, among other things that the building contract had been entered into in violation of the *Domestic Building Contracts Act* 1995 because no director of Dependable was a registered building practitioner in the relevant category. The letter noted the registration number quoted in the contract, DBU1289 was assigned to Mr Gerd Jacquin. The letter asked *'who is Gerd Jacquin?'*. The letter also noted that the warranty insurance certificate obtained by Mr Serong from the broker referred not to Dependable's contract with the Serongs but rather to a contract dated 25 October 2005 with a contract sum of $300,000 in contrast to the $800,000

stipulated in the contract between the Serongs and Dependable. Riordans sought full details including a:

> Written explanation of why [the Serongs] do not appear as the building owners in the purported certificate and why it is that your company [that is Dependable] (and R. Symons) does.

50 The letter also raised queries as to the insurance underwriters, Exporters Insurance Co Limited. Mr Symons responded to Mr Hesse of Riordans:

> You have made many points which I have to consider in detail. I don't know why these weren't made when the contract was originally put in place. I am going to go other these accusations very carefully as they are very serious.

51 The e-mail continued asserting that Mr Symons' intentions *'have always been honourable'* and he intended to complete the project. He observed:

> With Gerd's help we have added many additional refinements to the project that a normal building would not have happened. I have fought Council. I have added enormous amount in basic structure.

52 Mr Symons never responded to the specifics raised by Riordans. Some of these matters were, as will be seen dealt with by Slidders, the solicitors whom Mr Symons and Dependable later instructed to act for them in correspondence from Riordans following the service of termination notices. Riordans wrote again on 8 May noting the lack of specific response to the matters they had raised; but there was still no response. Riordans with a letter dated 22 May by registered post enclosed a notice of intention to determine contract on behalf of Mr and Mrs Serong. The notice bearing the same date alleged a breach of Clause 5 of the building contract in that Dependable had:

> Failed to produce to the owners a copy of the relevant insurance policy or certificate applicable to the works setting out the details of the required insurance under the *Building Act* 1993.

53 The notice alleged that the certificate produced and the only one available was inappropriate insofar as it related to building work carried out by Mr Gerd Jacquin. The notice also alleged substantial breach of Clause 10.1 and implied terms based on the fact that no director of Dependable was a registered builder and the registration number quoted did not pertain to Dependable or any director of Dependable. Finally, the notice alleged that Special Condition 2 of the building contract required contract works insurance with minimum cover of $1.4m whereas the cover procured by the builder dated 13 December 2005 underwritten by Mecon Insurance Pty Ltd gave cover only up to a level of $1m. The notice concluded that unless the breaches were remedied within 14 days:

> It is the owner's intention to terminate the contract pursuant to Clause 20.2 of the contract without prejudice to any other right or remedy the owners may have.

54 The response on behalf of Dependable and Mr Symons came from Slidders Lawyers dated 4 June 2007. Slidders alleged that the warranty insurance certificate was valid because the builder named Mr Gerd Jacquin, possessed an unlimited domestic builder's licence and was at the time *'a co-director of* [Dependable]'. Similarly it said there was no breach of the registration provisions of the *Domestic Building Contracts Act* because Mr Jacquin had been a director of Dependable since 1 September 2005, some months before execution of the building contract on 14 December. A revised contract insurance certificate was provided showing cover of $1.5m, hence it was asserted that this breach was remedied. A search extract obtained with respect to Dependable at 15.45 on 16 August 2005 showed its sole director and secretary as being Mr Symons. Another extract obtained 17 May 2007 at 16.32 was to the same effect. An extract obtained 28 May 2007 at 11.34 am however showed that Mr Gerd Jacquin had been appointed a director of Dependable with effect from 1 September 2005. A doc image of the record of this appointment (Form 484) was shown as having been lodged electronically on 27 May 2007 at 17.40 by Mr Symons. Mr Jacquin says that he never signed any written consents to appointment as a director. Mr Symons produced no minute of any meeting of directors or members of Dependable appointing Mr Jacquin as director. Mr Jacquin said that his work for Dependable consisted in acting as consultant and *'providing insurance'*. He said that he had done sub-contract carpentry work including the staircase at the Edward Street property and had billed for that work as a sub-contractor and had been paid.

55 Riordans sent a further notice of intention to determine contract pursuant to Clause 20.1 of the contract to Dependable this time dated 29 June 2007. This notice alleged in its first part a series of defects which were said to be *'substantial breaches and defaults'*. The alleged defaults consisting of alleged building defects numbered 31. The second part of the notice returned to the registration issues asserting that Mr Symons is not and never has been a registered domestic builder in any category and with respect to Mr Jacquin that:

> Notice of consent as required by Section 201D of the Corporations Act executed by Gerd Jacquin has not been produced'.

56 Next, it was alleged that the builder was in default in that it was said Clause 63 and 64 of the building contract required a public works insurance policy with cover of $10m whereas the cover produced was only $5m. Finally it was said that there was a breach of the contract in that the party wall was offset. The notice concluded that if the breaches were not remedied within 14 days the contract would be terminated.

57 A notice of determination of contract 18 July was despatched to Dependable with a copy to Mr Jacquin. On 13 July Slidders had responded. As to the alleged defects a number were disputed and a number were admitted. The breach based on registration issues was denied. The

allegation with respect to the failure to produce a notice under Section 201B of the *Corporations Act* was responded to as follows:

> The notice of consent is relevant only to the relationship between the company and ASIC, to the extent that non-production to the regulator may constitute an offence.
>
> Accordingly, the builder has no obligation under the building contract or the *Corporations Act* 2001 to furnish the owners with a copy of the notice of consent. In any event, this document would have no bearing on this dispute whatsoever.

58 A revised certificate of currency for higher insurance was included. As to the alleged misalignment of the party wall, Sliders said that Dependable could neither '*confirm nor deny this alleged defect*' and would engage a surveyor to investigate.

59 Mr Serong then took the work over as owner builder. He wrote to the building surveyor, Mr Nanda Cumaran stating that he had been given permission by the Builder's Registration Board to undertake the work as owner builder. He then obtained a copy of the original building permit and other documents. The building permit identified Mr Symons as owner; hence the stop notice was addressed to him and not copied to the Serongs when originally issued. As owner builder Mr Serong then proceeded to complete the work. He obtained reports from Mr Rudolph Arends of BSS Design Group, Douglas Buchanan, Quantity Surveyor of Prowse Quantity Surveying and a land survey from Kilpatrick and Webber. Mr George Eichner acted as project manager for Mr Serong. Mr Eichner, perhaps like Mr Symons has had extensive experience in the building industry but is not himself a registered building practitioner.

60 A certificate of occupancy issued on 2 October 2008.

APPLICANTS' CLAIM

61 The Serongs filed the application commencing this proceeding in the Tribunal on 20 November 2007. In their application they sought a declaration that they had lawfully determined the building agreement, they sought damages against Dependable for breach of contract '*and or repudiation*'. They sought damages against Mr Symons who was joined as the second respondent:

> For misleading or deceptive and/or unconscionable conduct pursuant to Section 159 of the *Fair Trading Act* 1999.

62 The Serongs sought interest, costs and further or other relief including orders under Section 158 of the *Fair Trading Act*. The points of claim included a contractual claim against Dependable and amongst other things a claim in Common Law negligence against Mr Symons based upon an alleged duty of care on his part. Mr Gurr of counsel who appeared at the hearing for the Serongs announced that this element of the claim would not be pressed.

DEPENDABLE'S COUNTERCLAIM

63 Slidders then acting for Dependable filed points of counterclaim on its behalf on 7 March. It sought damages of $261,676.00, statutory interest, costs and further or other relief. The counterclaim alleged that the service by the Serongs of the notice of intention to terminate contract dated 29 June 2007 itself constituted a repudiation of the contract by the Serongs. The counterclaim said that Slidders on behalf of Dependable accepted the repudiation by letter dated 26 July 2007. The damages claim consisted of claims for completed fixing stage works and completed *'completion stage works'* in the sums of $62,990 and $12,450 respectively. There was also a claim for $114,640 for variations. None of these variations or alleged variations had been reduced to writing. There was also a claim for $71,569 representing the loss of a 35% margin for profit and overhead calculated against a contract price of $800,000 being 35% of $204.560 being the unclaimed balance on unperformed work.

TERMINATION OF CONTRACT

64 The parties are agreed that the contract between the Serongs and Dependable was terminated. The Serongs contend that they lawfully terminated the contract by the notice procedure described above. Dependable alleged that by these notices the Serongs repudiated the contract and Dependable accepted that repudiation. Which party was in the wrong? The notice served by the Serongs' solicitors dated 22 May 2007 seems not to have been acted upon and may therefore be put to one side.

65 What then of the notice dated 29 June 2007? It is expressed to have been given under Clause 20.1 of the Building Contract. That sub-clause provides as follows:

> If the **Builder**:
>
> - fails to produce to the **Owner** a copy of the relevant insurance policy or certificate of currency setting out details of the required insurance under the *Building Act* 1993, as required by Clause 5; OR
> - fails to proceed with the **Works** with due diligence or in a competent manner; OR
> - unreasonably suspends the carrying out of the **Works**; OR
> - refuses or persistently neglects to remove or remedy defective work or improper **Materials**, so that by the refusal or persistent neglect the **Works** are adversely affected; OR
> - refuses or persistently neglects to comply with this **Contract** (including the requirements of municipal or other authorities); OR
> - is unable or unwilling to complete the **Works** or abandons the **Contract**; OR
> - is in substantial breach of this **Contract**:

THEN

the **Owner** may give written notice by registered post to the **Builder**:

- describing the breach or breaches of the **Contract** by the **Builder**; AND
- stating the **Owner's** intention to terminate the **Contract** unless the **Builder** remedies the breach or breaches of this **Contract** within a period of fourteen (14) **Days** after the **Builder's** receipt of the above notice.

66 The notice commences by alleging in terms of the last bullet point in sub-clause 20.1 that Dependable was *'in substantial breach of the contract and that the works are defective'*. There then follow a number of alleged defects. The existence of these defects is said to be in breach of the builder's warranties contained in Clause 10.1 of the contract. That clause provides:

> The **Builder** gives to the **Owner** the following warranties contained in Section 8 of the **Act**:
>
> - The **Builder** will carry out the **Works** in a proper and workmanlike manner and in accordance with the **Plans** and **Specifications** set out in the **Contract**.
> - **Materials** supplied by the **Builder** for use in the **Works** will be good and suitable for the purpose for which they are to be used and, unless otherwise stated in the **Contract**, those **Materials** will be new.
> - The **Builder** will carry out the **Works** in accordance with all laws and legal requirements including, without limiting the generality of this warranty, the *Building Act* 1993 and the regulations made under that Act.
> - The **Builder** will carry out the **Works** with reasonable care and skill and will achieve **Completion** by the date (or within the period) specified in the **Contract**.
> - If the **Works**, consist 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 **Builder** will carry out the **Work** so the home will be suitable for occupation at the time the **Works** achieve **Completion**.
> - If the **Contract** states the particular purpose for which the **Works** are required, or the result which the **Owner** wishes the **Works** to achieve, so as to show that the **Owner** relies on the **Builder's** skill and judgment, the **Builder** warrants that the **Works** including any **Materials** used will be reasonably fit for that purpose or are of such a nature and quality as they might reasonably be expected to achieve that result.

67 Some 31 defects are there alleged.

68 The response dated 13 July from Slidders admits that some nine of the alleged 31 items referred to in the Serongs' notice are defective. As to each of those the notice says:

> The builder agrees with that this item is defective and will rectify it.

69 Clause 20.2 of the contract provides:

> If the **Builder** fails to remedy the breach or breaches of this **Contract** as stated in any notice served by the **Owner** under Clause 20.1 THEN the **Owner** may, without prejudice to any other rights or remedies, give further notice by registered post to the **Builder** immediately terminating this **Contract**.

70 This sub-clause gives the owners a right of termination if the builder fails to remedy the breaches '*as stated in any notice*'. The Serongs' notice in accordance with Clause 20.1 and Clause 20.2 provides:

> Unless the builder remedies the breaches described in this notice within 14 days it is the owners' intention to terminate the contract …

71 A notice to that effect was despatched by registered post dated 18 July 2007. The terms of Clauses 20.1 and 20.2 operate so as to leave a builder at risk of having the contract terminated if material breaches are alleged and exist and are not remedied. Merely to admit that certain work is defective and promise to rectify it in the future does not seem to be sufficient to stave off the owners' right of termination. It would seem to follow that if the nine admitted defects constitute either singly or in combination a substantial breach of the building contract, the Serongs were entitled for that reason alone to terminate the building contract by the 18 July notice.

72 The first group of admitted defects are numbers 3, 4 and 5.

> 3. The integrity of the timber I beam (Hi-joist) has been substantially reduced by the plumber having cut through the whole of the top chord of the beam (Hi-joist). As a result, the structural integrity of the timber beam is significantly and dangerously reduced.
>
> 4. The breach described in point 3. (immediately above) also applies to the beam on the other side of the steel beam except the top chord has only been cut through.
>
> 5. Not all of the timber I beams have end blocking to the north wall, which is required by the manufacturer to prevent twisting of the timber I beams.

73 The next two that are the subject of admission are numbers 10 and 11, which are as follows:

> 10. The two timber posts at the northwest corner are in the wrong location according to the architectural drawing. They should be on the north façade. Further, the posts sit on top of the compressed cement sheet and have no base fixings back to the sub floor structure.

11. The Builder has changed the design at the north west corner in that the ceiling goes through and the overhang has been filled in.

74 The next admissions are with respect to Items 18 and 19:

18. The party wall plasterboard edges are required under the BCA to be fire rated by the use of fire rated mastic. This has not been done.

19. The majority of the butt joints in plasterboard have not been taped.

75 The next admission is with respect to Item 27 which is as follows:

> Bulk head in laundry is approximately 15mm out of level to left hand side. This is outside the tolerance of 4mm over 2 metres as set by the Building Control Commission guidelines on Standards and Tolerances and AS 2589.1.

