VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D768/2009

CATCHWORDS

APPLICANT	Verve Constructions Pty Ltd (ACN 132 046 827)
RESPONDENT	Karen Visser
AND:	
DOMESTIC BUILDING LIST	VCAT REFERENCE NO. D817/2010
APPLICANT	Verve Constructions Pty Ltd (ACN 132 046 827)
RESPONDENT	Karen Visser
WHERE HELD	Melbourne
BEFORE	Deputy President I. Lulham
HEARING TYPE	Hearing
DATE OF HEARING	28 June 2011, 30 June 2011, 1 July 2011, 4-8 July 2011, 11-15 July 2011, 18-19 July 2011, 4-5 August 2011, 8-11 August 2011, 29-30 August 2011
DATE OF ORDER	16 March 2012
CITATION	Verve Constructions Pty Ltd v Visser (Domestic Building) [2012] VCAT 284

ORDER

1 The Respondent must pay the Applicant a sum calculated as follows:

Variations (including excavation)	$195,325.60
Plus	
Section 41(5) Domestic Building Contract Act	$390,151.68
Plus	
Interest on the variations in accordance with paragraph 2 below	

Sub total	$
Less	
Payments made by Respondent	$247,304.53
Damages for defects / rectification costs	$83,845.50
Liquidated damages	$nil
Equals	
Total payable by Respondent must pay the Applicant $	

2 As to interest, the Applicant shall, within 21 days, file and serve a calculation of interest on each of the variations that are allowed in the enclosed Reasons, calculated at 10% per annum from the commencement date for the calculation of interest in respect of that variation. The commencement date is determined as follows:

> Date of variation claim + 20 working days (cl H4) + 1 day (cl N3) + 10 working days (cl N4) + 1 day (cl N5.1) + 7 calendar days (cl N6) = commencement date for the calculation of interest.

3 The total sum payable by the Respondent to the Applicant shall be further adjusted by two matters:

(a) As to the Applicant's claim under clause A4.2 of the contract, the Tribunal dismisses the claim for legal and consultancy costs. However, the Tribunal is unable to determine that Verve's internal administrative expenses are not recoverable under clause A4.2. The Applicant shall, within 21 days, notify the Principal Registrar if it wishes to press that claim, in which case the Tribunal will schedule a further directions hearing.

(b) Interest pursuant to statute, on the sum of $59,001.65 [being $390,151.68 – ($247,304.53 + $83,845.50)] calculated at the rate under the Penalty Interest Rates Act 1983 from the date of commencement of proceeding D817/2010.

4 Costs reserved.

DEPUTY PRESIDENT I. LULHAM

APPEARANCES:

For the Applicant	Mr J. Forrest of Counsel
For the Respondent	Mr B. Carr of Counsel

REASONS

Introduction

1 Mrs Visser owns a block of land on a hill west of the Maribyrnong River. It offers views of the river and the city.

2 In April 2009 Mrs Visser engaged Verve Constructions Pty Ltd to build a large dwelling on the land. The dwelling was designed by Mr Ferras Raffoul of FGR Architects Pty Ltd. The engineering design was by Mr Fara Fuzaty.

3 In December 2010 Mrs Visser terminated the building contract.

4 Verve and Mrs Visser are in dispute. There are two proceedings: D768/2009 and D817/2010. Verve claims over $1.4m under the contract and under the *Domestic Building Contract Act* 1995 ("DBC Act") and other legislation. Mrs Visser claims damages for defective work and liquidated damages under the contract.

5 There are two central facts in the dispute: that excavation on Mrs Visser's land cost more than she wanted to pay, and that the engineering design of her proposed dwelling was seriously flawed. Verve says that Mrs Visser is to bear the additional cost caused by the design defect. Mrs Visser says that the absence, at common law, of a warranty on her part of the 'buildability' of the design allocates that risk to Verve.

6 In order to determine the issues in dispute, it is necessary to examine the contract, the pleadings – which on Verve's side asserted many causes of action and on Mrs Visser's side tended towards ambiguity and denial –, and the conflicting evidence. Whilst neither the architect nor engineer were parties to the litigation, their conduct is most important. Under clause A4.2 of the building contract Mrs Visser indemnified Verve for any liability that it incurred in respect of any default or negligence of the architect or the engineer. Verve's substantial claim under the indemnity raised questions of whether on the facts the clause was enlivened and if so whether Verve's claims fell within it.

7 There was a lengthy hearing in which I heard evidence from the following people:

For Verve

Adrian Ruggerio, director of Verve.

Robert Magdziarz, director of Verve.

Sam Perera, formerly an employee of Verve, now employed elsewhere as a senior building estimator.

Vincent Vella of V & L Home Improvements, which performs all of its work for Verve.

Andrew Jeffries, a project manager who trades through the company Third Voice Pty Ltd, which was engaged by Verve.

John McFarlane, engineer, who was appointed by Order of the Tribunal in D817/2010 to report on the then alleged, design defect.

John Permewan, architect, who gave expert evidence on the professional conduct of the architect, and whether he had committed any default or negligence.

Timothy James Gibney, consulting engineer.

Fraser Lachlan Darrer, formerly an employee of Verve.

Liam Kelly quantity surveyor of W T Partnership, who gave evidence about that firm's expert report dated 21 April 2011 which had been signed by L M Thomas of that firm.

Neil Hannan legal practitioner of Thomsons Lawyers

For Mrs Visser

Ian Visser, Mrs Visser's husband.

Karen Visser.

Ferras Raffoul, architect.

Douglas Buchanan, quantity surveyor.

Donald Peter Haworth, consulting engineer.

Tim Holt, geotechnical engineer of A.S. Jones Pty Ltd.

Peter Andrew Hallyburton, licensed surveyor of Digital Land Surveys.

Anthony Croucher, building consultant.

Chronology

8 In 2007 Mrs Visser decided to build a multi storey dwelling with some ambitious design features, on her land. The land has a fall of around 4 metres from its highest point on its western boundary at the street, to its eastern boundary at the rear, and offers views to the east, of the river and the city.

9 Mrs Visser engaged Mr Feras Raffoul of FGR Design Pty Ltd, an inexperienced architect. Mr Raffoul prepared the design for the dwelling over a period of 5 months from September 2007.

10 The architect obtained a soil report from geotechnical engineers in October 2007 which classified the site as "H". The soil report noted that the site had a moderate to steep slope, contained fill and was likely to contain sub-surface boulders. It set out the results of 3 bore holes down the middle of the site, and noted that auger refusal was met at 1.1m at the front of the site, and at 0.6m in the other 2. No criticism is made of the geotechnical engineers by the parties.

11 The architect engaged a design engineer, Mr Fara Fuzaty. Mr Fuzaty issued engineering design documents under the name of a company, Fara Fuzaty Pty Ltd A C N 074 277 802, but did the work in his private capacity unknown to that company.

12 Between August 2008 and April 2009 Mrs Visser, through the architect, negotiated with Verve. Few of the shareholders and controlling officers of Verve had substantial experience in the building industry.

13 There were several false starts in the negotiations. The architect issued tender documents. In August 2008 Mrs Visser and the owners of seven adjoining blocks sought a quote from Verve to build eight dwellings under one contract. Some of those owners withdrew from that idea. The owners found that their respective lenders would not allow their individual building contracts to be interlinked. Eventually Mrs Visser and Verve negotiated for a contract to build Mrs Visser's dwelling.

14 The potential cost of excavation was raised throughout the negotiations. Verve never included excavation in its proposed fixed contract price. In its letters responding to the architect's tender packages, Verve wrote that its price excluded rock excavation. In one such letter, 4 September 2008, Verve stated a price excluding excavation, with a provisional sum allowance of $20,000.00 for rock excavation and contaminated spoil. A provisional sum allowance is used in a building contract when the final price of an item is unknown. The executed contract did not include a provisional sum allowance for rock.

15 The architect prepared the building contract. He prepared an "ABIC SW-1 2002 simple works contract". The contract price was $1,265,867.90 plus GST, plus the cost of excavation which was dealt with in the Specification.

16 On 2 April 2009 Mrs Visser and Verve signed the contract. Under the ABIC SW-1 form of contract, the principal provides the design of the works, and appoints an architect to administer the contract. Mrs Visser appointed her architect, FGR Design Pty Ltd, in that role. The architect's representative was Mr Feras Raffoul.

17 Almost from the beginning of the works, relations between the architect and the builder were poor. Mr Raffoul's contract administration skills proved to be poor. As the works progressed, Verve's first claim for payment, for rock excavation, led to a dispute. Claims for variations were either rejected by the architect, unfairly in Verve's view, or not dealt with by the architect under the contract provisions. As the works progressed Verve had several changes in staff. In April 2010 Verve discovered the serious deficiency in the design, which rendered the partially completed dwelling at risk of collapse. The consequences of the design fault were not dealt with by the architect in a timely manner.

18 The defect in the design concerns the "C1 columns". These columns are adjacent to the intended swimming pool, and are to support pre-cast

concrete panels. As designed they were inadequate and could not support the pre-cast concrete panels. As events unfolded, between the discovery of the flaw in April 2010 and the delivery of the report of Mr John McFarlane, special referee appointed by the Tribunal, on 30 November 2010 Mrs Visser, through the architect, did not accept that there was a design defect. However there is no doubt that the design was deficient. It had been deficient from the date of the design, which preceded the date of the contract.

19 Verve did some work temporarily to strengthen the C1 columns, and it sought directions from the architect on how to proceed. The architect did not deal with the consequences of the design fault as he should. Very little building work was performed after April 2010. On 13 December 2010 Mrs Visser terminated the contract, under section 41(1) of the DBC Act. By that date the site had been excavated, the floor slab and in situ walls constructed, and pre cast concrete panels put in place.

The claims

20 The disputes are the subject of two proceedings in the Tribunal: D768/2009 filed on 13 October 2009 and D817/2010 filed on 4 October 2010. The proceedings were heard together and they overlap to a considerable degree. Verve's pleadings in the cases were complex and were amended on several occasions.[1] Because Verve asserted several causes of action in relation to some claims, if I find that Verve is entitled to payment of a claim (for example, under an express term of the contract) it is unnecessary to discuss the other causes of action relating to that claim (for example, vicarious liability or estoppel). Further, unless it is strictly necessary to do so, I do not distinguish between the two proceedings.

21 Parts of Mrs Visser's pleadings were vague and ambiguous, and others were bare denials. Indeed, even though Mrs Visser brought a counterclaim against Verve for defective work, until some days into the hearing one of her defences was that because the contract named "Verve Construction Group" as the builder, it failed to identify a legal entity so that Verve could not bring the proceedings.

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[1] The parties amended their claims and defences during the proceedings, and their final "pleadings" were contained in:

D768/2009

Verve's Second Further Amended Points of Claim dated 4 August 2011.

Mrs Visser's Second Further Amended Points of Defence dated 22 August 2011.

D817/2010

Verve's Further Amended Points of Claim dated 12 July 2011.

Mrs Visser's Further Amended Points of Defence and Counterclaim dated 15 July 2011.

22 By the end of the hearing Verve's claims were summarised in Particulars of Claim dated 29 August 2011 (headed in both proceedings) which identified three categories of claims:

(a) $225,550.81 (plus GST) for "variations", including $120,598.54 (plus GST) for excavation,

(b) $483,331.38 (plus GST) as the reasonable price for building work performed, claimed under section 41(5) of the Domestic Building Contracts Act 1995, and

(c) $892,462.06 (estimate) under clause A4.2 of the building contract, which contains an indemnity. The Particulars state that the claim is for legal and consultancy costs. However, because a previous set of Particulars is referred to in one of the pleadings, Verve is also claiming under the indemnity an amount for internal administrative expenses. [I note that the hearing before me was to determine liability for this indemnity claim, with any assessment to be made separately].

23 As to the sum of $488,331.38 referred to in paragraph (b) above, the Particulars said that the claim under section 41(5) was for $528,626.56, but an examination of how that sum was calculated showed that it was incorrect.

The $528,626.56 was calculated in the Particulars as follows:

"Contract works" (being Deposit $57,539.45 + Earthworks and sub-structure concrete $218,649.91 + Precast concrete panels $207,142.02)

	$483,331.38
Add Variations	$225,550.81
Add interest	$ 18,991.94
Less paid by Mrs Visser	-$247,304.53
Sub total	$480,569.60
Add GST	$ 48,056.96
Total	$528,626.56

As the Variations are claimed separately, they should be excluded from the section 41(5) claim. Similarly, the payments by Mrs Visser should be taken into account in the overall calculation of Verve's claim, not the section 41(5) claim. Interest does not fall within section 41(5) claim.

It is far better to see the section 41(5) claim as being for $483,331.38, with the claims for variations and interest being separate.

24 Mrs Visser counterclaims damages of $152,951.00 for defective work and liquidated damages for 183 days, between 13 June 2010 and 13 December 2010.

The design of the dwelling

25 Whilst the front door of the dwelling is to be at the west, the dwelling was designed to take advantage of the views to the east and the fall of the land, by having a number of levels. Briefly, at the front the dwelling was to be three storeys: the garage just below natural ground level plus two storeys above. East of the garage, as the site fell, there were to be four storeys. At the rear of the dwelling, where the site was at its lowest, the top storey would become an open terrace.

26 The western (front) half of the dwelling was to take up the entire width of the site, and the eastern (rear) half not much less.

27 To paraphrase special referee Mr John McFarlane, the dwelling was to be constructed of precast concrete wall panels with some in situ walls at the lower basement level. The proposed floor construction generally was to comprise a concrete slab on the ground at the lower level, timber floors to internal living areas and "Hollowcore" concrete slabs to the internal garden area and the rear roof top terrace. The construction has reached the stage where all in situ concrete walls and in situ concrete columns have been constructed and all concrete wall panels have been placed. The precast concrete wall panels are secured by temporary panel props.

28 The dwelling was to include a swimming pool on the lower level, on the north east side of the site. At the edge of the pool were the three C1 columns, which are currently supported by temporary steel beams.

A brief overview of the contract

29 The contract price including GST, expressly excluding the charge for excavation, was $1,265,867.90, which was subject to adjustment in accordance with provisions of the contract. Verve's right to charge for excavation was contained in *clause 4 of the Specification*.

30 The form of the contract was an "ABIC SW-1 2002 simple works contract" with special conditions, and other contract documents which were incorporated by reference, including the architectural and engineering Drawings and Specification.

31 Clause O.2 of the Specification records that Mrs Visser supplied all of the design documents to Verve.

32 The architect had the role of acting as certifier, as well as acting as Mrs Visser's agent. The contract contained detailed machinery provisions to deal with variations to the work, payments and the like, and imposed time limits within which steps had to be taken. I will refer to the relevant provisions when I deal with the parties' claims. In the context of the dispute the most important express provisions were these:

Clause A4.2 Mrs Visser "must appoint an architect to administer this contract and provide appropriate contract documents for the works, given the nature of the works. (Mrs Visser) must indemnify (Verve) for any

liability incurred by (Verve) in respect of any default or negligence of the architect and any other consultant it engages under this contract".

Clause A6.2 "The architect [FGR] is appointed to administer this contract on behalf of (Mrs Visser). The architect is (Mrs Visser's) agent for giving instructions to (Verve). However, in acting as assessor, valuer or certifier, the architect acts independently, not as the agent of (Mrs Visser)".

Clause A6.3 "(Mrs Visser) must ensure that the architect, in acting as assessor, valuer or certifier, complies with this contract and acts fairly and impartially, having regard to the interests of both (Mrs Visser and Verve). (Mrs Visser) must not compromise the architect's independence in acting as assessor, valuer or certifier".

The parties' claims

I deal below with Verve's claims and then with Mrs Visser's claims.

Verve's claims for payment

Claims for excavation and rock removal:

33 Verve submitted five claims in respect of rock. They were put as 'claims to adjust the contract' but that was a misnomer. Excavation was part of the contract works and the contract price of $1,265,867.90 ("the fixed price") excluded the charge for excavation. Verve's right to payment for excavation lies in the Specification.

34 The claims were:

CV-01A submitted 16 July 2009 $101,385.90. The architect assessed the claim on 20 July 2009. Verve says that the assessment is wrong. Verve disputed the assessment, and the architect made a new assessment on 28 July 2009, which Verve alleges is wrong and in breach of the contract.

CV-06 submitted 17 November 2009 $12,029.38, which was not assessed by the architect.

CV-11 submitted 7 September 2010 $5,112.49, which was not assessed by the architect.

CV-12 submitted 7 September 2010 $3,105.10, which was not assessed by the architect.

CV-27 submitted 7 September 2010 $11,710.38, which was not assessed by the architect. (In the Particulars of Claim dated 29 August 2011 Verve said CV 27 was for $11,044.88).

Other claims to adjust the contract:

35 Verve also sought payment of the following claims.

36 CV 03 changed concrete strength $283.14, which was approved for payment by the architect, but not paid.

CV 04 lost formwork $8,107.00, which was approved for payment by the architect, but not paid.

CV 05 lost formwork $5,869.71, which was rejected by the architect.

CV 08 labour to hand-dig trench for pool contractor $658.24, which was rejected by the architect.

CV 09 lost formwork $2,359.50, which was not assessed by the architect.

CV 13 supply 'extra over' concrete $1,761.76, which was rejected by the architect.

CV 14 prepare and pour footings for retaining wall $4,386.25, which was rejected by the architect.

CV 15A supply of excavator and tipper, removal of rock $1,647.66, which was rejected by the architect.

CV 16 blinding concrete $314.60, which was approved for payment by the architect, but not paid.

CV 17 bulk concrete to pool area $1,694.00, which was rejected by the architect.

CV 19A structural concrete changes due to redesign $19,755.04, which was approved for payment by the architect, but not paid.

37 CV 20 additional structural steel $6,731.74, which was not assessed by the architect. In her defence Mrs Visser admitted that Verve submitted a variation quotation in relation to the steel beams, but says that it did not comply with clause J1.3 of the contract or s37(1) of the Domestic Building Contract Act. *Clause J1.3* requires a claim to be in writing.