76 The final admissions are with respect to Items 29 and 30, which state:

29. The ceiling to floor windows have not been fitted with safety glass as required by AS 1288.

30. Openings/windows around spa requires safety glass to comply with AS 1288.

77 Neither party made any submissions as to what sort of a breach or breaches would constitute alone or singly a substantial breach. The word substantial is protean and quite ambiguous. It refers to a concept which one might think is pre-eminently in the eye of the beholder. Building defects which may seem very serious and very annoying to a proprietor may seem to a builder to be matters of relative triviality. One of the best known and most frequently quoted expositions of what the word *'substantial'* means is to be found in the judgment of Deane J, then a judge of the Federal Court of Australia, in the context of Section 45D of the *Trade Practices Act* 1974 which prohibited secondary boycotts which would have the effect of causing substantial loss or damage to a third person. His Honour's exposition was as follows:

> The word 'substantial' is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase 'substantial loss or damage', it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size. The difficulties and uncertainties which the use of the word is liable to cause are well illustrated by the guidance given by Viscount Simon in *Palser v. Grinling* ([1948] 1 All ER 1 at 11; [1948] AC 291 at 317) where, after holding that, in the context there under consideration, the meaning of the word was equivalent to 'considerable, solid or big', he said: 'Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances of each case … ' (See also *Terry's Motors Ltd. v. Rinder* [1948] SR (SA) 167 at 180 and *Granada Theatres Ltd. v. Freehold Investment*

> *(Leytonstone) Ltd.* [1958] 1 WLR 845 at 848). In the context of s.45D(1) of the Act, the word 'substantial' is used in a relative sense in that, regardless of whether it means large or weighty on the one hand or real or of substance as distinct from ephemeral or nominal on the other, it would be necessary to know something of the nature and scope of the relevant business before one could say that particular actual or potential loss or damage was substantial. As at present advised, I incline to the view that the phrase, substantial loss or damage, in s.45D(1) includes loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal. It is, however, unnecessary that I form or express any concluded view in that regard since the ultimate conclusion which I have reached is the same regardless of which of the alternative meanings to which reference has been made is given to the word 'substantial' in s.45D(1). *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, 382

78 His Honour's analysis refers to a number of interpretations which have been applied to the word substantial over the years in different contexts. In broad terms the two strands of meaning are on the one hand *'of substance as distinct from ephemeral or* nominal'. If applied in the present context this would mean that any breach going beyond the *de minimis* would be a substantial breach. The view which I think was espoused by Mr Gurr, counsel for the Serongs and the view adopted by Viscount Simon in the case referred to by Deane J in the passage quoted above, namely *'considerable, solid or big'* in the context of a building contract would mean that only really important breaches would count. In my view, in the context of a building contract, the latter meaning is the one which should be given to the word *'substantial'* or the phrase *'substantial breach'*.

79 Experience sitting in the Domestic Building List and a reading of judgments in building disputes demonstrates that building is a complex process and this complexity and human frailty mean that defects in a structure are common and sometimes, at least on a temporary basis, unavoidable. The evidence before me in this case was for instance that the existence of defects in a building frame would not render it inappropriate for a builder to claim payment for the frame stage. Given that it is difficult to avoid some defects and that the process of rectification may take some time it seems inherently unlikely that a standard form building contract prepared by a builders' association (The Master Builders' Association of Victoria) would intend to leave a builder at risk of contract cancellation for failure to rectify within 14 days of a notice any defect which was more than ephemeral or *de minimis*.

80 Without descending to a detailed consideration of the various items which were the subject of admissions by Dependable in its solicitor's response to the Notice of Intention to Cancel, I would not be prepared to find that either singly or in combination they constitute a substantial breach.

81 The last basis alleged in the Notice of Intention to Determination the Contract is that Dependable was alleged to be in substantial breach of Clause 10.1 of the building contract in that it constructed the building in part on the adjoining land. It will be recalled that the Serongs' property and proposed residence is *'one of a pair'*, that is it is half of a larger building constructed across a two lot plan of subdivision. Both of the allotments under that plan of subdivision were owned by Dependable. As part of their transaction with Dependable the Serongs bought the allotment on which their house was to be constructed; Dependable retained the other half. The Serongs commenced proceeding 7208/2008 in the Common Law Division of the Supreme Court. They alleged that Dependable had constructed part of the Serongs' residence on the Dependable allotment rather than on the Serong allotment and sought declarations that the encroached area of the Dependable land referred to as the disputed land belonged beneficially to them and that Dependable held it on trust for them. They also sought an order that Dependable transfer its legal interest in the disputed land to the Serongs. In paragraph 11 of their Statement of Claim the Serongs alleged that the party wall was constructed wholly on the Dependable land instead of being half on their land and half on the Dependable land. Dependable in its defence dated 21 August 2008 which was prepared by Mr Symons admitted this allegation.

82 In the hearing before me Mr Symons did not deny that the party wall had been built across the boundary rather than along the boundary. He said first, that this was an error of design, presumably blaming the engineers who had prepared the plans for the building and secondly that he had put a proposal relative to the Supreme Court proceedings which would resolve them entailing a re-subdivision of the land. This proposal it seems has not been accepted by the Serongs though why they have found this proposal unsatisfactory or what the precise terms of the Dependable/Symons settlement proposal were, were not gone into in the hearing before me. In the response to the notice of intention to terminate the contract, Dependable said it was unable to comment on the allegation and would engage a firm of land surveyors to investigate.

83 In the circumstances I believe the allegation in the Notice of Intention to Terminate at least as to its factual basis has been made out by admission both in the pleadings in the Supreme Court proceedings and in the course of the hearing before me. The question remains whether these facts admitted as they are, constitute a breach of Clause 10.1 of the building contract. That clause is a warranty as to the builder's workmanship. In *Minchillo v Ford Motor Company of Australia Limited* [1995] 2 VR 594 the Full Court of the Supreme Court of Victoria, (Fullagar, Brooking and Ormiston JJ) held that a warranty as to good workmanship was not breached where a product was found to be defective by reason of a defective design. The warranty as to workmanship was held to extend to the execution of the manufacturing process (in this case of a truck) not the adequacy of the truck design. The

allegation both in the Supreme Court Statement of Claim and in the Notice of Intention to Terminate the Building Contract was not that the party wall was uniformly across the boundary but rather that the extent to which it crossed the title boundary varied along its length. I asked Mr Symons if he was alleging that those who prepared the plans for the Serongs' residence and the other half of the *'pair'* had depicted a party wall which ran other than at 90^{o} to the title frontage. He did not respond. I am accordingly highly doubtful as to whether the cause for the misalignment of the party wall really did derive from an error in the plans. I note for instance that I was not told of any third party claim or separate damages claim against those who prepared the plan brought by Dependable. In the end however I do not think it matters. Clearly proper workmanship in erecting a building extends to locating its walls in the correct place as per the plans. Similarly, if a plan called for the placing of a wall in a manner which violated a title boundary, proper workmanship would require in my view, those executing the plan to call a halt and seek clarification, not blindly follow what in the circumstances would clearly be an incorrect plan.

84 The consequences of this *faux pas* by Dependable, being a breach of Clause 10.1 of the building contract is a weighty and important matter. On any view it is a substantial breach. This breach remains unremedied to this day. In itself it provides a proper basis for the lawful termination of the building contract by the Serongs.

85 The penultimate *'substantial breach'* alleged in the Notice of Intention to Terminate was that being obliged by the third bullet point of Clause 2.1 to carry out the building work:

> In accordance with all laws and legal requirements including (without limiting the generality of [that] warranty, the *Building Act* 1993 and the Regulations made under that Act.

86 Dependable contracted to undertake and undertook work which it was legally prohibited from doing by reason of the fact that none of its directors was a registered building practitioner. The notice correctly asserted that Section 29 of the *Domestic Building Contracts Act* 1995 prohibits a company from carrying out major domestic building contract work unless at least one of its directors is a registered domestic builder. The notice alleged that Mr Symons was not and never had been a registered building practitioner in the category of domestic building. That fact was true then and remains true now. The premise of the allegation of breach was that Mr Symons was the sole director of Dependable at all material times. It will be recalled that this same allegation was made in the earlier Notice of Intention to Terminate dated 22 May 2007. Slidders in its response to that notice alleged that since 1 September 2005 Mr Gerd Jacquin had been a director of Dependable, hence there was no legal breach. The second notice dated 29 June returned to the same issue alleging that no Notice of Consent as required by Section 201D of the *Corporations Act* and executed by Mr Jacquin had been produced. That section of the *Corporations Act* requires a

person to sign a written consent to appointment as director before being so appointed and requires the company to retain a copy of the Notice of Consent. The allegation relative to this Notice of Consent which the evidence before me established did not exist and never has existed seemed to be based upon the view that the absence of such consent rendered Mr Jacquin's purported appointment void or invalid or in a more general sense a sham.

87 This matter was examined at some length in the hearing before me. It appeared that the Form 484 lodged in 2007 by Mr Symons after the service of the first notice recording a *'backdated'* appointment of Mr Jacquin dating from 1 September 2005 was irregular for a number of reasons. It gave as Mr Jacquin's address a property at which he had not resided for some decades, it gave an incorrect birth date (Mr Jacquin seems to have been born in 1950 not 1953 as the Form 484 would have it) and finally, gave his place of birth as Point Cook, Victoria whereas the fact was that Mr Jacquin was born in Germany.

88 Mr Gurr noted that when challenged on this registration question at a meeting on 5 March 2007 (see [46] above) Mr Symons failed to respond as one might have expected if Mr Jacquin had been a director since 2005 *'No I am not a registered builder but my co-director Mr Jacquin is'*. Mr Symons said it can sometimes be difficult to think of these things on the spot. Again, in a follow-up letter written by the Serongs' solicitors (see [49]) the solicitors asked *'Who is Gerd Jacquin'* and enquired as to his connection with Dependable. Mr Symons' response was evasive [50]. He failed to say as one could have expected him to do, *'Mr Jacquin is my co-director, that is his connection with Dependable'*.

89 Mr Jacquin admitted he had never signed any consent to be appointed as a director, he said that he had at some point which he could not specify agreed to serve as a director but he had never attended any board meetings. He said that he had acted as a consultant to Dependable and also furnished insurance for Dependable and these were his roles with the company.

90 On the basis of the material before me I have no doubt that the *'backdating'* of Mr Jacquin's appointment to 2005 was false. Had Mr Jacquin been a director of Dependable at any time prior to the service of the first Notice of Intention to Terminate, Mr Symons would have provided that as the answer to the allegations made both to his face by the Serongs themselves and in writing by their solicitors that Dependable was acting illegally in undertaking major domestic building work. The string of errors in the Form 484 also goes to support the view that it was a desperate expedient lodged in panic rather than a document recording corporate reality.

91 The directorship of Dependable ought not be regarded as constituting a substantial breach so as to justify the termination of the contract. For reasons already given I entirely reject the suggestion that Mr Jacquin served as a director of Dependable at any time prior to the date on which the Form

484 was lodged. That finding however does not exclude the possibility that he could be regarded at least for the purposes of the present dispute as having held the office of director from the date of the lodgement of the Form 484. What underlay Mr Gurr's submission that the appointment or apparent appointment of Mr Jacquin as director was for material purposes invalid, was that failure to comply with requirements of the *Corporations Act* such as signature of consent to appointment, meeting of members to appoint director or meetings by other directors rendered Mr Jacquin's apparent directorship invalid. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 the High Court of Australia rejecting the traditional distinction that had previously been drawn between alleged mandatory and merely directory statutory requirements held that an act done in breach of a condition regulating the exercise of a statutory power was not necessarily invalid. Whether it was depended on whether it was a purpose of the legislation to invalidate any act done in breach of the condition. There is much jurisprudence on provisions in successive corporate legislation rendering both official and shadow directors liable in certain circumstances for the debts of an insolvent company. One of the earlier leading cases in this line of authority is *Morley v Statewide Tobacco Services Limited* [1993] 1 VR 423 where Mrs Morley, a *'sleeping director'*, was held liable for the debts of the company of which she was a director. I doubt that a director in this situation would be heard to defend himself or herself and avoid liability by saying:

> My appointment was invalid I didn't consent to it in writing prior to its having been made'

or

> No proper meeting of members or directors was held to appoint me.

92 The premise of this part of the Serongs' case therefore failed. It is difficult to make a finding that somebody's directorship is a *'sham'* because of the difficulty in identifying some irreducible minimum function for a directorship particularly in the case of Mr Jacquin, an alleged non-executive directorship.

93 It is to be noted that the provisions of Clause 20 of the contract as to termination by the owners is expressed to be without prejudice to any of their other remedy. The notice dated 29 January 2007 is expressed to be *'without prejudice to any other right or remedy the owners may have'*.

94 For reasons which were never explained, whilst the first Notice of Intention to Determine dated 22 May 2007 specifically relied upon alleged breaches of the building contract referrable to warranty insurance this allegation was not repeated in the second and operative notice dated 29 June 2007. The Serongs had a Common Law entitlement to terminate the contract if there was a breach by Dependable of a fundamental or essential term of the contract *Shevill v Builders' Licensing Board* (1982) 149 CLR 620, 626 per Gibbs CJ. Such a fundamental or essential term traditionally called a

'condition' in contradistinction to lesser terms referred to traditionally as *'warranties'* is one which is:

> Of such importance to the promise that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.
> *Associated Newspapers Limited v Bancks* (1951) 83 CLR 222, 337

95 Clause 5.1 of the building contract obliged Dependable before carrying out any work under the contract to *'obtain the required insurance under the Building Act 1993'*. Clause 5.2 provided that if Dependable did not have or did not obtain the required insurance under the *Building Act* prior to entering into the contract it was a condition precedent that before Dependable was entitled *'to enforce any of the terms of [the building contract] that [Dependable] obtain the required insurance'* and that until Dependable obtained the insurance no moneys were payable by the Serongs to Dependable under the contract. Clause 5.4 stated that within 21 days of the commencement date Dependable was obliged to provide to the Serongs:

> A copy of the relevant insurance policy, certificate of currency or certificate of insurance setting out details of the required insurance under the *Building Act* 1993 …

96 Mr Serong said it was a concern to obtain the full warranty insurance cover provided for under the *Building Act* that led him to decline to deal with Mr Symons or Dependable as an *'owner builder'* [6] above. Having regard to this factual background and to the draconian consequences visited upon a builder who does not hold the necessary insurance viz. incapacity to enforce the building contract, I conclude that the provisions of Clause 5 of the building contract should be regarded as a condition or a fundamental or essential term of the contract breach of which by Dependable would entitle the Serongs to terminate the building contract.

97 The *Building Act* 1993 authorises the responsible Minister to publish orders in the Government Gazette requiring building practitioners in specified categories to be covered by particular insurance. Section 137A provides inter alia:

> (1) Without limiting section 135, if an order under that section requires a builder to be covered by insurance relating to the carrying out of domestic building work or managing or arranging the carrying out of domestic building work, the insurance required by the order may, subject to any exemptions or exclusions set out in the order, relate to losses resulting from—
>
> (a) breaches of warranties implied into the major domestic building contract for that work under the **Domestic Building Contracts Act 1995**;
>
> (b) domestic building work which is defective within the meaning of that Act;

(c) non-completion of the domestic building work;

(d) conduct by the builder in connection with the major domestic building contract for that work which contravenes section 52, 53, 55A or 74 of the **Trade Practices Act** 1974 of the Commonwealth or section 9, 11 or 12 of the **Fair Trading Act 1999**.

(2) An order under section 135 may require insurance cover of a kind referred to in—

(a) subsection (1)(a) to extend to each person who is or may become entitled to the benefit of any of those warranties; or

(b) subsection (1)(b) to extend to any person on whose behalf the domestic building work is being carried out and to the owner for the time being of the building or land in respect of which the building work was being carried out.

….

98 The Certificate of Insurance from Exporters Insurance Co Limited is expressed to have been issued under Section 135 of the *Building Act*. No-one has suggested that it does not accord with the Ministerial order. It will be seen that this policy is issued with respect to a particular building contract dated 25 October 2005. During the course of the hearing a copy of the contract between Mr Jacquin and Dependable dated October 2005 was produced. Section 137A(1) provides for the policy required by Section 135 of the Act to grant cover with respect to breaches of warranties implied into the *'**major domestic building contract'*** (emphasis added). Paragraph (c) provides for the cover to extend to non-completion of *'**the** domestic building work'* (emphasis added). Paragraph (d) refers to conduct by the builder in connection with *'**the** domestic building contract …'* (emphasis added). The form of the policy and the form of the statute indicate that the coverage is to relate to the building contract identified in the policy and not to building work generally conducted on the same site pursuant to a contract between other persons. Again, the certificate under the heading *'Limitations'* includes the following:

> The indemnities referred to in Clause 01 only apply if the builder dies, becomes insolvent or disappears. (b1).