38 CV 24 Delays / adjustment of time costs $7,761.61. Verve alleges that it made this claim as a result of the design defect, and that by Architect's Instruction dated 7 September 2010, the architect rejected the claim. In her defence Mrs Visser denied the allegation that the works had been delayed as a result of the inadequate design of the building and the need to install structural steel beams. In her closing submission, she added that CV 24 was not a claim for a variation, but instead a claim for adjustment of time costs, and that under clause H5.1 of the contract those claims were limited to working days. I note that CV24 was based on 98 calendar days

39 CV 25 Prop hire $40,795.80. Verve alleges that it made this claim as a result of the design defect, and that by Architect's Instruction dated 19 August 2010, the architect rejected the claim. In her defence Mrs Visser denied the allegation that the works had been delayed as a result of the inadequate design of the building and the need to install structural steel beams. In her closing submission, she added that the expense to Verve of hiring props for longer than anticipated was an instance of delay damages which were subsumed into adjustment of time costs.

Claims for extensions of time, rejected by the architect

40 As the contract has been brought to an end and Verve will not achieve practical completion, the relevance of these claims now lies in Mrs Visser's counterclaim for liquidated damages. Verve's claims were based on the abovementioned claims for adjustment of the contract and inclement weather. They were:

NOD 1 rock removal 13 days

NOD 3 delay caused by late provision of P.I.C (a certificate from the Plumbing Industry Commission enabling work to commence) 14 days

NOD 7 delay caused by late approval of shop drawings for concrete panels 32 days

NOD 13 miscellaneous delays 19 days

NOD 14 Verve alleges that on 11 June 2010 it issued Notification of Delay 14, for delays totalling 20 days incurred as a result of design deficiencies. By an Architect's Instruction dated 16 July 2010, the architect allowed 4 days. Verve disputes that assessment.

41 Verve has also claimed the above on many alternative grounds. CV 20 was a charge for additional steel which Verve installed to strengthen the C1 columns. In addition to claiming it as a variation, Verve alleges[2] that at a meeting on 14 April 2010 the design engineer, Mr Fuzaty as agent for Mrs Visser agreed with Verve that the latter should install structural steel beams to ensure that the concrete panels would not collapse. Verve installed the beams on about 5 May 2010 and submitted variation claim CV 20 for $6,119.76. The architect has requested further information in relation to the variation claim, but has not assessed it.

42 Verve also claims this sum[3] on the basis that at the meeting on 14 April 2010, Mr Fuzaty as agent for Mrs Visser made a representation on her behalf, in trade or commerce, that the steel beams should be installed and that a variation would be approved. This is alleged to have induced Verve to proceed, not just to install the beams, but to proceed with construction of the dwelling. Verve says that had it known that Mrs Visser would not pay CV 20, Verve would have ceased work. Verve says that by proceeding, it suffered delays, liquidated damages and wasted cost and expense in addition to the $6,119.76 due under CV 20. Verve also alleges that Mrs Visser is estopped from denying liability to pay $6,119.76 under CV 20.

43 The alleged wasted cost and expense have not been separately particularised and those claims are subsumed within the claim for a reasonable price described in the Particulars of Claim dated 29 August 2011.

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2 Paragraphs 8 – 15 of its Further Amended Points of Claim in D817/2010.

3 Paragraphs 42 – 59 of the Further Amended Points of Claim in D817/2010.

44 In Verve's Updated Further Particulars of Damage dated 17 June 2011 and Particulars of Claim dated 29 August 2011, Verve also claimed CV 24 Delays / adjustment of time costs $7,761.61 and CV 25 Prop hire $40,795.80. I note that CV 24 itself said that it was a claim for $6,414.55 and I use that figure in this decision.

45 As well as claiming CV 05 and CV 09 under the terms of the contract concerning claims and certification, Verve also claimed them as being based on misleading conduct under section 9 of the *Fair Trading Act* 1999 entitling Verve to damages under section 159 of that Act.[4] Of course section 9 of the Fair Trading Act prohibits a person in trade or commerce engaging in misleading or deceptive conduct. Mrs Visser did not act in trade or commerce: in the context of the Fair Trading Act she was the consumer. The architect acted in trade or commerce, but Verve does not sue the architect. Section 159 says that a person "involved in the contravention" of, in effect, section 9 can be ordered to pay damages but Verve did not establish how Mrs Visser could be caught by that section in relation to the claims for lost formwork, CV 05 and CV 09. These claims under the Fair Trading Act must be dismissed. Verve also claims payment of CV 05 and CV 09 on the basis that Mrs Visser is estopped from denying liability for payment.[5]

Non payment of certified claims

46 Verve alleged that the architect approved payment of four of the above 'other' claims: CV03, CV04, CV16, and CV19A. The sums approved were $283.14, $7,370.00, $314.60 and $19,755.04. Mrs Visser has not paid them. Mrs Visser admitted Verve's allegation that she had not paid the four 'other' variation claims approved for payment by the architect: CV03, CV04, CV16, and CV19A. However she denied that Verve had suffered damage as a result. The denial implies, erroneously, that a claim for payment pursuant to a contract is a claim for damages as distinct from a liquidated claim.

Linear program claim: damages and ss 107 and 108 of the *Fair Trading Act* 1999

47 Verve alleged[6] that it had been induced by Mrs Visser to submit a tender price for the construction of 4 dwellings on the adjoining sites known as Lots 589, 590, 591 and 592, and that it priced its works on the basis that it would construct the 4 dwellings on a linear basis. Lots 589, 590 and 591 were owned by others, not Mrs Visser. Verve alleged that the linear program was to result in Verve benefiting from economies of scale, and its works on Mrs Visser's land preceding the works on the other 3 sites. Verve alleged that when the Architect instructed Verve to proceed with all works

[4] Paragraphs 21A to 21O of the Second Further Amended Points of Claim in D768/2009.
[5] Paragraphs 21P to 21S of the Second Further Amended Points of Claim in D768/2009.
[6] Paragraphs 24 - 43 of the Second Further Amended Points of Claim in D768/2009.

on all of the allotments individually, disregarding the linear program, it incurred additional expense.

48 The claim was pleaded on several alternative bases: as misrepresentations by Mrs Visser which induced Verve to enter the contract; as negligent misstatements made in breach of a duty of care; as misleading conduct in trade or commerce contrary to section 9 of the *Fair Trading Act* 1999 entitling Verve to damages under section 159 of that Act; as misleading conduct as to future matters contrary to section 4 of the *Fair Trading Act* 1999; and as representations which Verve relied upon to its detriment thus founding a claim in estoppel. Verve alleges that Mrs Visser acted in trade or commerce, even though she is the consumer for the purposes of the Fair Trading Act. As I said above the claims based on the *Fair Trading Act* must be dismissed.

49 The damages claimed by Verve are described in paragraph 34 of the pleading. Verve says that it would not have entered into the contract at all had it known the truth. It says it incurred additional expense in not building under a linear program. However actual damages have not been separately particularised. It seems then that Verve has included its claims for additional expense, or for its loss of the benefit of the economies of scale, in its claims for a reasonable price under s41(5) of the DBC Act and in its claims for variations. I note that Verve signed a separate contract with each lot owner, and that there were no special conditions in Mrs Visser's contract about a linear program.

Claims for adjustment under sections 37(3)(b) and 38(6) (a) the DBC Act, in respect of variations

50 Verve also claims payment of the above-mentioned claims to adjust the contract "pursuant to" sections 37 and 38 of the DBC Act.

51 Sections 37 and 38 refer to situations in which the builder and the owner, respectively, seek to vary the contract.

52 Section 37 is a consumer protection provision which emphasises the need for the builder to be instructed to carry out variations, where the builder has sought the variation. Section 37(3) says that if the builder has not complied with sub sections 37(1) and (2), the builder is not entitled to recover any money in respect of a variation unless:

> "(b) the Tribunal is satisfied—
>
> (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship …; and
>
> (ii) that it would not be unfair to the building owner for the builder to recover the money".

53 Section 38 applies where the owner has sought the variation. The section requires the builder to give the owner written information about the effect

of the requested variation, if it is likely to add 2% to the contract price or cause any delay, and to obtain the owner's instruction to proceed. Section 38(6)(a) says that a builder is not entitled to recover any money in respect of a variation of that kind unless:

> "(b) the Tribunal is satisfied—
>
> (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship …; and
>
> (ii) that it would not be unfair to the building owner for the builder to recover the money".

Verve claims "the cost of carrying out the variations plus a reasonable profit". In Verve's closing submissions it argued that, if Verve had carried out work which amounted to a variation, but the machinery provisions of the contract had not been complied with – such as Verve making a claim late, or not disputing an architect's decision on a claim within the time allowed under the contract – the Act enabled the Tribunal to order Mrs Visser to make a fair payment.

Claim for damages on the basis of vicarious liability

54 Vicarious liability is a creature of tort law. Whilst in the context of motor vehicle collisions and the like the Tribunal does not have jurisdiction in tort, in a "domestic building dispute" as defined by section 54(1) of the DBC Act, it does. Section 54(2) of the DBC Act says:

> 54 (2) For the purposes of subsection (1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass but does not include a dispute or claim related to a personal injury.