99 Accordingly if contrary to the view I have just expressed the policy could extend to work done by Dependable under a contract dated 14 December 2005 rather than work done by Mr Jacquin under a contract dated October 2005 for Dependable and Mr Symons if Dependable were to become insolvent a claim could not be made under the policy if Mr Jacquin remained on the scene and in good financial and physical health. Again Mr Gurr pointed out that by Clause B4 of the policy terms the insurer's liability for non-completion is limited to 20% of the contract price. Twenty percent of the contract price for the contract between Mr Jacquin as builder and

Dependable and Mr Symons as owner would be $60,000. Twenty percent of the contract price for the contract between Dependable and the Serongs would be $160,00 – more than double. That Dependable was in breach of the building contract insofar as it required the provision by Dependable of the insurance cover provided for in the *Building Act* is clear. This was for reasons explained a breach of an essential, a fundamental term or a breach of condition. It might have formed the basis for termination of the contract. As it is however, it has been relied upon neither in the notice nor in the applicants' Points of Claim. I have found however that the breach by Dependable relative to the site layout with the party wall wrongly located constitutes a substantial breach on the part of Dependable of its obligations under Clause 10.1 of the building contract. This substantial breach is both referred to in the Notice of Intention to Terminate or Determine and also in the Serongs' Points of Claim. See Clause 8.2 and paragraph K of the attached schedule. The Serongs were entitled to determine the building agreement and by determining it they were not themselves guilty of repudiation.

DEFECTS VERSUS COMPLETION ITEMS

100 The finding that the Serongs determined the contract and that they were lawfully entitled so to do and that they would not repudiate the contract necessarily rendered the distinction made in Slidders' response to the Notice of Intention to Determine Contract and in Mr Symons' presentation at the hearing between the cost of rendering defects on the one hand and mere non-completion matters irrelevant. This is subject to allowance being made for that portion of the contract price which remained unpaid at the time the contract was determined. Dependable as the contract breaker would appear to be liable for the cost of both defective and incomplete items.

101 I turn therefore to the various matters alleged in the Points of Claim as being defective - a longer list than the one which was appended to the Notice of Intention to Determine observing that I am not called upon in the circumstances to determine whether these items are properly to be regarded as incomplete or defective I am concerned now only with the cost of finishing the job.

ALLEGED DEFECTS

102 The first defect alleged is in the lower ground floor garage. The allegation is as follows:

> The connection of the cantilevered structural beams FB2 and 3 to the crossbeam PFC180 supporting the veranda above only has two bolts whereas proper industry practice requires four bolts. As a result of this breach the structural integrity of the structural beams is significantly and dangerously reduced.

103 Mr Arends, a building consultant and architect gave evidence on behalf of the Serongs. His comment on this alleged defect which he identified and said existed was:

> According to the structural drawing from Kennedy Cox (s3) there should be four bolts at the end of FB2 and three at the connection of the 180 PFC.

104 Mr George Eichner who described himself as a qualified architectural draughtsman, the holder of an architectural design drafting diploma from the Royal Melbourne Institute of Technology and a surveying certificate from the Preston College of TAFE together with a two year construction estimating and quantity surveying course from the Housing Industry Association also supported this defect as existing. Mr Serong challenged the admissibility of Mr Eichner's evidence. He called upon him to produce certificates verifying the qualifications which he claimed. No certificates were produced either when Mr Eichner first gave evidence or at any later date. Mr Gurr said that according to Mr Eichner these certificates had been mislaid. Mr Eichner worked initially for a company known as BB Design and afterwards following a disagreement within that organisation went out on his own. In this latter capacity having been involved on commission with the Serongs with BB he took over project managing the completion of the Serongs' house.

105 Section 98 of the *Victorian Civil and Administrative Tribunal Act* 1998 provides, inter alia:

> (1) The Tribunal –
>
> …
>
> (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices and procedures;
>
> (c) may inform itself on any matter as it sees fit.

106 Whilst the Tribunal has a practice direction as to expert evidence in broadly the same terms as those which apply in the Federal Court and the Supreme Court, in my view that practice direction cannot cut down the statutory authority by which I have to inform myself as I see fit in accordance with Section 98 of the *Victorian Civil and Administrative Tribunal Act*. Further, the provision that the Tribunal is not bound by the rules of relevance means that the rules which would apply in the Supreme Court or the Federal Court as to the admissibility of expert evidence do not apply here. I do not believe that this is intended to create *'Rafferty's Rules'* where parties may adduce evidence without regard to rules of relevance, call persons as alleged experts on Victorian law and so forth. I do believe however that it gives me greater scope to receive opinion evidence than a judge in a court would have. Without making any definitive findings as to Mr Eichner's claimed qualifications what I heard demonstrated to me that he is a man of wide experience in the construction industry. I am prepared therefore to

consider his evidence. It is of course ironic that the objection described is made by Mr Symons who himself holds no trade qualification and no building registration.

107 Mr Martin a building consultant who gave evidence for the respondent having conducted inspections on 9 August 2007 and 13 September 2007 said that on the first of those inspections the plasterboard walls which had been affixed by Dependable's contractors were in place and that those plasterboard walls had been removed at the time of his second inspection. Mr Martin's comments were that having been provided with structural plans he conceded that they *'require the connection to be made with four bolts'*. This means that it is work that needs to be done.

108 The next alleged defect is:

> The integrity of the timber I beam (hi-joist) has been substantially reduced by the building having cut through the whole of the top chord of the beam (hi-joist). As a result, the structural integrity of the timber beam is significantly and dangerously reduced.

109 This defect was admitted by Slidders on behalf of Dependable. It was also accepted by Mr Martin. I conclude that the defect alleged existed. Mr Eichner reported that rectification entailed the installation of additional floor joists and beams. He said the work was significant and required chopping a number of beams through to get them in, to laminate them together.

110 The next alleged defect is:

> The breach described above also applies to the beam on the other side of the steel beam except the top chord has only been party cut through.

111 Again this defect was accepted as such by Mr Martin. It was also found to exist by Mr Arends. Mr Eichner observed that:

> We had to laminate additional F17 hardwood beams alongside each joist by gluing them to the side web, sitting them inside the web and the I beam and then nailing them together from side to side like a sandwich. This was done in 17 locations above the spare room and going into the theatre room wall. In order to level out the floor we had to jack up the floor 45-50mm as it had sagged that much, because the floor joists had collapsed.

112 This defect is established.

113 The next defect alleged said to exist in the lower ground floor cinema is:

> Not all of the timber I beams had end blocking to the north wall, which is required by a manufacturer to prevent twisting of the timber I beams.

114 Mr Martin following the provision of information agreed that this work needed to be done. This was in accordance with Mr Arends opinion. Mr Eichner commented:

> All [Dependable] had done was to use some off-cut section of the floor joists for the work which were buckling in the centre. These were replaced with solid timber blocking to achieve the design requirements.

115 This defect is established.

116 The next alleged defect is said to be in the ground floor master bedroom as follows:

> The west wall to the right of the double door to the balcony is out of plumb by approximately 8mm over a 1.2m straight edge which is outside the tolerances of 4mm over 2mm for walls allowed for under the Building Control Commission Guidelines and Standards and Tolerances and AS2589.1.

117 This alleged defect was identified by Mr Arends and Mr Martin's comment was:

> When considered over its full height the wall is bowed rather than out of plumb. The plaster sheeting on this short section of wall will need to be removed to enable the wall to be straightened.

118 Mr Eichner also concurred there is a defect. This defect is therefore established.

119 The next alleged defect also in the ground floor master bedroom is as follows:

> The plasterboard wall to the right of the western balcony doors is bowed. The plasterboard is outside the tolerances of 4mm over 2m for walls allowed for under the Building Control Commission Guidelines and Standards and Tolerances and AS2589.1.

120 This alleged defect is identified by Mr Arends. Mr Martin agreed that the wall was bowed and needed to be straightened. He said it was outside tolerances. Mr Eichner said that additional stud work was inserted inside the other studs and:

> Shot them to the side thereby plumbing out the walls all the way out to the corner of the bay window.

121 This defect is proved.

122 The next alleged defect in the ground floor meals/lounge area is as follows:

> The south wall (with two windows) has a bow both horizontally and vertically which is outside the tolerances of 4mm over 2m for walls allowed for under the Building Control Commission Guidelines on Standards and Tolerances and AS2589.1.

123 This defect is identified by Mr Arends. Mr Martin observed:

> I observe the plaster to the right-hand side of the west window that needed to packed out prior to the installation of the architraves.

124 Mr Gurr in his final written submissions characterised this as an acceptance by Mr Martin that there was a defect. He said that Mr Eichner dealt with the same issue at paragraph 3. Mr Eichner in this paragraph said inter alia:

> I had to set string lines in three locations across the bottom, middle and top and then buzz impact the entire wall to get it reasonably level and then I had to cut out the two windows and re-set them to suit the new position of the new plaster work.

125 Mr Martin said:

> I observe the plaster to the right-hand side of the west window and it needed to be packed out prior to the installation of the architraves.

126 All witnesses therefore agree there was work to be done. It may be that Mr Martin was intending to indicate that this was a completion item rather than a defect. For reasons previously given this distinction is not material in the present proceeding.

127 The next group of alleged defects are to the externals of the property. The first defect alleged to exist with respect to the north façade is as follows:

> The two timber posts at the north-west corner are in the wrong location according to the architectural drawing. They should be on the north façade. Further the posts sit on top of the compressed cement sheet and have no base fixing back to the sub-floor structure.

128 During cross-examination Mr Martin said that the two timber posts were temporary props. He agreed with the suggestion put to him by Mr Gurr that the reason for the inclusion of the temporary props:

> Was because the beam had been incorrectly constructed so that it went long short rather than short long
> T/S 402 ll 15-16.

129 As a result Mr Martin concluded that there was a defect T/S 403 line 30.

130 The next alleged defect is also in the northern façade and was said to be as follows:

> The builder has changed the design at the north-west corner in that the ceiling goes through and the overhang has been filled in.

131 In his report Mr Martin observes:

> The circumstances surrounding the change in detail are a matter of evidence.

132 Whilst cross-examining Mr Arends, Mr Symons alleged that this admitted departure from the design was as a result of an agreed variation. Challenged to produce written evidence of the variation Mr Symons said:

> That house has been completed and its been carried through.
> T/S 274 l 24-5

133 After taking instructions Mr Gurr said:

> It had been built like this [and] it was determined following termination of a contract to leave it as is.
> T/S 274 ll 29-30

134 In those circumstances there is no defect.

135 The next alleged defect is in the west façade and is said to be as follows:

> There has been a change in the brick dividing wall between the two apartments. The brick dividing wall stops at the dado level and then some sort of infill will be required to come above that level. This contravenes the building permit and does not comply with the fire rating.

136 This item was not dealt with by Mr Martin. During his cross-examination of Mr Arends, Mr Symons advanced the view that there had been an agreed variation so that the upper levels of this wall would consist at least partly of glass bricks. Accordingly said Mr Symons this was a completion issue rather than a defect. The result then is that there was work to be done and for the purposes of calculating damages the cost of that work must be allowed for.

137 The next alleged defect also is said to relate to the western façade and is alleged as follows:

> The junction of the roof edge beams, which are two of two multiplied 190 x 45 F17 timber beams according to the structural drawing S2, should be supported by the central brick wall. In the absence of any post or wall support the façade beam will have too great a span.

138 Mr Martin said:

> The reason for the change in construction is a matter of evidence. I understand that the alternative support details have been designed by the engineer.

139 Mr Symons at T/S 278 argued that this should be regarded as a completion item. Once again this is indicative that there is work to be done and on the findings I have made an allowance must be made for the cost of doing that work.

140 A general comment made by Mr Arends relative to the externals of the building was the next alleged defect:

> The external cladding is not positioned correctly which will result in moisture ingress into the building.

141 Mr Martin said that this was a completion item. During the course of his cross-examination of Mr Eichner, Mr Symons advanced the same view T/S201 ll 22-23. The same proposition was put to Mr Arends in cross-examination and he accepted it T/S279 ll 5-6. Once again this involved the concession that there was work that needs to be done and in the

circumstances the doing of that work needs to be allowed for in the damages whether the matter is considered one of completion or defect.

142 There then follow a number of alleged structural defects, the first of which was as follows:

> Kennedy Cox Engineers at Drawing S3 specified 20mm grout bed under steel plates between brick face. This has not been done.

143 Mr Arends identified this alleged defect. Mr Martin said that he had not inspected this issue. He conceded however that the structural drawings specified the provision of a grout bed. At T/S 279-280 Mr Symons sought to have Mr Arends concede that the provision of the grout bed was a completion item rather than a defect. He declined to do so. I asked at T/S 280 ll 10-13:

> Now, under the steel plate, does that mean from where we are here as depicted in that photograph it will be necessary in effect to jack up the steel plate to get the grout under it?

144 At lines 13-15 Mr Arends replied:

> You would have to do that or at least hold the steel beam in position to take the brickwork out so you have a smaller brick …

145 At lines 17-19 Mr Arends continued:

> You would have to do that at this framing fixing stage you can't do it down the track.

146 I am inclined to the view that having regard to the implausibility of lifting the structural member which has already been installed and jacking it up that this failure to provide a grout bed as stipulated in the plans is a defect rather than a completion item. As it is however, for reasons already explained the distinction is not ultimately material; the work has to be done.

147 The next alleged structural defect is as follows:

> Balcony steel should be galvanised, it has been painted.

148 Mr Martin said that he had not inspected on this issue. He conceded however that the plans do specify galvanised steel on the balcony. This defect was conceded by Mr Symons in the course of his cross-examination of Mr Arends T/S 285 ll 14-15.

149 The next alleged structural defect is as follows:

> The deck steel framework is bearing on broken brick corner in the basement courtyard.

150 Mr Martin did not inspect or comment on this issue. As I understood Mr Symons' cross-examination of Mr Arends, he conceded the correctness of Mr Arends observation but suggested that this was a completion item because:

> The whole really had to be redone because it was only temporary considering a spa was going to go in there [as part of a variation].
> T/S 285 ll 25-7

151 Again, I take this to be a concession that there was work to be done whether by way of completion or rectification.

152 The next alleged defect is as follows:

> Kennedy Drawing S2 shows C8 columns being 3/90 x 45 mgp 10 studs each side of the laundry door, powder room door and cavity slider in master bedroom. This has not been done.

153 This item was not commented upon by Mr Miller. As I understood Mr Symons response to this point, it was that:

> All that whole section had to be rejigged, re-designed, re-engineered according to how big the steel spa was.
> T/S 286 ll 11-13

154 Again, a concession that there was work to be done if not as a defect as a completion item.

155 The next alleged structural defect was as follows:

> C6 90 x 90 x 60 SHS at kitchen wall in line with stair has not been installed.

156 Mr Martin did not deal with this issue suggesting that it be referred to a structural engineer. As I understood him, Mr Symons conceded that a column was required. He said there was discussion of some design modification and it would provide the necessary structural support in some other way. He continued:

> So all I am saying is that that is not an actual defect, what it is is a completion item.
> T/S 289 ll 24-26

157 Once again this is a concession that there is work which needs to be done and whether one characterises it as a defect or a completion item is beside the point.