55 In the law of contract it is unusual to refer to the liability of a principal, arising from the conduct of its agent, as 'vicarious liability'. In an agency relationship, the principal authorises the agent to act on the principal's behalf and to bind the principal. If an agent enters a contract on behalf of a disclosed principal, only the principal can sue or be sued on the contract. If the agent does not disclose that it acts for a principal, the principal may later disclose the agent's authority, and both agent and principal can sue or be sued on the contract. This is not a case in which the architect executed the building contract with Verve as agent for Mrs Visser. Verve alleges that the architect was Mrs Visser's agent because the architect did not act independently.

56 Verve alleges[7] that Mrs Visser is vicariously liable for the acts of Mr Raffoul architect on four grounds –

(a) From the express authority that Mrs Visser gave to the architect to act as her agent, evidenced by Section A of the building contract and by a letter that Mrs Visser wrote to Verve dated 29 August 2007.

[7] In paragraph 50 of the Second Further Amended Points of Claim in D768/2009.

(b) From the architect's rejections of Verve's claims for adjustment of the contract price in respect of the excavation and the other claims, which Verve alleges were in contravention of the architect's obligation to act fairly, impartially and independently.

(c) From the architect's rejections of Verve's claims for adjustment of the contract price being made as the agent of Mrs Visser as distinct from being made pursuant to the architect's obligation to act fairly, impartially and independently. Here Verve alleges that the architect acted under the direction of Mrs Visser, contrary to the legal obligations under clause A6, and that this made the architect her agent.

(d) From the alleged fact that in the course of acting as Mrs Visser's agent in rejecting Verve's claims for adjustment of the contract, the architect was negligent.

Verve does not allege that Mrs Visser is vicariously liable for any other conduct of the architect.

57 The second and third grounds are identical. Both presuppose that Mrs Visser directed the architect what to do. The fourth ground is unsustainable. The usual vicarious liability claim is where a plaintiff, injured by the negligence of a person who owed the plaintiff a duty of care, sues that person's employer. In Verve's pleading, there is no allegation that the architect owed Verve a duty of care. Verve only alleges[8] that the architect owed a duty of care to Mrs Visser. I conclude that a claim for vicarious liability absent an allegation that the architect owed Verve a duty of care, is misconceived.

58 The other aspects of paragraph 50 rely on the allegation that Mrs Visser breached the contract by improperly directing the architect, contrary to her obligation under clause A1.1 of the contract, to act reasonably and to cooperate in all matters relating to the contract. If Mrs Visser has a direct liability for breach of contract, the question of her vicarious liability for the alleged misconduct of the architect is superfluous.

59 In paragraphs 71A – 71C of its Further Amended Points of Claim in D817/2010, Verve alleges that Mrs Visser is vicariously liable for the architect because the architect is her agent, and for the engineer because she gave the engineer ostensible authority to act as her agent and design engineer.

60 The claim for vicarious liability in D817/2010 is far wider than in D768/2009. In D817/2010 Verve alleges in paragraph 71A that Mrs Visser is vicariously liable for "any loss and damage" caused to Verve by the architect and the engineer, and in paragraph 71B Verve basically repeats the whole pleading as particulars of the losses and the causes of them. The

[8] Paragraph 50 of the Second Further Amended Points of Claim in D768/2009.

difficulty with that sort of incorporation by reference is that not all of the causes of action asserted in the earlier paragraphs of the pleading can found vicarious liability. Rather than getting lost in a labyrinth, I will only consider vicarious liability in a claim if Verve fails on all other grounds.

Claims for relief under section 53 of the Domestic Building Contracts Act 1995

61 Verve pleads that "the disputes herein" are a domestic building dispute and that Verve seeks "relief" under section 53.[9]

62 Section 53 of the DBC Act is entitled "Settlement of building disputes", and sub-section 53 (1) says:

> "The Tribunal may make any order it considers fair to resolve a domestic building dispute".

63 Of course, there is no doubt that provisions of this kind, which also exist in the *Fair Trading Act* 1999 and the *Owners Corporations Act* 2006, do not give the Tribunal power to make orders which are contrary to law. See for example **Christ Church Grammar School v Bosnich & Anor** [2010] VSC 476.

64 In clause A11.1 of the contract the parties acknowledged, in accordance with s132(2) of the *Domestic Building Contracts Act* 1995, that sections A H and J of the contract imposed more onerous obligations than are imposed by the Act. Parts H and J dealt with the procedures for variations and architect's instructions. Section 132 establishes a 'floor' of rights for owners. Parties cannot contract out of the Act, but they can impose more onerous obligations on the builder. The section says:

> 132 **Contracting out of this Act prohibited**
>
> (1) Subject to any contrary intention set out in this Act—
>
> (a) any term in a domestic building contract that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
>
> (b) any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.
>
> (2) However, the parties to a domestic building contract may include terms in the contract that impose greater or more onerous obligations *on a builder* than are imposed by this Act. *(emphasis added)*

65 Verve submitted that a clause in a building contract to the effect that the builder cannot make a claim for payment if it is out of time is void under s132(1) because it purports to exclude ss37, 38 and 53 of the Act. Verve was perhaps to reacting to one of Mrs Visser's defences, which was to the

[9] This claim is set out, briefly, in paragraphs 52 and 53 of the Second Further Amended Points of Claim in D768/2009 and in paragraphs 74 and 75 of the Further Amended points of Claim in D817/2010.

effect that she did not admit that a claim had been made in accordance with the contract.[10]

66 The claim under s53 is not separate from Verve's other claims described above. It is in the nature of a reply to an aspect of Mrs Visser's defence.

67 The claim that s53 overrides s132(1) does not withstand analysis.

68 You must read the two sub-sections of s132 together, because were it not for the word "However" at the beginning of sub-section (2), the very notion of imposing on the builder more onerous obligations than are imposed by the Act would contradict the prohibition on varying a provision of the Act in sub-section (1)(a).

69 Clearly, sub-section (2) states an exception to, and overrides, sub section (1). It means that parties can impose on a builder obligations which are more onerous than those imposed by the Act. It follows that parties can impose time limits, obligations to submit claims in a particular form, and machinery provisions in their contract.

Claim for damages for breach of contract, arising from the architect's acts and omissions in contract administration

70 These allegations appear between paragraphs 8 and 41 of the Further Amended Points of Claim in D817/2010. In April 2010 Verve detected the defect in the design of the C1 columns. Verve notified the architect that those columns were of inadequate strength to support the walls above. In April 2010 Verve met with Mr Fuzaty, who agreed that Verve should attach some structural steel beams to the columns. Verve did so in May 2010.

71 Verve submitted its claim for $6,119.76, CV 20. The architect requested further information. Verve responded on 11 May 2010, saying amongst other things that the addition of the steel beams resulted in a discrepancy between the design and the dwelling 'as built'. Verve called for amended engineering drawings, and an amended building permit. Despite chasing the architect for a response, on 28 May 2010 the architect asked Verve to continue works in accordance with the original documentation, and then formally instructed Verve to do so on 3 June 2010.

72 Verve alleges that this instruction was wrong, as it amounted to an instruction to build in an unsafe manner and in breach of building laws. It alleges that the architect should have sought the opinion of an independent engineer. Verve alleges that the architect failed to act independently.

73 On 8 June 2010 Verve sent the architect an opinion of an independent engineer, Mr Arcaro, which said that the C1 columns were undersized, and

[10] In paragraph 17 of her Second Further Amended Points of Defence in D768/2009 Mrs Visser admitted that Verve had made claims CV05, CV04, CV09, CV16, CV20, CV08, CV13, CV14, CV15A, CV17, CV19A and CV03, but said that she "did not admit that they were made in accordance with the contract provisions". This somewhat evasive pleading was intended, I gather, to leave scope for Mrs Visser to allege that the claims lacked information, were made late, and/or that they did not amount to variations at common law.

that temporary propping should remain until the design engineer approved its removal. Verve also issued a notice of dispute under the contract, in respect of the architect's decision of 3 June 2010. Verve also gave formal notice of a discrepancy in the design, under clause B1.1 of the contract.

74 Belatedly on 28 June 2010 the architect sent Verve an amended engineering drawing, but without any instruction. On 1 July 2010 the architect formally replied to Verve's notice of dispute, directing Verve to continue building in accordance with the contract and previous instructions. Verve says these two communications were contradictory, and again indicative of incompetence and a failure to act independently.

75 On 14 July 2010 Verve formally objected to the 1 July 2010 decision. Until 24 August 2010 Verve sought from the architect a formal direction in relation to the amended engineering drawing of 28 June 2010.

76 On 24 August 2010 Verve sent the architect a report of Mr Gibney, consulting engineer, which set out deficiencies in the engineering design. The architect responded on 24 September 2010, by sending Verve an Architect's Instruction A110235 enclosing a report from the design engineer and computations. Mr Gibney found that the design and computations did not comply with the Building Code. The architect did not address the issues raised by Mr Gibney.