158 The next alleged default is as follows:

> C3 column 15 should be 300 psc post each side of stair windows noted on drawing S2 marked as C14, only a 90 x 90 shs is visible in back corner behind stud work.

159 Mr Martin did not comment on this issue, saying it had not been raised when he carried out his inspection. Mr Eichner commented that including the necessary C3 column:

> Required a welded connection at the top and travel through the floor and sat on the brick wall from the alfresco area below. This required cutting out the original flooring, open up the ceiling below to put the steel beam in and closing up the whole area again.

160 This issue does not seem to have been pursued by Mr Symons in cross-examining Mr Arends hence I regard this defect as effectively conceded and therefore made out.

161 The next alleged defect is:

> First floor dormer roof frame has no collar ties.

162 Again, this was not a matter in issue when Mr Martin made his initial inspection and hence he offered no comment. Mr Eichner observed:

> No collar ties were used in the roof construction to the dorma (sic). Further, the diagonal bracing on the two side walls was running the same direction as the rafters rather than in the opposite direction. The cross-bracing across the little window in the dorma (sic) only went half way and then just stoped instead of running across from corner to corner. The same defect was evident in the ensuite. The diagonal bracing was inadequately carried out as a consequence additional bracing throughout was required. The 45^{o} return wall that divides the ensuite from the dorma (sic) has no connection across the corners on both sides and as a consequence additional structural work to ensure stability in that area was required.

163 At T/S 9 it was put to Mr Arends that the photographs which he referred to did not in fact depict the relevant area. Mr Symons then said he would seek clarification on this matter from Mr Martin. There was a lengthy debate as to whether Mr Martin ought in the circumstances be allowed to give evidence on this point. During the course of the hearing I ordered a conclave of experts which took place one morning when no evidence was led. It seemed that Mr Symons would be seeking to obtain evidence from Mr Martin on this and other issues where my understanding was that the conclave had determined that he was unable to opine. Mr Martin said that he could add evidence on *'two points', 'but the others I wouldn't be prepared to comment at all'* T/S 386 ll 3-5. The issues relative to the dormer were amongst those on which he was not prepared to comment at all. Even although as the cross-examination of Mr Arends by Mr Symons indicated there were no photographs available which illustrated Mr Arends' observation I am prepared to accept their correctness and hence find a defect as alleged.

164 The next alleged defect is as follows:

> First floor RB1 3-240 x 45 fit not installed correctly support to RHS inadequate. This also applies to LHS shower. This needs to be rectified.

165 This matter was not commented upon by Mr Martin in his report or in his supplementary evidence in chief. In his cross-examination at T/S 291 Mr Symons suggested that the photographs chosen by Mr Arends to illustrate this point did not depict the correct area. Again, even despite the apparent absence of photographs depicting the observation, Mr Arends was generally

an accurate observer and in the absence of any evidence contradicting his observation I accept it as correct and find that there is a defect as alleged.

166 The next alleged defect is as follows:

> Lintel to highlight windows in bedroom 2 comprises three small beams and not one continuous beam as required by Kennedy Drawing SC.

167 This alleged defect is identified by Mr Arends. It was not dealt with by Mr Martin during his inspections. He suggests that it be referred to a qualified engineer. Mr Eichner made the same observation. Mr Arends was not challenged on this point in his cross-examination by Mr Symons hence I find the defect to be established.

168 Next it was alleged as a defect:

> Stud work to same wall as [previous alleged defect] above is contrary to good building practice, studs cut and noggins missing. This wall supports the main tile roof load. This needs to be complete.

169 Once again Mr Martin offered no comment. Mr Eichner referred to:

> Stud work … bowing in two different directions as it was cut through in a number of different locations, requiring the replacement of the studs and all associated noggins. By doing so whatever plumbing and electrical wire in those walls had to be stripped out to allow the work to be carried out.

170 Mr Arends conceded under cross-examination by Mr Symons that the photographs which had been taken by Mr Eichner and which were appended to Mr Arends' report did not depict the alleged defect. In the absence of any contrary expert evidence I accept the evidence of Mr Arends and find the defect established.

171 The next alleged defect is a related one. It is alleged:

> There are more than 20 load bearing studs that have been cut through by more than 50% and a pleat overlap into one side only by a maximum of 150mm framing. The Code requires less than 50% cut and 600mm long pleat overlapping 300mm each way to both sides. These need to be replaced.

172 This alleged defect was observed by Mr Arends. Mr Martin was unable to comment. Mr Arends did not himself allege that more than 20 load bearing studs had been cut through by more than 50%. He was not prepared to advance beyond the three which were admitted to by Mr Symons in the course of his cross-examination of Mr Arends (T/S 294). In his report Mr Eichner referred to '*a number of studs had been cut through more than 60% with only a small pleat to one side*'. Once again there was no actual evidence adduced on behalf of the respondents contradicting the observations made by Messrs Eichner and Arends; hence this defect is established.

173 The next alleged defect is:

> Non-load bearing walls have double plates impeding trust movement as required.

174 Mr Martin agreed that more clearance was required. Mr Eichner agreed with the observation stating it was *'in breach of the design'*. He said *'the entire wall needed to be let down to create the gap required'*. So far as I can make out there was no challenge in cross-examination mounted by Mr Symons against Mr Arends' opinion. This defect is established.

175 The next defect alleged is:

> Top plate wall junctions do not have gang plates across plate tying them together which would prevent the plaster cracking in corners which has occurred.

176 In his written report Mr Martin was unable to comment on this point. In cross-examining Mr Arends, Mr Symons indicated that Mr Martin would disagree with Mr Arends' opinion that this alleged defect existed. In the event Mr Martin was prepared to go beyond his written report on two points only which he described as *'the ply bracing versus packer and the way in which beams are stabilised by noggins'* T/S 386 ll 10-11. In the absence of any evidence challenging Mr Arends' opinion that this defect exists I accept its existence and so find.

177 The next alleged defect is:

> First floor, bedroom four party wall load bearing stud work is short by up to 15mm so plastic glass spaces were used to fill the gap. This needs to be rebuilt.

178 Once again Mr Martin gave no evidence on this point. Mr Symons did not so far as I can make out challenge Mr Arends on this point hence I accept that the defect is made out. Similarly the next alleged defect, namely:

> Glazing spacer plastic packers have been used in various locations which is not in accordance with the Code.

179 This defect is therefore established.

180 Item 19:

> Multiple load bearing stud work has not been nailed properly.

181 Once again Mr Martin makes no comment on this point. This alleged defect is left in an uncertain situation. In answer to questions by me referring to photo 68 attached to his report and responding to the question:

> Does that mean that this work may not be defective?

Mr Arends replied *'correct'*. In those circumstances I do not believe that this defect, Item 2.3.17 in the Arends' report has been made out.

182 The next alleged defect is:

> Floor joists around lift well are not ply block to transfer roof load.

183 As I understood Mr Symons' cross-examination of Mr Arends (T/S 298) he conceded that work needed to be done but put to Mr Arends that this was a completion item rather than a defect. I accept that interpretation but note that in the events that have occurred the distinction is not material.

184 The next alleged defect is:

> Load bearing stud work around window and door openings need to transfer load through floor joists to lower plates on each level as per details F3-F5 of installation manual, none of these have been done.

185 Mr Martin had no comment on this. Mr Symons was critical that Mr Arends was unable to produce photographs illustrating this point. Mr Arends however did not resile from the opinion which he had expressed and I do not understand that Mr Symons directly contradicted it. This defect is established.

186 The next alleged defect is:

> Bracing ply to external faces above basement is not adequately nailed.

187 Mr Symons' point in cross-examination was that there was extensive plywood employed sometimes for packing and sometimes for bracing. Mr Symons put it to Mr Arends that from the inside he would not be able to distinguish which plywood was bracing and which was merely packing; hence one could not tell the difference from the inside, the point from which Mr Arends was making his observations. His response was *'fair enough'* T/S 301 line 23.

188 This defect is not established.

189 The next alleged defect is:

> Lightweight cladding is meant to be screwed at 300mm on studs this has not been done.

190 Mr Martin's comment appeared to agree with the observation but said it was a matter of completion. Again in his cross-examination at T/S 302 Mr Symons appeared to concede that the cladding was not *'screwed at 300mm on studs'*. He said however this was a matter of completion. The work must be done.

191 The next alleged defect is:

> Lightweight cladding missing from above bedroom 2 allowing weather to penetrate insulation and plasterwork which had been installed.

192 Mr Martin said this was a matter of completion. The work needs to be done. In the events that have occurred the distinction between defect and completion item is not material.

193 The next alleged defect is:

> Door frame to laundry external door has been installed inside out.

194 This matter was the subject of lengthy cross-examination. Mr Symons alleged in the course of the cross-examination that the door depicted in the photograph referred to by Mr Arends had been installed by Mr Eichner following Mr Symons' departure from the site. Mr Gurr pointed out the alleged defect related not to the door itself but to the allegation that the door frame had been installed back to front. Mr Arends stuck to his guns on this point. Mr Symons said he would take the matter up through Mr Martin. As previously noted Mr Martin was unable to comment on this matter in his report and did not offer any supplementary *viva voce* evidence on this point. Accordingly I accept the evidence of Mr Arends and regard this defect as having been established.

195 The next alleged defect is:

> Bulkhead framework was installed with only nail connections and not screws to prevent separation.

196 Mr Gurr contended that Mr Martin conceded that these items were defects. I am unable to follow his transcript reference said to establish this point. Mr Eichner said:

> Once the condemned plasterwork was removed it was evident that all the bulkheads that had been created in the kitchen and family room were not constructed properly – there were no screws used in the connection of the bulkheads to the main structural frame above. As a consequence the 75mm nails that were used to fix the bulkhead framing were only piercing the timber frame above by some 15mm and in one section when I pulled the plaster off (the bulkhead above the island bench) it collapsed in one complete solid piece.

197 In the absence of evidence to the contrary I regard this defect as established.

198 The next alleged defect is:

> Cavity sliders in master bedroom are not fixed into place.

199 Mr Arends observed the existence of this alleged defect. Mr Martin offered no comment on this. I accept that this alleged defect has been established though it may be that it could more properly be regarded as a completion item.

200 Next it is alleged that various walls are out of plumb. I will not stay to give details of each alleged irregularity. Mr Arends said that these irregularities were caused by defective work by the finishing carpenter. He said that this was not a matter of completion; it was a matter of defect. The finishing carpenter should have regularised these matters before plaster was attached T/S 307 ll 17-19. I accept Mr Arends' evidence on this point. These defects are established.

201 The next alleged defect is:

> The floor in front of ground floor lift opening has a 15mm hump in floor. This needs to be levelled out.

202 Mr Martin made no comment on this alleged defect. During cross-examination of Mr Arends, Mr Symons said:

> … what I am saying was the lift wall was poured 100ml higher than it should have been therefore that area around the lift had to come up or dug out, one or the other, but because we were going to put in flooring, then to bring it up was just as easy because we are going to have to batten it out anyway.

203 This seems to be an admission that the floor was not properly poured. This defect is made out.

204 The next alleged defect is as follows:

> FB4 structural steel beam was designed to carry load through master bedroom wall above, but steel beam is 150mm too far west requiring additional timber beams to carry load.

205 Mr Martin was not inspecting for this item and so was unable to comment. In cross-examining Mr Arends at T/S 308 Mr Symons complained that:

> We were [not] invited back in to take measurements and to just ascertain that this in fact was the case.

206 Mr Eichner made this observation. He said the remedial work was*:*

> Significant and required chopping a number of beams through to get them in and to laminate them together in a manual fashion, where we were not able to use pneumatic equipment to connect them. So each beam had to be bolted and connected in order to achieve minimum structural integrity.

207 I accept the evidence of Messrs Arends and Eichner. This defect is established.

208 The next alleged defect was:

> FJ1 floor joists are not installed as per design specifications from smart frame.

209 This alleged defect does not appear to have been contradicted by Mr Symons. Mr Arends' opinion as to its existence is backed up by a report from *'Smart Frame'* which is an appendix to his report. This defect is established.

210 The next alleged defect is:

> Dividing party wall at front balcony only goes up 1500mm, should go to roof line for fire rating and structural support of roof.

211 As I understood Mr Symons' contention T/S 308 ll 24-27 the upward portion of the wall was to include glass bricks hence a completion item. For reasons previously given a distinction between completion items and defect items is not material. This item is established as something which must be allowed for in the assessment of damages.

212 The next alleged defect is:

> Roof rafters under tiled roof area should be blocked at 180mm to tie rafters together. 190mm min size blocking but 90 x 45 used only randomly.

213 In his written evidence Mr Martin made no comment. In cross-examining Mr Arends, Mr Symons put to him that Mr Martin would disagree with Mr Arends' opinion on the point in some manner. Mr Martin said in supplementary *viva voce* evidence at T/S 388 that:

> The Building Code gives you options in building construction over many years has allowed you to raise this sort of scenario with herringbone braces in the old days, these days that has become uneconomical but it could be achieved with two members as long as they were in opposing positions at the time and the bottom of the rafter rather than one continuous piece but the photos do not help me insofar as identifying that.
> ll 14-22

214 Mr Symons had apparently told Mr Martin that he or his contractors had used *'two members'* in opposing positions. Mr Martin did not observe these matters and it seems that the photographs do not give us an indication of what the fact was. In my view however, in light of all the irregularity in the framing work which I have already found established the more pessimistic view of Mr Arends is likely to be correct. I accept this defect as having been established.

215 The next alleged defect is:

> Noggings in walls particularly in basement are fixed randomly. The Framing Code requires them to be placed either side of a centreline no more than twice their thickness apart.

216 This alleged defect was identified by Mr Arends. Mr Eichner made the same observation. Mr Martin said that based upon the photographs that Mr Arends referred to:

> The spacing between these noggings would not exceed 1350mm and in my experience, in my opinion the noggins that are there would comply. It is not uncommon for there to be a break in that continuous line, particularly at door openings where it is recommended practice to put an extra noggin in beside and you just step and put one either side similar to what has occurred here. In this instance it has occurred for a different reason but I believe that that wall is structurally sound and in compliance with the relevant section of A1684. I only just have one final thing to say about that and I think the spacing of noggins, because they are nominally a lesser measurement than the frame, the location of the noggings does not need to be in line with or adjacent to the join in the plaster sheets. The joins are designed to float across between the studs and not be supported by the noggings, and that is all that I intended to say.
> T/S 377 line 25 to 378 line 14

217 I must say I find Mr Martin's evidence on this point somewhat difficult to follow. I prefer the evidence of Mr Arends that the Code is breached. This defect is made out.

218 The next alleged defect is:

> Bottom plates to most wall frames have only one nail randomly fixed not two nails at maximum 600mm centred.

219 Mr Symons observed that no photographs depicted this alleged defect. He did not however distinctly deny it as I understand him. The defect is made out.

220 The next alleged defect is:

> Floor sheeting is required to be fixed as per AS 1684.1. A large number of sheets have only been tacked but not shot off. Flooring and top flange accounts for 53mm nails at 75mm approx 20mm of nails should be visible from underneath. This has not been completed.

221 This alleged defect was mentioned in passing by Mr Symons in his cross-examination of Mr Arends T/S 313 ll 6-7. He seems to have asked no question and directed no distinct challenge on the point. Presumably he would contend that this is a completion item. At any rate in the absence of contradictory evidence there is work that needs to be done and the need for this work to be done should be reflected in the damages assessment.