77 Verve claims "damages",[11] particularised as payment of CV 20, liquidated damages under the contract, delay damages, and "wasted costs and expense" which are the legal and consultancy costs and administrative expenses which are also claimed under the indemnity in clause A4.2. These pleadings repeatedly describe the architect's directions instructions and omissions as breaches of the contract. Because the architect is not a party to the contract, but merely a creature of it, he cannot breach the contract. The intention of the pleading is that the architect's failure to take proper steps under the contract amounts at law to breaches of contract by Mrs Visser.

Claims based on misrepresentation, negligence and estoppel

78 In paragraphs 42 - 58 of the Further Amended Points of Claim in D817/2010 Verve recasts the same facts into other causes of action. So, the engineer's agreement to the steel beams being installed, in April 2010, is alleged to be a representation made by Mrs Visser in trade or commerce which was misleading and deceptive or false and untrue. They are also alleged to have been made by her negligently. They are also alleged to have been made by her in order to induce Verve to install the beams and to continue working under the contract, so that Mrs Visser is now estopped from resiling from them.

79 On the basis of these causes of action, Verve claims "damages", particularised as payment of CV 20, liquidated damages under the contract,

[11] Paragraph 41 of the Further Amended Points of Claim in D817/2010.

delay damages, and "wasted costs and expense" which are the legal and consultancy costs and administrative expenses which are also claimed under the indemnity in clause A4.2.

80 Under the building contract the engineer has no role in contract administration, or in acting as a certifier. There is no provision like clause A6.2 which makes the engineer Mrs Visser's agent for the purpose of giving instructions to Verve. Mrs Visser did not act in trade or commerce. It seems to me that this collection of causes of action serves no purpose, are unsustainable and must be dismissed.

Claims for CV24 CV 25 and Extension of Time NOD14 based on a catch all allegation

81 It is hard to discern the intent of paragraphs 60 – 65 of Further Amended Points of Claim in D817/2010. Verve repeats its claims for payment of CV24, CV25 and an extension of time under NOD 14, and says the architect's rejection of them was a breach of contract – which must mean a breach by Mrs Visser – and that they fall within sections 107 and 108 of the Fair Trading Act 1999. Those provisions give the Tribunal jurisdiction to hear contractual disputes and grant relief. The paragraphs are repetitive and unnecessary.

Claim for indemnity under clause A4.2 of the contract

82 Verve claims all of the legal and consultancy costs it has incurred since 23 July 2009, which it puts in the order of $350,985.33 in D768/2009 and $541,476.73 in D817/2010. It also claims an amount for internal administrative expenses.

83 Clause A4.2 is as follows:

> "The owner must appoint an architect to administer this contract and provide appropriate contract documents for the works, given the nature of the works. The owner must indemnify the contractor for any liability incurred by the contractor in respect of any default or negligence of the architect and any other consultant it engages under this contract".

84 Verve alleged[12] that Mrs Visser breached clause A4.2, in that she failed to "appoint an architect to administer the contract in accordance with the contract". Clearly, it is not the case that Mrs Visser failed to appoint an architect altogether. Verve's claim is based on the 'quality' of the architect, not the quantity.

85 Verve alleged that the architect owed a duty of care to Mrs Visser "to perform and provide architectural services and contract administration services in a professional and competent manner with the due care and skill of an architect and contract administrator in the building industry".

[12] In paragraph 47 of the Second Further Amended Points of Claim in D769/2009, and paragraphs 70 and 71 of the Further Amended Points of Claim in D817/2010.

86 Verve alleged[13] that the architect breached its duty of care to Mrs Visser in rejecting the five rock claims CV-01A, CV-06, CV-11, CV-12 and CV-27, and the so called other claims CV 05, CV 04, CV 09, CV 16, CV 20, CV 08, CV 13, CV 14, CV 15A, CV 17, CV 19A, and CV03.

87 Verve also alleged that the architect, in making its decisions to reject those same claims, acted in default of the contract because it failed to act fairly, impartially and independently as required by clause A6.

88 Clause A6 included:

> A6.2 The architect is appointed to administer this contract on behalf of the owner. The architect is the owner's agent for giving instructions to the contractor. However, in acting as assessor, valuer or certifier, the architect acts independently, not as the agent of the owner.
>
> A6.3 The owner must ensure that the architect, in acting as assessor, valuer or certifier, complies with this contract and acts fairly and impartially, having regard to the interests of both the owner and the contractor. The owner must not compromise the architect's independence in acting as assessor, valuer or certifier.
>
> A6.4 The owner warrants that the architect has authority to administer this contract.

89 In this part of the pleading Verve does not claim damages from Mrs Visser for breach of contract arising from her alleged failure to "appoint an architect to administer the contract in accordance with the contract".[14] Instead, Verve only claims indemnity under clause A4.2. Referring to the words of indemnity in that clause, Verve alleges that there were "defaults or negligence" of the architect and of the engineer, the engineer falling within the description "other consultants". In paragraph 49 of the Second Further Amended Points of Claim, Verve claims indemnity under clause A4.2, "for the liability it has incurred as a result of the default of the architect", which it asserts are all of the legal and consultancy costs it has incurred since 23 July 2009.

90 In her defence[15] Mrs Visser pleaded a denial and said that Verve "has failed to identify any liabilities it has incurred as a result of the alleged negligence or breach of duty of the architect or design engineer". It seems to me that the denial is intended to be wide enough to encompass arguments that the matters which trigger liability under clause A4.2 (for example, the alleged negligence) have not occurred, and that the word "liabilities" in clause A4.2 is to be read narrowly, by distinguishing between Verve's liability to a third person in damages and its liability to a creditor for services rendered.

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13 In paragraph 46 of the Second Further Amended Points of Claim in D769/2009.

14 In paragraph 47 of the Second Further Amended Points of Claim Verve merely asserts that breach.

15 Paragraph 51 of her Further Amended Defence and Counterclaim in D817/2010.

91 Certainly in the closing submissions on Mrs Visser's behalf, it was argued that the word "liabilities" in clause A4.2 did not include Verve's liability to its own lawyers and consultants, or for costs and expenses voluntarily incurred by Verve in disputing an architect's decision. Mrs Visser submitted that the clause should be read as if it said "liability in damages to a third party".

Claim under section 41(5) of the Domestic Building Contracts Act 1995

92 Mrs Visser ended the contract under section 41 of the DBC Act. This was not rescission in response to repudiation, but termination pursuant to a statutory right which arises where the contract has not been completed within 1½ times its agreed duration.

93 Sub-sections 41(5) and (6) are as follows:

> (5) If a contract is ended under this section, the builder is entitled to a reasonable price for the work carried out under the contract to the date the contract is ended.
>
> (6) However, a builder may not recover under subsection (5) more than the builder would have been entitled to recover under the contract.

94 Under section 41(5), Verve claims "all costs and expenses incurred by (it) arising out or in relation to the project", in addition to the above claim for indemnity and the claims in D768/2009. Clearly Verve has the onus of demonstrating that these expenses equal a reasonable price for the work. The particular costs and expenses have not been set out separately and so must be within the claims made in the Particulars of Claim dated 29 August 2011.

95 The alleged chronology of events surrounding the design fault are set out in some detail in paragraphs 8 to 41 and 68 of the Further Amended Points of Claim in D817/2010.

Section 107 of the Fair Trading Act 1999

96 Verve also alleges that the disputes comprise a consumer and trader dispute under section 107 of the Fair Trading Act entitling the Tribunal to grant relief under section 108 and section 109 of that Act. This allegation is directed to the Tribunal's jurisdiction to hear the matter and grant relief. It does not found a separate claim for damages.

Discussion

The rock claims: CV 01A, CV 06, CV 11, CV 12 and CV 27 totalling $132,658.40 inc GST

97 Clause 4 of the Specification is entitled "Preliminary Site Works & Foundation Excavation", and it specifies the work that Verve was required to carry out.

98 Clause 4.1 is entitled "Site Preparation", and in sub clauses 4.1.1 to 4.1.8 it specifies 8 types of work. Relevantly –

> clause 4.1.2 said "Clearing of site – By (Verve)", and
>
> clause 4.1.3 said "Grading & Levelling of site – By (Verve)
>
> (Verve) to spread over site or to cart away all surplus soil
>
> Excavation: Site Scrape – refer to site plan for extent".

99 The text in clause 4.1.3 does not have full stops, but it is set out on three separate lines and they are to be understood as separate sentences.

100 Even though the last line in clause 4.1.3 uses the word "Excavation", it is used in the context of grading & levelling, and of a "site scrape". I construe the word "Excavation" in clause 4.1.3 to simply signify that earthmoving equipment will be used. It is subservient to "site scrape". It does not mean 'digging'. Therefore, grading levelling and the site scrape falls within the fixed price. Verve could only charge extra for 'digging'.

101 Digging is covered by clause 4.1.6 of the Specification, which says:

> "4.1.6 Excavation of Rock - $160 per m3".

102 The use of the word "Rock" distinguishes that work from the lighter grading and levelling referred to in clause 4.1.3. Thus clause 4.1.6 also distinguishes between work which is to be charged at $160 per cubic metre, and grading and levelling which falls within the fixed price and so would be absorbed by Verve.