222 The next alleged defect is:

> There is a hump in the roofline as viewed along the roof. The hump is at RB1. The RB1 is too high or at the top end of the roofline the wall is too low.

223 This is not commented upon by Mr Martin. It is observed by Mr Arends. Mr Symons put it to Mr Arends in cross-examination that the alleged hump could not be seen in the photograph which he had chosen to illustrate that point, something which Mr Arends conceded. Nevertheless Mr Symons did not distinctly assert that there was no hump. Neither I nor Mr Symons could observe the hump. Mr Arends gave evidence that he did. It seemed to me that at TS 313 ll 24-25 I gave Mr Symons the opportunity to make an outright denial which he failed to take up. This defect is therefore established on the basis of Mr Arends' evidence.

224 The next alleged defect is as follows:

> There is a large deflection in the first floor. Floor joints will require additional joists to stiffen floor. Smart Frame design does not allow for spa bath in centre of spam with 100mm thick concrete base. Expanding foam should have been used to lessen load. This large amount of movement will cause wall and ceiling plaster joints to constantly open up creating an ongoing maintenance problem.

225 Again Mr Arends conceded that the photographs did not illustrate the deflection T/S 314 ll 39-31. Mr Symons said:

> Anyway, it is very difficult to see the deflection and I suppose what I am saying here, sir, and Mr Arends is if there is a large deflection we would have seen it before the plaster. It wasn't ever mentioned before the plaster was removed.

226 Accepting that the photographs do not depict the deflection I nevertheless accept Mr Arends' evidence that he observed it. This defect is established.

227 The next alleged defect is:

> All wall junctions are required to be tied together with strapping and overlapping plates. The wall joints are separating in a number of locations.
>
> Under cross-examination at T/S 316 Mr Arends agreed that it was difficult by reference to the photographs to *'see what has been tied together* [at] *those junctions?'* T/S 316 ll 25-26. The photographs that Mr Arends was taken to depicted a fairly jumbled set of framing with a number of members stuck together, packing and the like.

228 I accept that evidence and conclude therefore that this defect has been made out.

229 The next alleged defect is as follows:

> Master bedroom window reveal over bath has been removed to allow window to fit into opening which is too small, some modifications will need to be made to give a proper finish.

230 This alleged defect is identified by Mr Arends. He does not seem to have been cross-examined on it. There is no contrary evidence from Mr Martin. I accept it as having been established.

231 The next alleged defect is:

> Bedroom 2 roof main rafters run into dormer valley but are not connected and in some locations are 30mm short.

232 Mr Arends' evidence under cross-examination at T/S 317 to 318 was somewhat indefinite. He conceded for instance that one of the rafters if cut off would create no difficulty if it was a mere tail piece T/s 318 ll 1-3. I do not find that defect established.

233 The next alleged defect is:

> A rafter over shower ensuite entry doorway sits on top plate non-load bearing head with a 20mm gap taking full roof load.

234 This alleged defect is identified with Mr Arends. It was not the subject of any comment by Mr Martin. So far as I can see Mr Arends was not challenged on this point by Mr Symons in cross-examination, hence I find that this defect has been established.

235 The next alleged defect is:

> Rafters are lapped over RB I beam which is not as per engineer's detail. They are meant to but into beam from each side with a 100mm x 100mm x 6mm steel angle supporting them.

236 Once again this matter is not dealt with by Mr Martin nor was it the subject of any cross-examination by Mr Symons. It was identified by Mr Arends, hence I accept that this item has been established as a defect.

237 The next alleged defect is:

> The speed bracing does not comply with the Code.

238 There was no comment on this matter by Mr Martin. At paragraph 41 of his report Mr Eichner said:

> Further, the diagonal bracing on the two side walls [of the front bedroom on the second floor] was running the same direction as the rafters rather than in the opposite direction. The cross-bracing across the little window in the dorma (sic) only went halfway and then just stopped instead of running across from corner to corner. The same defect was evident in the ensuite. The diagonal facing was inadequately carried out as a consequence additional bracing throughout was required. The 45^{o} return wall that divides the ensuite from the dorma (sic) had no connection across the corners on both sides and as a consequence additional structural work to ensure stability in that area was required.

239 In his cross-examination at pages 320 to 322 Mr Symons put to Mr Arends that a number of photographs which depicted inadequate speed bracing depicted walls which as a matter of design and structural integrity did not require such speed bracing. As I summed up what Mr Symons seemed to be putting, it was this:

> That this bracing here is not, according to the strict requirement but since it is to make assurance doubly sure it doesn't matter?
> T/S 322 ll 8-11

240 Mr Arends' response at lines 11 to 15 was as follows:

> It is not normal for a builder to start putting a lot of extra bracing in that isn't required. So seeing as I saw the basis there one would assume it is a requirement to stabilise the building in which case it should go from top plate to bottom plate.

241 Even although Mr Arends was unable to answer the challenges thrown down to him by Mr Symons, I think first, that he is correct in saying it is unlikely that Dependable added additional albeit defective speed bracing. Secondly, Mr Eichner whose evidence on this point does not seem to have been challenged in cross-examination in the passage quoted from page 41 of his report indicates that speed bracing did need to be carried out to ensure the structural integrity of the building. That being the case I reject the hypothesis that the speed bracing which was observed and found to be deficient was additional and unnecessary speed bracing. I regard this defect as having been established.

242 The next alleged defect is as follows:

> The angle bracing in bedroom 2 does not span from top plate to bottom plate in opposite corners as required.

243 This was not an issue dealt with by Mr Martin. Mr Arends was not challenged in cross-examination on this point. Accordingly I accept that the defect has been made out.

244 The next alleged defect is as follows:

> Common rafters at dormer valley intersection bear on independent stud in four plates are not connected to the main wall run on both sides as required.

245 Again this is a defect identified by Mr Arends, not commented upon by Mr Martin. In his cross-examination of Mr Arends, Mr Symons mentioned this item (paragraph 2.3.47 from the Scott Schedule) but then seemed to move on immediately to the next item. In the absence of a challenge to Mr Arends' evidence I regard this defect as having been made out.

246 The next item of alleged defect is:

> Wall junctions are not tied together resulting in joints opening.

247 Again the alleged defect identified as such by Mr Arends and not commented upon by Mr Martin because the issue had not been raised when he carried out his inspections. Cross-examining Mr Arends, Mr Symons put the following to him:

> So I just say, Mr Arends, that really from the photos, we can't say that this wall junction, and it's not really a wall junction, it's a wall abutting if you like because it is not a junction as such …
> T/S 323 ll 26-29

248 Mr Arends response at lines 29-30 was *'even abutting is a junction'*. It was then put to him by Mr Symons that *'it's one of these ones rather than one of those ones'* (T/S 323 line 31). At line one of the following page, 324, Mr Arends said *'yes'*. At line four on the same page he agreed that the photograph taken Mr Eichner which he had chosen to illustrate the point did not really illustrate it. He said *'you can't see'*. As I understand Mr Arends' evidence he has conceded only that the photographs do not illustrate the observation which he made in his report. He did not accept that there was no defect or that there was for the purposes of considering this issue a distinction to be drawn between a wall junction and a mere abutment of two walls. In the absence of any evidence contradicting Mr Arends on this point I regard this defect as having been established.

249 Next, the Serongs allege:

> RR2 rafters each side of the dormer are required to be doubles, they are singles only.

250 Again, this was a matter not raised when Mr Martin carried out his inspection and so he was unable to comment. The gravaman of Mr Symons attack upon the allegation that there was such a defect was that the plans required single rafters not double rafters (T/S 324 ll 29-31). Mr Arends concluded that the plans were as alleged by Mr Symons hence there was no defect (T/S 325 ll 12-14). In his report, Mr Eichner said that because they were single rather than double rafters:

> A 150 x 100mm steel angle on either side of those rafters on both sides of the dorma (sic) had to be bolted in to carry that cantilever load.

251 In re-examination Mr Gurr on behalf of the Serongs appeared to be asking questions aimed at obtaining answers from Mr Arends that the structure as erected by Dependable included single rafters where there should have been double rafters according to the plans but simply misdescribed the location of the defect T/S 366 line 1 – 367 line 2. Ultimately however at line 7 on page 367 Mr Arends said *'I am unable to say'*. In the result therefore this defect has not been made out.

252 Next, it is alleged:

> Additional floor beams are required in bedroom 1 ceiling to distribute roof load from floor above.

253 Mr Symons criticised the formulation of this alleged defect as:

> General statement, two general statements, not back. [ed] by any engineering.
> T/S 325 ll 15-16

254 Again this was not a matter that Mr Martin examined when he carried out his inspection and hence he made no comment. At pages 325 – 326 of the transcript Mr Arends said that the cross-joist between joists were not depicted on the plans hence it could not be said that there was any failure to follow the plans. At T/S 326 ll 24-29 Mr Arends said:

> … the plans don't specify those – generally speaking engineers won't show cross-joists between joists. That is left up to the builder and depending on the floor structure. The Smart beams are posi-strats, solid beams will determine the actual cross-members.

255 At T/S 327 Mr Arends said *'there was probably need for an additional six cross-members'*. At lines 19-22 Mr Arends said he was not sure:

> But my memory says that the wall is just sitting on top of the floor and with nothing underneath it.

256 The matter remains uncertain. Even although Mr Arends' memory is not entirely certain and no photograph can be produced to illustrate the point I accept that he would not have included this allegation in his report without some appropriate basis. I am fortified in the view because the findings I have made relative to other defects indicate that the framework that we are

dealing with now is in general far from perfect. I regard this defect as having been made out.

257 Next the Serongs allege:

> Verandah roof edge beam was to cantilever out over the first C2 column to pick up front 190 x 45 fit rafter fascia beam. There is a cold joint over the first column requiring engineered steel connecting plate to both sides to bolt both beams together to allow a cantilevered work 75mm foam panel placed outside of that same beam means that level beam is 75mm out of alignment with the 180 PFC steel beam below which the first C2 column is meant to land. Additional angle iron and webbing will be required to allow a connection to work.

258 Once again this matter was not dealt with by Mr Martin. Mr Eichner at paragraph 26 of his report observed the same alleged defect. Mr Arends was not challenged on this matter in cross-examination hence I conclude that this defect has been made out.

259 Next it is said:

> The 180 PFC beam is sitting on a steel bearing plate not pinned or fixed to anything, the PFC beam is welded to it but movement is allowing the column to shift alignment if knocked. Angle tie welded to edge and fixed to inside bottom plate as required.

260 Again this alleged defect was noted by Mr Arends but not commented upon by Mr Martin because it was not an issue when he carried out his inspection. Mr Eichner at paragraph 6 of his report observed the same alleged defect. Mr Arends was not cross-examined on this point. I accept that this defect has been made out.

261 The next alleged defect is:

> RR2 rafters are meant to be doubles as per Kennedy Design (Drawing S2) design but only single rafter installed. This needs to be rectified.

262 In cross-examination I asked if in light of the earlier cross-examination relative to double rafters it would follow that Mr Arends would now concede there was no defect. He said at T/S 328 line 18 *'I would think so'*. At T/S 366-7 Mr Gurr sought to modify these answers in re-examination - unsuccessfully as best I could understand Mr Arends' evidence. This defect has not been made out.

263 The next alleged defect is as follows:

> Tillings 'Smart Frame' floor joist system was used. There is a 10 page installation guide provided with the product. What has been constructed does not comply rendering a good number of long span joints useless, as top flanges have been drilled out, entire sections cut out, holes drilled too close to end of joists. A table is provided as to how large and how far from ends all these wholes can be above entry. The table was not followed.

264 This matter had been the subject of a report from Tillings indicating a need for certain rectification work. In cross-examining Mr Arends on this point, Mr Symons did not appear to challenge the existence of a defect, rather he was raising criticisms as to the mode by which the matter was being rectified suggesting that putting the work out to tender would have been more economical. Implicitly therefore he accepts the existence of the defect which I find to be established.

265 The next three defects alleged are as follows:

> There are eight joists that do not comply with the installation guide on ground floor, and 16 joints in basement level that do not comply because joists are cut around bedroom 1 beam. All these need to be repaired.
>
> Double floor joists are meant to be connected together, for load bearing, with a 250 x 45 continuous timber filler between them and nailed through web. This has not been done anywhere in the house.
>
> No holes in web can be closer than two times the diameter of the largest hole. There are two joists which do not meet this criterion in master bedroom ceiling.

266 These three alleged defects were observed by Mr Arends. They were not challenged in cross-examination hence I accept their existence.

267 The next alleged defect is:

> There are a number of I joists extensively weathered increasing possibility of glue de-laminating. This will need to be rectified.

268 In cross-examination at T/S 332 ll 26-29 Mr Arends agreed that there was no defect hence this defect as alleged has not been established.

269 The next three alleged defects relate to the lift shaft and are as follows:

> Lift shaft internal dimensions currently do not meet the specifications for any lift companies to supply a lift that will fit inside the shaft. Further, the dimensions do not allow a wheelchair and one person in the lift at the same time. The slab set down is not deep enough for lift car or the head clearance at roof level not high enough.
>
> Lift shaft roof will need to be extended by 300mm to allow for full travel of lift car and lift well will need to be lowered by 700mm to fit the hydraulic operation. The carriage will need to be shortened by 230mm in depth to fit.
>
> Lift shaft wall at first floor level on shaft side is made of two panels double top plates are in the same location allowing wall to hinge back and forward.

270 These matters were not dealt with by Mr Martin in his report. At T/S 332 Mr Symons said that in the other half of the *'pair'* which he constructed and lived in temporarily a lift had been installed and was operative. Mr Arends said at lines 26-27 that he could not really comment beyond saying:

> I basically said it should comply with the drawings.

271 At T/S 334 Mr Gurr submitted that there was only a fairly small claim made for the lift. Ultimately the issue of the lift was left uncertain. In the circumstances I do not regard this defect as having been made out.

272 The next four items are structural and relate to roof trusses. They are as follows:

> Roof trusses not installed PRYDA installation guide provided by Able Trusses, additional end bracing will need to be done so trusses do not rack.
>
> Two roof trusses are damaged requiring repairs bottom cord cut out to allow plumbing pipe to pass through.
>
> Three trusses directly over lift shaft are not fixed down to plate and UFT shaft front wall not tied to side walls as there is a 10-15mm gap to each side of lintel and side wall junction with six skew nails across corner to do job.
>
> Roof joists over rear family room, adjacent to deck are 'Smart Frame'. One joist with LBL flanges. Perimeter trimmers put in for bulkheads were nailed through laminated bottom flange, separating the bottom flange, in at least six locations along the same flange.

273 Each of these alleged defects was observed and reported upon by Mr Arends. They were not the subject of any comment by Mr Martin because they were not issues at the time he carried out his inspections. Mr Arends was not challenged as to these items in cross-examination hence I accept them as having been made out.

274 The next six items alleged to be defective are structural and relate to the rear deck. They are as follows:

> Rear deck floor joist, on sub-floor side, are within 75mm off the floor for more than 25% of floor area. It should be a minimum clearance of 250mm ground clearance.
>
> Rear deck extreme west beam connected to two concrete pads via treated pine post cast in concrete. No clearance from ground as beam is hard down on earth and will rot quickly.
>
> The same beam is spaning too far between posts, need extra stump installed.
>
> Decking boards are only fixed via 2/50mm coil nails; minimum requirement for fixing into soft wood is 2/65mm nails 2.5mm thick, boards loose and lifting.
>
> Timber floor beam directly under bi-fold rear doors is only fixed to steel beam via three Ramset nails no other bolting connections are evident hence squeaking when you step onto deck. This carries the distributed deck load. This needs rectification.
>
> Insufficient noggings between floor joists to deck at ends causing joists to twist sideways.

275 The gravamen of Mr Symons cross-examination on these matters at T/S 342 and following is that these are properly to be characterised as completion items and not as defects. Mr Arends said that in his opinion when he carried out a second report the building was *'still partially through fixing stage'* T/S 343 ll 24-25. At T/S 344 speaking of these matters Mr Arends said *'it can be completed at any time during the fixing stage'*. In these circumstances I take Mr Symons not to be challenging the need to do the various pieces of work referred to in these alleged defects but contending merely that they were completion items not defects. In the view I have taken this is a distinction without a difference. The work needs to be done.

276 The next five defects alleged relate to tanking.

277 The first of those alleged defects is as follows:

> The purported waterproofing to the outside of the northern and eastern walls of the residence below the ground lines does not comply with the Building Code of Australia (BCA). The garage is classified, under the BCA, as a Class 10 building. Under the BCA a masonry wall is not required to be waterproof. However as this area is attached to the entertainment area, which is classified under the BCA as Class 1 building and is therefore required to be waterproof, the garage must also be waterproofed externally. Part 3.3.4 of the BCA requires that every external wall of a Class 1 (residential) building be made waterproof. Class F2.2.1 of the BCA states 'a building is to be constructed to provide resistance to moisture from the outside and rising moisture from the ground'. Therefore, the east and north walls of the lower ground floor should have a proper waterproof membrane applied to the full height of the wall under the ground and have an agricultural drainage pipe (connected to stormwater) at the footing level to relieve any hydrostatic water pressure. This also accords with proper building practice.

278 This defect was observed by Mr Arends, not commented upon by Mr Martin. Mr Symons' cross-examination suggested that these matters were in truth completion matters and not defects at all. Moreover, he said that the building was left in the state in which Mr Arends reported upon it in circumstances where matters had been left deliberately unfinished because it was contemplated that a spa would be installed in the rear deck area. Mr Gurr noted that no variations had been put in writing and no variation relative to a spa had been pleaded in Dependable's counterclaim. Mr Symons observed that the spa was in contemplation rather than committed to. As I understood Mr Arends' evidence he did not disagree that the present state of affairs could not persist for some temporary period. The line of cross-examination leads me to conclude that Mr Arends' observations are not being denied, it is merely an argument being put as to whether the item is properly to be characterised as a defect or a completion item. In the view that I take this is a distinction without a difference.

279 The next alleged defect is as follows:

> Only a single coat of bitumen has been applied and not completely in some area. It stops approx 20mm from bottom not painted behind stormwater stack at all and no tanking on slab behind agricultural pipe drain. A single layer of 0.2mm moisture barrier poly placed in front but not taped across poly joints. This will allow water to leach through the wall.
>
> 4.5mm fibro-cement sheet protection lay used, already broken down and cracked in numerous places and held in place via a timber block shot into brickwork penetrating membrane. This will allow water to leach through walls.

280 In cross-examination I did not understand Mr Symons to deny the accuracy of Mr Arends' observations. At T/S 361 he said of the photographs viewed:

> If they are in the alfresco wall they would also establish that that tanking was only a temporary measure. It is now an item of completion.
> LL 8-11

281 For reasons previously given this is a distinction without a difference.

282 The next alleged defect is as follows:

> Stormwater stack behind wall placed there to provide drainage from behind wall, but water would need to fill to 80mm before discharging as 'T' entry is 75mm above slab level. Salt leaking is evident at present from bottom three courses. This needs to be repaired.

283 The same considerations appear to apply to this defect and to the following alleged defect:

> Back fill behind wall was predominately building rubbish and clay except to 300mm high x 200mm high wide layer of 7mm topping over A661. More than $2m^3$ of rubbish being drink bottles, timber, plastic wrappings from brick packets and brick bats removed.

284 Once again I do not understand that Mr Arends' observations were challenged, it was merely put that these were completion items rather than defects.

285 The next alleged defect relates to *'general electrical distribution'*. The alleged defect is as follows:

> The infrastructure in place in (sc is) inadequate. Three phase mains have been partially installed from the main switchboard (located at front porch) to basement garage but still remain on cable spool. From main switchboard there are single phase sub-mains to lower ground floor sub-board below storage. Single phase sub-mains to ground floor sub-board and two single phase sub-mains to sub-board on first floor.

> There has been no pre-design carried out. Sub-board enclosures installed are not large enough to accommodate required control and protection hardware. Distribution of sub-mains in single phase will make the matter of balancing the total installation almost impossible.

286 This alleged defect is taken from an inspection report provided by Mr Giancino of Architectural Electronic Systems Pty Ltd following a report which he carried out on 17 September 2007. It is not a matter dealt with by Mr Martin on behalf of Dependable.

287 Mr Symons cross-examined Mr Giancino at some length. That cross-examination had a number of strands. He suggested to Mr Giancino for instance that to describe a building as a *'smart house'* did not require the selection of a particular class of technology (as will appear later in the present case Clipsal C-bus technology) either at all or exclusively throughout the house. Next he suggested that even without a plan it would be relatively easy for a new electrician completing this house or rectifying defects to ascertain what had been done and what underlay the various installations that had been made before Dependable was removed from the site. Mr Symons challenged the picture that Mr Giancino appeared to be conveying that what was there by way of partially completed wiring when he inspected was so incomprehensible that the task had to be started anew and the existing installation scrapped. Mr Lika who was Dependable's sub-contracting electrician gave evidence on behalf of the respondent. In cross-examination he agreed that the appropriate way to approach the task of wiring a house such as the subject property, particularly with an obligation to provide some sort of *'smart'* technology would be to *'develop a lighting and electrical plan'* T/S 611 ll 11-15. In the present case Mr Lika conceded that he had no more than a rough draft *'nothing substantial'* T/S 611 ll 28-29. At lines 30-31 he said he proceeded on the basis of simply doing what Mr Symons told him to do T/S 611 line 31. The particular observations made in this alleged defect by Mr Giancino appear to stand uncontradicted. This defect is established.

288 The next alleged defect relates to C-bus cabling. It is alleged:

> Electrical wiring was initially installed as conventional 240v system. An attempt was made to convert C-bus by running C-bus cat 5e network to each light switch. Switch points had been relocated to switchboard at lower ground floor (by running additional twin active TPS for each switch). Whilst this conversion system will work, it would require an in-wall termination behind each light switch which would have enclosed in an approved insulated junction box. The box is required to provide insulation between 240v and the extra-low voltage C-bus network termination between each C-bus key input unit.
>
> If the electrical installation was completed using the conversion system that has been put into place there would be an excessive amount of junctions within the installation which will be predominately concealed. These junctions will create weak points within the installation; (increase the likelihood of mechanical

> breakdown). Further, these junction boxes would be multiple earth and neutral connections, which would possibly need to be accessed if a major fault occurred in the system for testing purposes.

289 At T/S 615 Mr Lika said that he initially began wiring the ground and first floor with ordinary 240v cable and connection and commenced a retrospective conversion to C-bus. According to Mr Lika:

> I was working as directed so I was wiring the house in what I thought was the smart way, the smart system, and basically the owners must have commented to the builder and the builder approached me to, yes, see what we could do to fix it.
> T/S 615 ll 17-24

290 Mr Lika at T/S 627 denied that a multiplicity of junctions as found in the installation work which he did constituted to design weaknesses. At lines 21-24 he said in answer to a question from me:

> Let me say that electrical installation is made up of an array of connections. Those downlights above your head there sir, are all electrical connections.

291 A moment later I asked a question, inter alia:

> So you say yes, there are connections there but they are okay, they are done all the time?

292 Mr Lika replied *'absolutely'* T/S 627 ll 30-31. The following page saw Mr Lika assert that his installations would have been able to balance the phases *'within 5% per phase'* T/S 628 line 26.

293 These inconsistent pieces of evidence create a difficulty in fact finding. Both witnesses impressed me as straight forward and frank. I had no reason to doubt the competence of either Mr Giancino or Mr Lika. The evidence of both inevitably was tinged with some self-interest. Mr Lika clearly had an interest in justifying the work which he had done and defending it from criticism. Similarly, Mr Giancino had an obvious interest in defending the correctness of the advice which he gave to the Serongs to remove the existing installation and start from scratch.

294 A constant theme of the examination and cross-examination pursued by Mr Symons relative to these electrical issues was a contention that there was a variety of approaches which might be followed to achieve a *'smart'* house. The effect of the evidence on all hands was that there is no single meaning to the phrase *'smart house'*, it is a wide generic phrase with no fixed meaning. At this stage it is worth quoting in full the contract provisions as to wiring:

> The house will be wired as a smart house. Clipsal bus or C-bus, is a fully programmable control and management system that is designed to transform energy savings into reduced power bills.

> Clipsal C-bus is microprocessor controlled wiring system that offers complete control of lighting and other electrical services. Clipsal C-bus also provides the platform for a total building automation system that can be integrated with air-conditioning, security system, heating, communications and major appliances. It also advances features such as voice activated switching, movement control switching.

295 Mr Symons told me that most of this text was lifted from some Clipsal marketing material. If the wiring description ended with the first sentence Mr Symons' contentions that he and his contracting electrician were at liberty to adopt a number of possible solutions would be correct. In fact, however, the contract goes on to extol the C-bus system insofar as the contract describes C-bus as providing:

> The platform for a total building automation system that can be integrated with air-conditioning, security system, heating, communications and major appliances.

It indicates the contemplation is that the C-bus treatment will be given to the entire wiring system of the house rather than merely introduced to particular areas as Mr Symons' initial approach would have done. The fact that Mr Symons directed Mr Lica to retrofit C-bus to some areas where it had not initially been fitted is to some degree supportive of this though generally the post-contractual acts of the parties are not admissible as to the true construction of the contract *FAI Traders Insurance Co Limited v Savoy Plaza Pty Ltd* [1993] 2 VR 343. Dependable contracted to provide a fully integrated C-bus wiring system. What it delivered was a patchwork combination of C-bus and ordinary 240v connections without a master plan. Whilst I accept that it may have been possible for the Serongs' electrical contractor to establish what had been done, I believe Mr Giancino's advice to start anew was reasonable and proper advice and that the Serongs were entitled to accept that advice. This defect has been established.

296 The next alleged defect relates to *'starserve'* cabling, it is as follows:

> The starserve cabling should consist of data phone and TV cabling wired in star configuration from central enclosure. All phone and data should be minimum Cat 5e and TV should be minimum of tri-shielded RG6 coaxial cable. Typically a phone/data and TV point should be cabled to each bedroom and living space with additional phone and data for study or multi-purpose area.
>
> While predominately cable has been run for the starserve system there are a few concerns. There is not adequate segregation between 240v cabling and starserve cabling especially where cabling is grouped, this is most crucial with 240v cables as large numbers of cables increases the likelihood of electromagnetic interference.
>
> There are not adequate provisions for the minimum recommended number of points to each room there are some particular locations where what has been installed is at the very least questionable.

297 These criticisms are to be found in Mr Giancino's report and also in a report obtained by Mr Serong from an organisation known as Tech Safe Australia. They appear to stand uncontradicted or unchallenged in cross-examination. I accept these defects as having been established.

298 The next group of alleged defect to be found at Item 2.9.2 of the Scott Schedule filed on behalf of the Serongs consisting of some 34 items numbered for the purposes of Mr Gurr's final submission (a) to (ah). I will not bother to set out these defects seriatim. A plastering consultant Mr Kelson identified in his report these various alleged defects. Mr Kelson was cross-examined at some length about plastering techniques, the registration and status of plastering as a specialist trade and so forth. There was no expert evidence to contradict his evidence nor did there seem to be any direct attacks upon the various criticisms that he made of the plaster work. The Serongs in effect *'condemned'* the plastering that had been done by Dependable or its contractors. On the basis of Mr Kelson's evidence I believe they were entitled to do so. Moreover, the findings which I have earlier made relative to the wiring necessitated the removal of the plastering which had already been done. Mr Martin in his report accepted that there were some defects in the plastering work. He did not however agree that these defects went the distance which Mr Kelson alleged, in particular for instance, he said:

> It was alleged that backing metal angle or flashings had not been installed in showers or spa internal corners and that this breached the relevant Australian standard for wet areas being BCA Part 3.8.1. BCA Part 3.8.1.0 includes AS 3740 – waterproofing of wet areas in residential buildings, as an acceptable construction manual meeting performance requirement P 2.4.1. The 2004 version of the standard is adopted by reference in Part 1.4 of the BCA. Metal angles would only be required if the walls were not fully waterproof. They are used as a secondary moisture barrier from the surface as only water resistant. I inspected the waterproofing that had been completed to the bathrooms of the adjoining property and it has been carried out to the full height of the walls above any fixtures and exceeds the minimum requirement Clause 5.7.3 of AS 3740 2004 in relation to vertical flashing provides that it may be external or internal to the wall sheeting.

299 As Mr Symons brought out in cross-examination there are no formal established qualifications for plasterers, however Mr Kelson established himself as a lifelong expert in the field and as an instructor. I therefore prefer the evidence of Mr Kelson to the reservation expressed by Mr Martin.

300 Accordingly I regard the plastering defects as established.

301 The next alleged defects relate to brickwork.

302 The first of these is as follows:

> External brickwork is meant to be laid using white cement which has not been done.

303 This alleged defect was identified by Mr Arends. It was not commented upon by Mr Martin nor was it the subject of any cross-examination by Mr Symons, hence I accept that this defect has been established.

304 I make the same finding for the same reason with respect to the next alleged defect, namely:

> Brickwork around north boundary is raked but lower level brickwork is ruled. The brickwork on the verandah is extremely poor and requires removal and reinstatement by a competent tradesman.

305 The next alleged defect relates to drainage and is as follows:

> The stormwater drain has been damaged in nature strip resulting in water rising to surface when it rains. This needs to be repaired.

306 This observation was made by Mr Arends. The correctness of his observation was not challenged by Mr Symons, Mr Symons observed however that Mr Arends was unable to say when or by whom the drain was damaged. Mr Arends according to the front sheet of his report inspected on 10 April 2007, 6 December 2007 and 7 March 2008. Those inspections occurred whilst Dependable still had control of the site. Regrettably no-one pursued the issue with Mr Arends to ascertain at which of his inspections he made the observation relative to the drain. If this was observed in April 2007 the inference that the damage was done by Dependable or its contractors would be fairly strong. On the other hand if the observation was made at one of the two later inspections the inference would equally be open that the damage was done by one of the Serongs' contractors. A further matter which was not explored was the history of the drain – was it a new drain established as part of the re-development project promoted by Dependable and Mr Symons or was it a stormwater drain that had pre-existed serving whatever was previously located on the site. If this latter were the case the damage may have pre-dated even the site's connection with Dependable and Mr Symons. In this state of uncertainty I do not regard the defect as having been made out.