103 Clause 4.1.8 says:

> "4.1.8 Removal from site / or spreading of surplus soil and/or rock by (Verve) (* this cost is included in item 4.1.6)"

104 This phrase both specifies an item of work to be done by Verve – "removal from site / or spreading of surplus soil and/or rock" – and refers to Verve's right to charge for that work. It is poorly expressed.

105 As grading and levelling falls within the fixed price, and as removal from site or spreading of surplus soil and/or rock is an instance of grading, clause 4.1.8 does not mean that rock removed as a result of grading and levelling is to be charged at the rate of $160 per cubic metre. The removal of rock from grading and levelling is within the fixed price.

106 The words "(* this cost is included in item 4.1.6)" only mean that if rock is removed from site, as part of the process of excavation specified in clause 4.1.6, then the cost of removal is to be absorbed by Verve within the charge it makes for excavation. Put another way, Verve cannot charge for excavation, and then charge again for removing the excavated rock from the site.

107 Verve relies on clauses 4.1.6 and 4.1.8 of the Specification to say that it can pass on to Mrs Visser all of the charges rendered by its sub contractor

REDS Concreting Pty Ltd in respect of excavation and carting. That claim goes beyond those clauses.

108 Verve engaged REDS under a sub contract dated 12 May 2009. The sub contract works were defined in item 6 of the Particulars in the sub contract as being 7 types of work: bulk earthwork, detailed excavation, removal of excavated material from the site, and 4 types of concreting. The sub contract set a fixed price plus "Rock Excavation & cart away $160/m3".

109 Whilst under clause 2.5 of the sub contract REDS warranted that it had visited the site and understood its conditions and characteristics and that it was not entitled to any increased costs or extensions of time arising from those conditions, Verve did not seek to limit REDS' ability to charge for rock excavation and instead stated a rate per cubic metre. Verve's sub contract with REDS is consistent with Verve's intention that clauses 4.1.6 and 4.1.8 of the Specification passed the risk of the cost of excavation entirely to Mrs Visser.

110 On 19 June 2009 REDS sent Verve its first invoice for excavation, number 1577D. It said that from 1 May 2009 until 18 May 2009 REDS had excavated on Mrs Visser's land (Lot 592), and that it had removed 957.44 tonnes. REDS attached to its invoice a summary of loads received by Delta Group from REDS' cartage sub contractor V & G Group, which showed gross and nett weights, marked to show to which of Lots 589, 590, 591 and 592 the loads related. That summary is consistent with 957.44 tonnes having come from Lot 592.

111 REDS converted that tonnage to cubic metres by dividing the tonnage by a factor of 1.6, to give 598.4 cubic metres. REDS then applied the rate of $160.00 to 598.4 cubic metres, and invoiced Verve the resulting figure plus GST, being $105,318.40.

112 Verve made its claim on Mrs Visser on 24 June 2009 by issuing its invoice number 2175. That invoice was for $105,318.40 plus $10,531.84 GST, contained the description "Roc (sic) excavation and Cartaway (Bulk excavation)", and said that payment was required in 7 days. Verve invoiced for that figure by taking REDS's invoice net of GST ($95,774.00) adding a 10% margin, and then adding GST. Verve recorded the claim internally as Variation CV01 in its variations register.

113 Verve's invoicing of Mrs Visser reflects poorly on Verve's management and its understanding of the contract. Excavation was not a variation. There was no basis in the contract for Verve adding a 10% margin to its sub contractor's charge. There was no basis for Verve requiring payment in 7 days. The invoice was not issued in the manner required by clause N of the contract (which allowed Verve to send one progress claim each month, and required the architect to assess the claim and issue a certificate within 10 working days, upon the receipt of which Verve was to render a tax invoice). It was inevitable that the invoice would be open to dispute.

114 It is clear from invoice 2175 that Verve sought to simply pass on REDS' charge to Mrs Visser. Verve did not form an independent view on whether the conversion rate of 1.6 used by REDS was correct. It simply accepted it. Mr Ruggerio of Verve said in cross examination that he was "not an expert on the conversion rates" but that he understood that you take the weight and divide it by 1.6 to come up with the quantity in cubic metres.

115 Subsequently Verve sought some evidence to support the conversion rate of 1.6. On 30 July 2009 REDS forwarded to Verve a letter that REDS had received from a Mr Brasier of Eastern Plant Hire. Mr Brasier wrote:

> "The conversion factor per metres and tonnes in the twenty and more years I have been pricing Earthworks *I have myself for convenience* generally use a factor of 1.5 – 1.6 Tonne in my calculations" (emphasis added).

This is not a persuasive explanation.

116 Mrs Visser was shocked at the amount of the invoice. She spoke to the architect about getting an explanation of the claim. In cross-examination Mrs Visser insisted that she did not immediately form the view that she would not pay the invoice, nor direct the architect to dispute it. She said she wanted clarification of the invoice. Nevertheless in her first witness statement she said that she was shocked and amazed at the size of the claim; she initiated discussions about it directly with Robert Magdziarz of Verve, circumventing the scheme of the contract which requires communications between owner and builder to be via the architect, and asked Mr Magdziarz why Verve had proceeded with the works without 'raising alarm bells', which seems to ignore the contractual provisions about Verve's construction period. Mrs Visser said in this witness statement that she began to distrust Verve.

117 By this time there was also distrust between Verve and Mr Raffoul. Mr Magdziarz, a director of Verve, made a Witness Statement dated 6 September 2010. The Statement includes material in relation to the negotiation of the building contract over a lengthy period from June 2008.

118 In paragraph 31 of his Statement, Mr Magdziarz said that Verve knew when it entered the contract with Mrs Visser that it would not make any money from the contract, but that it expected to receive marketing benefits in the luxury home market by taking on the project. If it were true that Verve intended to make no money from building this large dwelling on a difficult site, it would reflect the inexperience of Verve's management and show that if the project did not run smoothly Verve could make a loss.

119 At paragraphs 37 and 38 of the Statement Mr Magdziarz said that on or about 8 June 2009 he attended a meeting with Mr Raffoul architect, Mr Perera and Mr Ruggerio both of Verve, and the owner of Lot 591 to discuss delays that had been caused by rock having been encountered on that adjoining site. Mr Magdziarz said that the meeting deteriorated as he became very angry at the architect. Mr Magdziarz said that he lost his

temper, and "said a few things I should not have", including alleging in front of the owner of Lot 591 that the architect had sought to include in that contract's price a secret commission of $50,000.00, but that Verve had refused to allow it. Mr Magdziarz said that he regretted his actions in the meeting and chose to have a reduced involvement on the project after this. Mr Magdziarz said that he was aware that Mr Ian Visser was told about the meeting. Mr Magdziarz made a witness statement in reply dated 5 October 2010, and in paragraph 3 of that statement said that his behaviour in the meeting did not amount to bullying, and that he did not try to bully Mr Raffoul into making an assessment in favour of Verve. It was just a matter of Mr Magdziarz being frustrated.

120 Mr Magdziarz was not cross-examined on the allegations of the secret commission or his conduct in the meeting.

121 Mr Perera also gave evidence that Mr Raffoul had sought a secret commission. He said that Verve "rejected that straightaway, and - and from that point, you know, he took the different turn". He said that at the meeting around 8 June 2009 Mr Magdziarz "asked - you are doing this to us because you wanted a kickback, we didn't give you".

122 Mr Raffoul's evidence was that Mr Magdziarz's conduct in the meeting amounted to an assault. The distrust between Verve, the architect and Mrs Visser probably contributed to how the architect dealt with Verve's invoice 2175.

123 In paragraph 11 of Mr Magdziarz's Statement in Reply, he gave evidence of a lengthy telephone discussion with Mrs Visser on 23 June 2009. He said that the subject matter of the discussion was her shock at the charge made for rock excavation. Mr Magdziarz said that in order to maintain Verve's relationship with Mrs Visser and as a sign of goodwill, he agreed on Verve's behalf to waive the 10% builder's margin on the rock "variation" if it was paid promptly. Mr Magdziarz instructed Mr Perera to confirm that by e-mail. Mr Magdziarz said that as the invoice was not paid Verve withdrew the waiver of the 10% margin.

124 On 6 July 2009 a meeting was held between Mr Raffoul as architect, Mr Perera of Verve, Mrs Visser and some owners of other lots, and on 8 July 2009 Mr Raffoul emailed Mr Perera and said that he required Mr Perera to answer the queries raised at that meeting, that he requested that Verve give an estimate of excavation costs each week from then on, and that unless Verve provided an estimated cost for rock excavation to that day Mrs Visser would "request" a "stop works on her site".

125 Under clause N4.4 of the contract, if the "architect reasonably needs additional information to assess the claim, the architect must promptly ask the contractor for it". That clause empowered the architect to require answers to the questions put at the meeting. The demand for Verve to give a weekly estimate of excavation costs was an architect's instruction under

clause A7.1. However the reference to a possible request for work to stop had no status under the contract.