307 There then follow some four alleged defects in glazing which are as follows:

> The ceiling to floor windows have not been fitted with safety glass as required by AS1288.
>
> Opening/windows around spa require safety glass to comply with AS1288.
>
> Ground floor sliding glass doors should have a sub-sill to allow for water membrane or sub-sill reveals as required by AS2047.
>
> Double glass doors installed in bedroom 4 and single glass doors installed in bedroom 2 and 3 are in breach of the existing town and building permits.

308 These alleged defects are identified by Mr Arends. As to some of these Mr Martin said that he was prepared to accept the alleged defect subject to verification. As to others he said they were not raised when he inspected and so he was unable to comment. In those circumstances I regard these defects as having been established.

LIABILITY OF DEPENDABLE

309 I have already explained why in the events that have occurred the Serongs were entitled to terminate their contract with Dependable and validly did so. Clause 20.4 of the building contract provides:

> If the **Owner** terminates this **Contract** in accordance with this Clause 20 the **Owner** may then engage another builder to complete the **Works**: and
>
> - if the reasonable cost to complete the **Works** exceeds the unpaid balance of the **Contract Price**, then the excess amount shall be a debt due and payable by the **Builder** to the **Owner**; OR
> - if the reasonable cost to complete the **Works** is less than the unpaid balance of the **Contract Price**, then the remaining amount of the unpaid balance shall be a debt due and payable by the **Owner** to the **Builder**.

310 Clause 19.5 authorises the owners where defects have not been rectified to employ others to rectify them and recover from the builder the reasonable costs of doing so. In my view the reference to the owner engaging another builder at Clause 20.4 is not intended to exclude the possibility the owner may do as the Serongs did here, namely complete the project as owner builders engaging sub-contractors. On the findings I have made therefore the distinction which Mr Symons frequently made in cross-examining expert witnesses between completion items and defects is a distinction without a difference. Dependable is liable for the cost of both.

311 Describing the situation in which the Serongs found themselves following termination, the learned editor of *Hudsons Building and Engineering Contracts* (11th Edition) (I.N. Duncan Wallace, QC) said:

> An owner completing the contract after a determination, whether at common law or under a contractual clause, is not in the position of a mortgagee in possession whose actions are jealously scrutinised. Subject to the principles of mitigation of damage, whereby any obviously unreasonable conduct will serve to reduce the damages otherwise recoverable by an innocent party for breach of contract, the owner, though naturally bound to account to the contractor and those claiming under him (as, for example, assignees of the sums due under the contract) in computing the cost of completion and also in making any necessary allowances for differences between the final work and the originally contemplated contract work, will be allowed a reasonable discretion in the way in which he completes, whether this determination results from a decision at common law or under a

contractual termination clause condition on default.
Paragraph 12-071 pp 1287-8 (Volume 2)

312 In the following paragraph 12-072 the learned editor quotes with approval two dicta of Williams J the Supreme Court of New Zealand in *Fulton v Dornwell* (1885) 4 NZLR 207 where the learned Judge said:

> Now when a contractor gets into difficulties … and the employers in consequence put to the extreme inconvenience and annoyance of having himself to complete the work I think the employers should be allowed a large discretion in the way in which he completes it, and that the contractor, in the absence of fraud or extreme negligence, cannot complain if the work be carried out in an uneconomical manner.

and

> The contractor cannot, in the absence of fraud or extreme negligence complain if the work be carried on in an uneconomical manner .. every allowance should be made in considering the conduct of the employer for the position in which the default of the contractor has placed them.

313 I approach the assessment of the damages to which the Serongs are entitled as against Dependable in this spirit.

QUANTUM OF DEPENDABLE'S LIABILITY IN DAMAGES

314 Mr Gurr on behalf of the Serongs relied upon costings made by Mr Douglas Buchanan, Quantity Surveyor in the sum of $935,234.00 representing his costing of the work that was actually done. Mr Buchanan said in his report that the completion cost was reasonable. Mr Gurr noted that Mr Buchanan in Appendix C to his report costed and excluded in Appendix C all additional works outside the original scope of the Serongs' contract with Dependable thereby excluding any element of betterment.

315 Mr Gurr further submitted that it was not practicable for his clients to have obtained a fixed price contract for completion from another builder. Mr Buchanan's evidence was that it was almost impossible to obtain a fixed lump sum price contract in a competitive market. He was cross-examined on this point by Mr Symons. This cross-examination to be found at T/S 426-9 had Mr Buchanan adhering to the view he expressed in his report that the costs incurred by the Serongs were in the circumstances reasonable. He conceded that there were alternative courses of action including the assembly of a group of experts and letting the matter out to tender. He did observe however that any new fixed price contract would include a clause excluding from the scope of the works covered by the fixed price, any further defects uncovered during the course of the rectification work. Mr Gurr observed that Mr Eichner who acted as project manager for the Serongs said that he continued finding further defects in the work until Christmas 2007. Mr Gurr referred to paragraphs 20 to 22 of Mr Eichner's report.

316 I accept Mr Gurr's submissions on these points. Doing so accords with the principles stated by *Hudson* and quoted above. Acceptance of Mr Symons' submissions to the contrary would be in the teeth of those principles.

317 Mr Symons obtained by a call on Mr Eichner a copy of a draft budget for the completion works. As it turned out the final cost was substantially above that budget. The fact is that Dependable and Mr Symons left the Serongs with a mess. It was a mess administratively. On the planning front, the site was subject to a stop order which had been in force for 12 months. Despite the letterhead graphics depicting Sherlock Holmes and Dependable's attention to detail the reality was quite different. What the Serongs did with the assistance of Mr Eichner was in my view reasonable. It does not lie in the mouth of Mr Symons or Dependable to subject their actions and costings to the minute criticism that was attempted here. So much appears from the principle stated by the learned editor of *Hudson* and quoted above. In particular I believe it was reasonable for the Serongs and Mr Eichner to engage bricklayers not merely to do actual bricklaying duties but also to carry out general work including labouring on the site.

318 Nevertheless, there remain issues which are yet to be resolved. Accepting in broad terms the costings for defect rectification and completion made by the Serongs, Mr Symons raises a number of valid points. He complains for instance about certain additions, contending for instance that:

> George [that is Mr Eichner] has claimed $128,519.77 in invoices and yet if you add all these invoices they only total $123,277.94.

319 There is also the fact that I have not sustained all of the defects alleged by the Serongs. The number that I have not accepted have been relatively small and my present thought is that even excluding them from calculation, the scope of the completion and rectification works would not be materially affected. Nevertheless I believe that I should hear the parties on this point as upon the arithmetic issue raised by Mr Symons and quoted above.

320 Mr Symons was also critical of the fact that the various sub-contracting trades did not provide insurance warranties to the Serongs. That is a matter which is of concern to the relevant tradesmen and the Serongs not to Mr Symons or Dependable. In particular there is no reason to think that the absence of such warranties in any way inflated the cost of completion and rectification. Mr Symons also suggested in at least one case with some justification that there had been an overcharging or double charging of Goods and Services Tax. Mr Gurr conceded that the amount claimed by his client should be reduced by $21.58. This appears to be correct though in making this finding I would not necessarily exclude the possibility that some further reduction may be appropriate. I should note that I reject the contention put in cross-examination by Mr Symons that where a tradesman invoiced goods to the Serongs it was not incumbent upon that tradesman to add a further Goods and Services Tax to the cost of such goods even although the supplier to the tradesman had levied Goods and Services Tax.

321 Subject to the qualifications just mentioned, in broad terms I accept the evidence of Mr Buchanan that the cost of rectifying the works was $342,679.00 and completing them $592,645.00 making a total cost of $935,234.00. Hence in broad terms it would follow that $647,992.00 would be payable by Dependable to the Serongs subject to the adjustment issues to which I have referred above. There was no suggestion here that the cost of rectification of defects was other than the appropriate measure of damages. It was not suggested for instance as it is in some cases that the proper measure is the difference between what has been provided in comparison to what should have been provided cf *Bellgrove v Eldridge* (1954) 90 CLR 613, 617-8. I accept the contention put by Mr Gurr that the actual cost of rectifying the defects is the proper measure of damage where those defects have been rectified *Hyder Consulting (Aust) Pty Ltd v With Wilhelmsen Agency Pty Ltd* {2001] NSWCA 313 [19].

322 Likewise I accept that the Serongs should be entitled to damages in the sum of $25,200.00, $700 x 36 weeks for liquidated damages. Similarly the claim for $35,544.00 representing rent paid for a residence in Southbank from 18 July 2007 the date of termination until 18 August 2008 should be allowed.

323 Mr Symons noted that at one stage the Serongs had agreed during the course of a meeting to waive any claim for liquidated damages; but that waiver was conditional on their receiving a firm date for completion. Dependable never completed the work nor promised a completion date.

COUNTERCLAIM

324 The counterclaim filed on behalf of Dependable was on the premise that the Serongs and not Dependable had repudiated the building contract. Given that I have found that the Serongs were in the right and Dependable was in the wrong the counterclaim must be dismissed. I should also note insofar as the counterclaim asserts an entitlement to payment for variations, first there was no proper evidence to support claims for payment for those variations. Secondly since these variations alleged have not been reduced to writing it would only be if I were to find that there are exceptional circumstances or that the builder would suffer significant or exceptional hardship and it would not be unfair to the building owner for the builder to recover payments that any award could be made for these alleged variations. *Domestic Building Contracts Act* 1995 Section 37(3), 38(6). I am not aware of any exceptional circumstances. Having regard to the size of the breaches of contract by Dependable and its conduct relative to registration and insurance, not only am I unable to conclude that it would not be unfair to the Serongs to consider making an award in favour of Dependable on these matters I conclude that it would be unfair to make an award to Dependable for these alleged variations.

325 The counterclaim is dismissed.

326 Finally I turn to the claim against Mr Symons.

CLAIM AGAINST MR SYMONS

327 A claim against Mr Symons for an alleged breach of a duty of care was not proceeded with. The Serongs' points of claim allege that Mr Symons had engaged in misleading and deceptive conduct in trade and commerce contrary to Sections 7, 8, 9, 10 and/or 11 of the *Fair Trading Act* 1999 or alternatively that he aided or abetted such contraventions in breach of Section 145 of the *Fair Trading Act*. The Serongs sought to recover the same amounts from Mr Symons as they sought from Dependable. The misleading and deceptive conduct alleged against Mr Symons in the points of claim was as follows:

> 4.1 He would be the person primarily involved in the construction of the house to be built on the site;
>
> 4.2 He would do most of the physical construction himself including all the excavation and carpentry work and would also supervise any construction work performed by others;
>
> 4.3 He would personally project manage the construction of the house;
>
> 4.4 He had the necessary professional qualifications, skill and competence to project manage the performance of the building agreement and the proposed works;
>
> 4.5 The house would be designed by, and would be constructed in accordance with structural drawings and computations prepared or to be prepared by a qualified structural engineer;
>
> 4.6 Planning and building permits were in place or would be obtained for the house in compliance with all applicable laws;
>
> 4.7 He was a registered building practitioner under the *Building Act* in the appropriate category and therefore Dependable Developments was a registered builder under the *Domestic Building Contracts Act* 1995.

328 There was also alleged to be *'further conduct'*.

> 11.1 Dependable Developments was permitted to start the work under the building agreement;
>
> 11.2 The works were proceeding lawfully;
>
> 11.3 All appropriate permits were in existence;
>
> 11.4 The work would be completed on time;
>
> 11.5 Payments would be claimed and should be made in accordance with the building agreement.

329 As to the first range of conduct it was said by the particulars to be partly in writing and partly oral and partly to be implied. Reference was made to Item 2 of the appendix to the building agreement quoting a domestic building, building practitioner's registration number. The representations

were also said to have been made by word of mouth at a conference attended by the Serongs and Mr Symons at Brad Teal Real Estate Essendon on 16 August 2005 and at the offices of Riordans on 13 and 14 December 2005. The *'further conduct'* was said to be false. On the basis it was said that *'no appropriate and lawful planning permit was in force upon the commencement of the works'*. Further it was said that a stop work order was issued on 10 July 2006 but works continued until the Serongs terminated the contract. Next it was alleged that two instalments for the frame stage were rendered and paid when in accordance with the terms of the contract these instalments were not payable because no certificate had been given from the frame stage by the relevant building surveyor. The Serongs contended that as a result of the further conduct they allowed Dependable to commence work and continue work and made payments for the base frame and lock-up stages to Dependable. Somewhat surprisingly the points of claim do not so far as I can see, directly assert that the initial conduct defined at Clause 4 of the points of claim as *'the Symons' conduct'* was false and incorrect. These issues were joined at trial however and the case was fought out on the basis as far as I can see that there was an obligation of falsity relative to some or all of the matters alleged to be Symons' conduct. In my view it is appropriate that I consider the points of claim as if they alleged falsity relative to these matters or at least some of them, most notably the matter alleged at 4.7 that Mr Symons was a registered building practitioner. I would if necessary give leave even at this late stage to the Serongs to amend their points of claim so that they would accord with the issues as fought out at trial.

330 Section 9 of the *Fair Trading Act* 1999 provides as follows:

> **9 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in the succeeding provisions of this Part is to be taken as limiting by implication the generality of subsection (1).

331 Section 159 of the Act authorises the Tribunal to award in favour of a person who suffers loss and damage because of a contravention of a provision of the Act including Section 9, the amount of that loss or damage. Sections 9 and 159 therefore are the analogues in the Victorian *Fair Trading Act* of Sections 52 and 82 of the Commonwealth *Trade Practices Act* 1974, provisions which have created a vast jurisprudence in the Federal Court of Australia and to a lesser extent in cross-vested State Supreme Courts and on appeal in the High court of Australia. In contrast to the Commonwealth *Trade Practices Act* these provisions in the Victorian *Fair Trading Act* are not confined to corporations but apply alike to corporate and natural persons.

332 There is no doubt that to the extent that any of this alleged conduct was engaged in, it was engaged in in trade and commerce. The evidence shows that Dependable was a trading corporation seeking to make money by house building. Mr Symons was its directing mind and the body through which it acted. Accordingly his actions were also carried out in trade and commerce and to the extent that he is found to have engaged in any of the conduct alleged, that conduct would be in trade and commerce whether viewed as conduct by him or by Dependable. If as an individual officer or employee of a corporation he engages in misleading or deceptive conduct contrary to Section 9 of the *Fair Trading Act* he may be directly liable for that misleading and deceptive conduct despite engaging in it as a servant or agent of a corporation or as a corporate organ thereof. The liability is direct and not accessorial *Houghton v Arms* (2006) 225 CLR 553. It is however important to note the distinctly different jurisprudential character of a claim for damages for misleading and deceptive conduct on the one hand and a claim for damages for breach of contract on the other. Under Section 82 of the *Trade Practices Act* and Section 159 of the *Fair Trading Act* the award of damages for misleading and deceptive conduct is aimed at placing a plaintiff or applicant in the same position as if he had not been misled or deceived. An award of Common Law damages for breach of contract aims at placing the plaintiff or applicant in the same position as if the contract had been properly performed in that party's favour. In *Gould v Vaggelas* (1984) 157 CLR 215, a case of misleading and deceptive conduct relative to a purchase of property, the High Court of Australia in considering how damages under Section 82 should be assessed commenced with a consideration of what damages would have been awarded in a Common Law action for deceit. Since then in a long line of cases the Court has been at pains to say that the award of damages in this area is not to be constrained by analogies derived from Common Law entitlements to damages in contract or tort. Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ said in *H.T.W. Valuers v Astonland Pty Ltd* (2004) 217 CLR 640, 666 [52]:

> The wide language of S.82 is compatible with a legislative desire to broaden the scope of recovery, not to keep it within the bounds of some comparison with the Common Law.

333 See also *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 407 [44].

334 An early illustration of the distinction between the award of damages under Section 82 of the *Trade Practices Act* or Section 159 of the *Fair Trading Act* is found in the judgment of Ormiston J (as he then was) in *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217. This claim was brought under the corresponding provisions of the *Fair Trading Act* 1985. Mr Gadzhis made a bid at a real estate auction sale which was the final bid and the property was knocked down to him. He declined to sign the contract. Despite demands and attempted persuasion by the auctioneer,

Mr Gadzhis declined to sign. Despite Mr Gadzhis' denials, His Honour accepted that he should be treated as having made genuine bids, hence he agreed to purchase the property. Nevertheless, since he refused to sign the contract there was no note or memorandum in writing to satisfy Section 126 of the *Instruments Act* 1958 and the sale was not enforceable against him. A claim for damages under the *Fair Trading Act* for misleading and deceptive conduct failed because according to His Honour's finding the previous 11 bids were all *'dummy'* or vendor bids. Hence since there was no competing genuine bidder or purchaser, no demonstrable loss flowed from the misleading and deceptive conduct. The refusal to award damages placed Futuretronics in the same position it would have been in had it not been misled and deceived, viz. with no bidders. His Honour was quite critical of the vendor's conduct in generating *'dummy bids'*. This was perhaps the first step which led to the provisions now strictly regulating vendor bids under the *Sale of Land Act*.

335 I turn then to the facts of the present case. I accept the evidence which was given by Mr Serong and was not as I understood it denied by Mr Symons that the Serongs insisted on dealing with a registered builder. Mr Symons assured them that he would obtain registration. He propounded a contract that disclosed relative to Dependable a registered building practitioner number for an unlimited entitlement to do domestic building work. For reasons previously given the suggestion that Mr Gerd Jacquin was a director of Dependable at that time must be rejected. Propounding the contract quoting the number entailed an implicit representation that Mr Symons as sole director of Dependable was a registered building holding that registration and that accordingly Dependable was entitled to carry out the building work, obtain the appropriate insurance cover and so forth. My findings earlier demonstrate that these matters were false. Again Mr Serong said that he would not have entered into the building contract with an unregistered builder. Given that the contract was in the circumstances illegal this is readily believable.

336 Mr Symons contended that since the issue of registration could have been according to him, verified by reference to any one of no less than four internet web sites, I should not accept that the Serongs were misled at all or that that they relied in any way upon a representation as to registration. I can only say that in the circumstances the Serongs were most imprudent in signing up with Dependable without verifying the correctness of the implicit representation in the form of a contract. In contrast to the situation under the *Trade Practices Act* however, contributory negligence is not made a defence to a claim for damages for misleading and deceptive conduct. That Act includes no contributory negligence defence. The defence of contributory negligence provided in the *Wrongs Act* 1958, Section 26, applies by virtue of a definition of *'wrong'* in Section 25 of the Act only to claims in tort at Common Law or breaches of contractual duty of care. The defence would not apply to the strict liability imposed by

Section 9 of the *Fair Trading Act*. I accept the evidence of Mr Serong that he relied upon the assurances given by Mr Symons and would not have signed the contract had he known the truth, namely that Mr Symons was not a registered builder and therefore Dependable was not legally entitled to undertake the building work in question or enter into the contract. Mr Symons' representations as to his future registration were of course representations as to future conduct but in propounding the contract quoting the registration number matters moved to representations of presently existing fact and the complications relative to misleading and deceptive conduct where what is represented relates to future conduct do not arise.

337 What loss and damages therefore have the Serongs suffered as a result of Mr Symons' misleading conduct described above? They entered into the building contract, made payments under the building contract and allowed matters to reach the unhappy circumstance which they had reached by July 2007 with a building way overdue, riddled with defects and subject to a stop order (and also not covered by property warranty insurance). The points of claim allege that in making the progress claims which were paid, Mr Symons represented to the Serongs that these moneys were in fact payable. In fact since the frame stage had not been certified by the building surveyor.

338 Section 40(2) of the *Domestic Building Contracts Act* 1995 prohibits a builder from making progress claims except in accordance with the table attached. Fifteen percent of the contract price is the amount which may be demanded and recovered by the builder for the *'frame stage'* but the frame stage is not according to the definition in sub-section (1) to be regarded as reached until the frame is *'completed and approved by a building surveyor'*. It is common ground that the relevant building surveyor never approved the frame stage of this building. By making the claims for payment for the frame stage, Dependable and Mr Symons implicitly represented that the frame stage had been reached such that the claim was payable. This was not the case. The issues of warranty insurance as I have observed earlier in the narrative meant that no amounts were payable under the building contract at all. Though given that this matter has not been pleaded and relied upon by the Serongs apart from noting it I place no reliance upon it. More generally Mr Gurr submits that by a series of pieces of uncandid conduct Mr Symons on behalf of Dependable lulled the Serongs into a false sense of security whilst matters were unravelling with their project. He did not in terms inform them at all about the existence of the stop notice served in July 2006 until this emerged eventually and involuntarily. He referred to *'troubles with Council'* in e-mails to the Serongs on their overseas holiday in September as if these were matters that had only just arisen rather than that they derived from a notice served some two months earlier. When these matters came to Mr Serong's attention he felt annoyed but felt he was *'too deep in'* to change builders.

339 Mr Gurr made more elaborate reference to misleading and deceptive conduct by Mr Symons. It is my view unnecessary to go to the detail of those submissions. In broad terms by Mr Symons' misleading and deceptive conduct the Serongs were induced:

(a) to enter into the building contract with Dependable in circumstances where they would not otherwise have done so; and

(b) persist with Dependable with had they known the truth they may have moved to terminate the contract earlier.

340 The difficult issue in this proceeding is what is the measure of damages recoverable for the loss and damage which the Serongs have incurred? Their claim is that they are entitled to damages in the same sum against Mr Symons for misleading and deceptive conduct as they say they are entitled to for breach of contract by Dependable. Given that at least back in the days of *Gould v Vaggalas* it was customary to say that the damages awardable for misleading and deceptive conduct whether under the *Trade Practices Act* or the *Fair Trading Act* were the so called *'tort measure'* rather than the *'contract measure'*, reliance rather than expectation damages, this claim is problematic. It is not inconceivable however as a variation of the facts in *Gadzhis'* case will demonstrate. Suppose that in contrast to the situation in *Gadzhis'* case there was a genuine under bidder who would have signed a contract had the property been knocked down to him at his highest bid. Suppose further that rather than immediately refusing to sign the contract as Mr Gadzhis did, the defendant prevaricated until the crowd from the auction had dispersed such that contract was lost with the under bidder and any other potential bidder. If a contract could not eventually be made with the under bidder either because for instance he had changed his mind or he had bought elsewhere, it would seem that the defendant would be liable for the equivalent of damages for the loss of the bargain, albeit relative not to the contract which he had made but refused to consummate by signing but in relation to a hypothetical contract with the under bidder.

341 The question of the proper quantum of damages allowable under Section 159 of the *Fair Trading Act* depends crucially on the issue of causation. The section allows damages to be recovered for loss and damage occurring *'because of'* the relevant misleading and deceptive conduct. In *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 the Travel Compensation Fund sought damages from an accountant or auditor on the basis that the accounts they prepared and audited for a licensed travel agent were misleading and deceptive with the result that the fund remained liable as guarantor whilst the agent traded on illegally in circumstances where this would not have occurred had the true state of accounts been made known to the fund. Gleeson CJ said:

> Misrepresentation will rarely be the sole cause of loss. If, in reliance on information, a person acts, or fails to act, in a certain manner, the

> loss or damage may flow directly from the act oromission, and only indirectly from the making of the representation whether reliance involves undertaking a risk, and information is provided for the purpose of inducing such reliance then if misleading or deceptive conduct takes the form of participating in providing false information, and the very risk against which protection is sought materialises, it is consistent with the purpose of the statute to treat the loss as resulting from the misleading conduct.
> (2005) 224 CLR 627, 640

342 Here, upon the facts which I have found, had the Serongs known the truth about Mr Symons and Dependable's registration status that they were not obliged to make payment for the frame stage and that as at July a stop work notice had been issued by the relevant building surveyor, they would not

(a) have entered into a building contract with Dependable at all; or

(b) allowed matters to proceed as long as they did.

343 It may be objected however that the principle stated by the learned Chief Justice in *Tambree's* case does not apply here. The problems with the Serongs' house do not derive at least directly from the registration status of Mr Symons and Dependable. It was not suggested however that there were not other properly registered, solvent and competent builders who could have undertaken the work that Dependable was commissioned to do. Indeed the criticisms made by Mr Symons on quantum issues suggested that such builders would be available even to take over the project in a half finished state with extensive defects. Logically therefore, such contractors must have been available to undertake this work as a clean job commencing from scratch. Again, it was not suggested that Dependable was offering some unusually attractive credit terms or a price which was lower than anybody elses. Indeed from time to time Mr Symons asserted that the price of the land component of the land and building package which the Serongs bought from Dependable had been artificially depressed, implying that the price for the building work was if not an overfull one, not an especially competitive one either. In *Kenny & Good v MGICA (1992) Limited* (1999) 199 CLR 413 a mortgage insurer sued a valuer for negligent misstatement arising out of a valuation which it prepared for mortgage purposes with respect to property against which a mortgage loan was made and insured by MGICA. The High Court held that had an accurate valuation been given no mortgage loan would have been insured by MGICA at all, hence MGICA was entitled to recover against the negligent valuer not merely the difference between the valuation as published by the valuer and the proper value of the property at the date of valuation but the whole amount paid under the insurance policy a large part of which loss was caused by a subsequent collapse in the real estate market. Gummow J said:

> If the realised market value of the property had equalled or exceeded the sum secured, because the property had been sold into a buoyant property market, or as in this case, if the property market had only

> slightly fallen, no recoverable 'loss' would have arisen. The contingency would have fortuitously operated to the benefit of a valuer, the party at fault. … The party which is not at fault should not carry the burden of a contingent [the collapse of the property market] when that party has no control over it, in circumstances where the contingency is not remote and is reasonably foreseeable by the party at fault and where the legal wrong, in this case careless representations, induces the faultless party to expose itself to the contingency.
> (1999) 199 CLR 413, 449

344 The contingency here was that Dependable would erect a defective structure and fail to complete it in accordance with the contract. This contingency is outside the control of the Serongs, it was entirely within the control of Mr Symons as the controlling mind of Dependable.

345 Here, even if we do not conclude as would seem somewhat tempting that the lack of progress in building and the defective nature of the structure erected derived from the registration status of Mr Symons and Dependable it was a loss to which the Serongs were exposed to because they were misled and deceived by Mr Symons' conduct. Had they known the truth they would never have signed a building contract with Dependable and they would have never been exposed to or suffered the losses for which they had been held entitled to recover damages from Dependable. Of course Mr Symons' misleading and deceptive conduct was far from the sole cause of this loss and damage but the question in a claim for damages for misleading and deceptive conduct is not whether the misleading and deceptive conduct is the sole cause; merely whether it was a cause of the relevant loss and damage *Travel Compensation Fund v Tambree* (2005) 224 CLR 627, 644 [49] per Gummow and Hayne JJ. On the findings that I have made the misleading and deceptive conduct was for the reasons explained a cause of the same loss and damage for which the Serongs have been held entitled to damages against Dependable. The whole of that loss therefore is recoverable against Mr Symons for misleading and deceptive conduct.

346 The damages recoverable from Mr Symons for misleading and deceptive conduct are in effect the cost to the Serongs to extricate themselves from the situation into which Mr Symons led them. They were left not with a contract which was wholly executory and could simply be abandoned but rather having bought as part of a package a parcel of land that now had erected on it an incomplete and extensively defective structure for which they had already made major outlays. There was as a matter of practical reality no alternative to their taking matters into their own hands by one means or another and rectifying and completing the house. This was the loss and damage which they suffered and the cost of doing this was the quantum of the damages which they may recover under Section 159 of the *Fair Trading Act.*

WRONGS ACT 1958 PART IVAA

347 The *Wrongs Act* Part IVAA establishes a regime of proportionate liability. By virtue of Section 24AF(1) the part applies to:

> A claim for damages for a contravention of Section 9 of the *Fair Trading Act* 1999.

and also to:

> A claim for economic loss or damage to property in an action for damages (whether in tort, in contract under statute or otherwise) arising from a failure to take reasonable care.

348 The result then is that Part IVAA applies to the claim for misleading and deceptive conduct. Section 24AI(2) provides:

> (2) If the proceeding involves both an apportionable claim and a claim that is not an apportionable claim—
>
> (a) liability for the apportionable claim is to be determined in accordance with this Part; and
>
> (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Part) are relevant.

349 The contractual claim against Dependable does not arise from a claim for misleading and deceptive conduct contrary to Section 9 of the *Fair Trading Act* nor does it arise from an alleged failure to take reasonable care. Rather it arises out of allegations that Dependable has failed to meet certain absolute standards arising out of the contract including the due completion of the works within a specified time and the employment of proper workmanship in the construction of those works. Dependable's liability under the contract is to perform its terms not to use reasonable care to perform them. Mr Gurr submits that the effect of Section 24AI is that there should be no apportionment as between the contractual claim against Dependable and the claims for misleading and deceptive conduct. I agree with this submission.

350 Section 24AH(1) of the *Wrongs Act* provides as follows:

> (1) A concurrent wrongdoer, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the loss or damage that is the subject of the claim.

351 In the circumstances and with respect to the claim for damages for misleading and deceptive conduct it would seem that Dependable and Mr Symons are concurrent wrongdoers. Section 24AI(1) provides:

> (1) In any proceeding involving an apportionable claim—
>
> (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the

court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and

(b) judgment must not be given against the defendant for more than that amount in relation to that claim.

352 The result seems to be therefore that the liability for this part of the Serongs' claim must be apportioned as between Mr Symons and Dependable. Section 24AP states, inter alia:

> Nothing in this Part—
>
> (a) prevents a person from being held vicariously liable for a proportion of any apportionable claim for which another person is liable; or
>
> …

353 In the present case the misleading and deceptive conduct that I have found was committed solely by Mr Symons. Dependable's liability for Mr Symons conduct is solely vicarious. Mr Symons personally did all the relevant acts and omitted all the relevant omissions. In those circumstances it is in my view just to apportion 100% of the liability to Mr Symons. By virtue of Section 24AP Dependable ought also be liable for 100% of the relevant loss and damage. Mr Symons was its controlling mind and the person through which it acted.

RELIEF

354 In summary the Serongs should be held entitled to the declaration they seek that they lawfully determined the building agreement and they should be entitled to damages against Dependable for breach of contract and/or repudiation and damages against Mr Symons under Section 159 of the *Fair Trading Act*. The prayer for relief also seeks interest and there would seem to be no reason why that interest should not be allowed.

355 The issue of costs has not been argued and so should be reserved. I have explained why in my view I should reserve for a further argument the quantum of damages allowable for rectification and completion of the works.

356 I will direct the parties within 14 days to bring in short minutes to give effect to these reasons.

MFM:RB