126 Verve then discussed with REDS how its charge had been calculated and whether a credit was available for the 'spoil removal' that had been charged for within REDS' claim for rock excavation. On 7 July 2009 Mr Perera of Verve emailed the architect, and copied in Mrs Visser, reporting that REDS would respond to this request. REDS issued a variation claim to Verve on 16 July 2009, in which it reduced its charge by $13,167.00 ($11,970.00 + GST), calculated as $20.00 x 598.3 cubic metres, as a credit for "bulk excavation in light soil". Apart from saying that it was reducing its charge by $20.00 per cubic metre, REDS did not explain how it came to that reduction. For example, REDS did not say that one eighth of the material excavated was spoil. The figure of $20.00 gives the appearance that the discount was given as a commercial decision. REDS's new charge for excavation was $83,790.00 plus GST.

127 Verve withdrew its invoice number 2175, and made its claim CV-01A on Mrs Visser, for $92,189.00 plus GST, $101,385.90. Again, Verve used REDS' figure excluding GST ($83,790.00), added a 10% margin, and added GST. In effect, then, Verve continued to rely on REDS' calculation of the appropriate charge, and added a margin that it was not entitled to under the contract. As REDS' charge for spoil removal had been removed, Mr Perera understood that CV-01A was a claim for excavation of rock under clause 4.1.6 of the Specification.

128 The architect assessed CV-01A on 20 July 2009. He did not issue a "certificate" as he was required to do under clause N4.1. He issued Architect's Instruction VQR09002 under clause A7.1 on 20 July 2009, in which he said that he had assessed the claim. The architect said that the reduction of $20.00 per cubic metre did not make sense and that Verve had not answered the questions which had been put to it. He said that Mrs Visser had in her fixed contract price an amount:

> "for all excavation works … (which was given by Verve) in the pricing stage… This price included site cut, footings and all earth works resulting in the removal of soil/rock from the site. The rate of $160 per m3 is applied in the removal of rock from the site by means of hammering or picking with an excavator. Removing rock by means of normal excavation with the bucket is part of the original price".

129 In his Architect's Instruction VQR09002 the architect also explained that he would issue a formal variation in relation to the rock excavation. This was not the correct step to take under the contract because Verve's claim for payment was not under a variation. In any event the architect said that in his formal variation he would allow Verve a payment of $11,759.75 calculated as 957.44 tonnes of rock, divided by a conversion rate of 1.954 to give a sub-total of 489.99 m3. He would allow 15% of 489.99 m3 @ $160.00. An annexure to Mrs Visser's witness statement shows that Mr Raffoul had obtained the conversion rate of 1.954 from a website www.simetric.co.uk,

but there is no evidence of the veracity of that website. The Architect's Instruction VQR09002 says that he came to the figure of 15% by considering the number of working days claimed for excavation during the site cut (21), and then subtracting the amount of time that he said would have been spent loading the trucks (leaving 5 days), then saying that 75% of those days would have been spent actually loading the trucks leaving 25% for hammering or picking the rock. He then reduced that to 15% "at this stage".

130 The architect's reasoning was clearly wrong. Having accepted that 957.44 tonnes of rock were removed, and having used a conversion rate to arrive at a number of cubic metres, he failed to apply the contracted rate to that number and instead purported to reduce his measurement of chargeable cubic metres by reference to time.

131 The architect's consideration that Verve was only entitled to charge for rock that had been hammered or picked calls for the contract to be construed. It is not a matter of the architect arguing in his assessment that there was an implied term in the contract that only rock which was hammered or picked could be charged for. Rather, it is a matter of the architect interpreting "Excavation of Rock" in clause 4.1.6 of the Specification as meaning excavation by hammering or picking, and not by use of a 'bucket'. I can see no justification for such a narrow construction.

132 I find Architect's Instruction VQR09002 to be incorrect in two respects: its adoption of a conversion rate of 1.954 published on a website, and its reduction of the figure arrived at by using that conversion rate on the basis of the time that he deemed certain activities to have taken.

133 On 23 July 2009 Verve disputed Architect's Instruction VQR09002, as it was entitled to do under clause A8.1 of the contract. The dispute was set out in a letter from Verve's solicitors Thomson Playford Cutler dated 23 July 2009. As well as setting out the arguments that excavation and removal of rock was to be charged at $160.00 per cubic metre and that Verve did not have to justify the discount of $20.00 per cubic metre because it was a concession by Verve, the letter criticised the architect's reasoning. The letter also made a veiled assertion that the architect was not acting in accordance with his obligation of fairness and impartiality under clause A6.3. It was a veiled threat because it was expressed as a "reminder" of the obligation, coupled with the comment that if legal proceedings were commenced, the architect "would certainly be joined as a party". Despite its inclusion of homilies about the desire to work harmoniously, the letter was quite aggressive.

134 Then on 28 July 2009 the Architect issued his assessment of CV-01A and decision under clause H of the contract. He accepted that 957.44 tonnes of rock had been removed. He applied a conversion rate of 1.954 (not 1.6) to that weight to give a sub-total of 489.99 m3. He then allowed 25% of that figure (122.49 m3) @ $160.00 and decided that $19,599.59 was payable.

Again, the architect's decision to reduce the number of cubic metres to which the rate would be applied, by reference to time, was incorrect.

135 There is a dispute over the conversion rate. The rate of 1.6 was used by REDS, and Verve has paid REDS. The architect's rate of 1.954 comes from a website, whose author is unknown.

136 Mr Ruggerio and Mr Raffoul met on 31 July 2009. Mr Ruggerio felt that Mr Raffoul was pressing for Verve and Mrs Visser to mediate about the amount payable for rock excavation. Mr Ruggerio argued that doing so was contrary to the contract – that Mr Raffoul now had all the relevant information and should make a decision. However on 31 July 2009 Mr Rugerio emailed Mr Raffoul and said that Verve would participate in a mediation. Mr Raffoul replied by saying that Verve should commence a formal dispute resolution procedure under the contract. Verve did so on 3 August 2009.

137 Ironically, experts called by the parties - Mr Tim Holt, geotechnical engineer for Mrs Visser and Mr Liam Kells, quantity surveyor of W T Partnership for Verve – gave two further opinions about the sum payable for excavation, neither of which followed the methodology of REDS or Mr Raffoul. Mr Holt distrusted the accuracy of weights measured at tips and said that he would apply a conversion rate of 2.55, which is of course considerably higher than the 1.6 used by REDS. Mr Holt's distrust of data from tips applied to tips generally, and was not said to arise from the particular measurements in this case. Mr Kells said that he would not pay any attention to the weight of rock at all, but would calculate a number of cubic metres of rock by measuring the rock *in situ* by doing a take off from the drawings.

138 W T Partnership's report on this issue was dated 21 April 2011, and was signed by L M Thomas. It set out his costings on rock excavation and other claims in an attachment called "Revision A". Mr Kells of W T Partnership gave evidence about the report. Mr Kells opined that the contract rate of $160.00 per cubic metre was within the range that he would expect in the industry. Mr Kells explained that his methodology in calculating the volume of rock was to assume that the rock was non-rippable (by which he meant that the rock could not be removed with the bucket of the excavation machine but had to be broken out); and to deem all excavations over 600 mm in depth from natural ground level as being excavation in rock. The volume measured was net in the ground quantity, with no bulking factor applied.

139 Mr Kells noted that his assessment for rock excavation covered all of Verve's variations claims for rock (CV-01A, CV-06, CV-11, CV-12 and CV-27). His assessment is set out in detail in section 8 of "Revision A". For CV- 01A, CV-06, CV-11, CV-12 his assessment is $92,216.00 and for CV-27 $17,985.00, a total of $110,201.00. On page 2 of his report Mr Kells said that he had used the rate stipulated in the contract of $160.00 per cubic

metre. However, whilst "Revision A" shows that to be so for CV-01A, CV-06, CV-11, CV-12 and most of CV-27, in respect of CV-27 Mr Kells costed 75 cubic metres at a rate of $90.00. I can see no explanation for that lower rate being applied. Nevertheless experts reports are not signed lightly; Mr Kells gave evidence that he verified the report and assessment as being true and correct; and he had seen the drawings, specifications and the soil report. The particular item costed at $90.00, item 8.45, is described as 'detailed excavation', yet in giving evidence Mr Kells said that he would expect a rate higher than $160.00 for that kind of work. Nevertheless Mr Kells did not give evidence at the hearing that departed from verifying the report and so I proceed on the basis that he assessed the 5 rock variation claims at $110,201.00. I note for clarity's sake that Mr Kells's report gave a figure of $125,099.00 for earthworks and substructure concrete, but that it includes amounts for work other than the 5 rock variation claims.

140 Mr Kells' assumption that all excavation below 600mm was rock is different to that of Mr Buchanan, quantity surveyor called by Mrs Visser. Mr Buchanan noted that in one of the bore holes in the soil report, 'refusal' was not encountered until 1100mm and that on that basis the site should not be assumed to have a uniform content of rock. Mr Buchanan's report concedes that an allowance of 10% should be allowed on his figures. It must also be said that all these witnesses are extrapolating from bore holes. I prefer Mr Kells' assessment to that of Mr Buchanan.

141 Mr Kells also said that the contract was silent on how rock should be measured, and that Mr Kells' methodology was that where rock was "non-rippable", all excavations over 600 millimetres in depth from natural ground level would be allowed as excavation in rock, and the volume measured was the "net in the ground quantity". Mr Kells described the rate for rock of $160.00 per cubic metre in the contract as an "extra over-rate". When asked what that meant, he said that an "extra over-rate" is "in addition to the rate for normal excavation in material".

142 By distinguishing between "normal excavation" and the excavation of non-rippable material that could be charged under clause 4.1.6 of the Specification, Mr Kells was recognising some merit in the architect's view that only something more difficult than normal excavation was to be charged for at that rate, and REDS' credit to Verve.

143 I accept and rely upon Mr Kells' evidence. He is a quantity surveyor, qualified to give expert opinion on costing. His approach recognises an objective means of costing where a rate per cubic metre has been provided for. By opining that normal excavation was within the fixed price and that only the excavation of non-rippable material could be charged as an extra over-rate, he recognised that Verve was not entitled to pass on all excavation charges to its principal.

144 Mrs Visser's defences to these claims were in the form of a bare denial, plus the allegation that a sum less than the architect's assessment was

payable in respect of CV 01A. Mrs Visser calculated a figure for CV 01A by dividing 957 tonnes by 2.55 (as distinct from 1.6 or 1.954), a conversion rate used by Mr Holt. I reject Mrs Visser's defence because the contract does not empower Mrs Visser to challenge an architect's assessment. I find that Verve challenged the architect's assessment of CV 01A in accordance with the contract. There is no impediment under the contract to Verve challenging that assessment.

145 I find that the architect did not assess CV 06, CV 11, CV 12 and CV 27. Under clause A9.1 there was no deemed acceptance or rejection of the claims. Time did not run against Verve. There is no impediment under the contract to the Tribunal determining the claims for excavation and rock removal.

146 I accept Mr Kells' opinion and I find that the sum due to Verve, in respect of CV 01A, CV 06, CV 11, CV 12 and CV 27 is $110,201.00 plus GST.

Changed concrete strength CV03 $283.14

147 Mrs Visser's final position was contrary to her Defence. She acknowledged in her closing submissions that the architect had approved this claim for $257.40 plus GST and she conceded it. The claim is allowed at $257.40 plus GST.

Lost formwork CV04, CV05 and CV 09 totalling $16,336.21 including GST

148 Verve claims three sums as variations. In Mrs Visser's Defence she pleaded that she "did not admit that they were made in accordance with the contract provisions".

149 The submissions made in closing revealed that her point was that the claims were not for variations within the common law meaning of that term; that they related to matters which were part of the work under the contract and not in addition to it.

150 The claims relate to excavation work performed at the boundary between Mrs Visser's land and Lot 591 in preparation for the construction of the lowest level. Structural drawing S4 contains a detail for Protection Works for Boundary. It shows the "excavation face" as a straight vertical line, requires a rubberised tanking system to be applied to that face, and a slimline AG drain to be installed at the foot of the excavation. It then calls for "shotcrete" with a Xypex waterproofing additive to be sprayed onto the rubberised tanking system.

151 There is an error in drawing S4, because it depicts the slimline AG drain on Lot 591, and not on Mrs Visser's land. Clearly, one cannot design for works to be constructed on neighbouring land. This part of the design was wrong.

152 Verve's claims were not made entirely in response to that error. After the excavation was performed, the remaining rock face was not left as a perfectly straight surface on which to place a rubberised tanking system. Verve seeks to treat this as an error in the design. However it would have

been obvious to Verve before the excavation was carried out this would be the outcome, particularly as Verve knew that the site contained rock. Verve issued a Request for Information to the architect, asking "How do you propose to do the rubberised tanking – given the site conditions due to rock face".

153 The architect forwarded that Request to the engineer Fara Fuzaty, who wrote on the Request and faxed it directly to Verve: "Due to site conditions rubberised tanking system can be omitted provided *in situ* concrete has XYPEX waterproofing additive".

154 It is not part of the contract administration system established by the parties in their contract that the engineer would give instructions directly to the builder. However as the engineer copied in the architect to his fax, and the architect did nothing to contradict it, I conclude that the architect adopted the engineer's fax as an instruction by the architect under clause J1 of the contract.

155 On 29 June 2009 Mr Perera of Verve emailed Mr Raffoul, saying that Mr Fuzaty had also spoken about eliminating the AG drain. Mr Raffoul emailed Mr Perera in reply, sending a copy to Mrs Visser and others, saying, "We are awaiting instruction from Fara (Fuzaty) to forward to Verve". Later on 29 June 2009 Mr Fuzaty faxed Verve and the architect, saying:

> "Following our joint site meeting … we are now confirming the following items:
>
> Concrete strength in in situ retaining walls to be increased to 40MpA
>
> Concrete to have XYPEX waterproofing additive
>
> Provide water stop bars between footing and retaining wall
>
> We still require slimline AG drain in the wall as per" a sketch, which depicted the AG drain hard against the excavation face, between it and the water stop bar.
>
> An arrow pointed to the location, with the legend "Possible location of slimline AG".

156 The sketch also depicted "plastic membrane + 20mm Styrofoam" to be placed against the excavation face.

157 The fact that this fax was sent to the architect, as well as Verve, after the architect had emailed that he was "awaiting instruction from Fara" confirms that this fax stood as an instruction from the architect to Verve. The architect adopted the engineer's fax as an instruction by the architect under clause J1 of the contract.

158 Verve instructed its subcontractor REDS to carry out this work. REDS advised Mr Perera that the 20mm Styrofoam "will not hold its line when the wall is poured due to the unevenness of the rockface. A method of lost formwork will have to be used to keep a straight line on the boundary".

159 On 12 August 2009 Mr Perera sent a Request for Information to the architect and the engineer, reporting the advice that the styrofoam would not hold its line, suggesting the use of a system of lost formwork, and concluding "please advise urgently".

160 There is a clash of evidence between Mr Perera and Mr Raffoul as to the next event. They agree that they met and discussed the matter. Mr Perera says that Mr Raffoul instructed him to proceed with the lost formwork as a variation. Mr Raffoul said that they "determined the type of constructability, but didn't have confirmation on variations".

161 I do not accept Mr Raffoul's evidence as meaning that Verve was not instructed to proceed with the work as a variation. During cross-examination Mr Raffoul frequently expressed himself in a vague, circuitous, evasive and overly defensive way. He frequently took a strict, narrow interpretation of a question, and then gave a highly qualified answer on the basis that the question had been so specific.

162 Simply, as an example, I refer to the lengthy controversy over Mr Raffoul's conduct in dealing with summonses to produce documents. At the hearing on 18 July 2011, when asked whether he recalled the Tribunal having made Orders for the production of his file, Mr Raffoul answered "Not clearly". Yet when asked, "Not clearly? So are you saying you don't recall Orders being made by the Tribunal in relation to you producing documentation contained on your file?" he answered "Yes, I do remember that".

163 When Mr Raffoul was asked whether he had notified his professional indemnity insurer about the possibility of a claim being made against him, he gave a series of contradictory answers in rapid succession: his bookkeeper had; no, his office manager had; actually his bookkeeper and his office manager were the same person; he was unaware when this occurred in that he could not recall an exact date; then, "We haven't made an application for a claim. We've notified them".

164 Finally for the purposes of illustration, Mr Raffoul gave evidence that he did not have a contract with Mr Fuzaty. When a contract between the two was produced to him, he asserted that, "We're not contracted to him. We didn't make payment to the contract - to the - to his services. We signed off on his engagement". So Mr Raffoul purported to distinguish between signing off on the engagement of an engineer, with entering into a contract with the engineer – even where the object that was signed was a contract between the architect and the engineer - Mr Raffoul and Mr Fuzaty.

165 Returning to the discussion between Mr Perera and Mr Raffoul in August 2009, Mr Raffoul's statement that they "determined the type of constructability, but didn't have confirmation on variations" is typical of a convoluted construction which skirts around a question rather than answering it. Mr Raffoul engaged in obfuscation.

166 It is implausible that a design fault would be discovered, a request for information issued, an instruction called for from the engineer, a new design detail published, a flaw being discovered in that detail, and a meeting being held at which the builder was directed to proceed, to amount to a 'determination of the type of constructability being made, but its status as variation not being confirmed'.

167 I prefer Mr Perera's evidence on this issue and I find that the architect instructed Verve to proceed with the variation, as he was empowered to do under clause J1.1 of the contract.

168 Verve's claim CV 04, in the sum of $8,107.00 including GST has been approved by the architect for payment, in his Architect's Instruction A109049. It must be paid.

169 Verve made its claim CV 05 on 17 November 2009, in the sum of $5,869.71 including GST. The narration was "balance (of) lost formwork" and it was supported by a 'REDS' invoice no 1964VC for the cost of 63 square metres in lost formwork. The claim was rejected by the architect in his Architect's Instruction VQR09019, in which the architect said, "It is the contractor's responsibility to have allowed for all works related to and with the construction of all in-situ walls".

170 One cannot reconcile the approval of CV 04 with the rejection of CV 05. The latter flows from, and indeed is really part of, the approved variation CV 04. As such there is no scope for Mrs Visser to avoid liability for payment on the basis that the architect had not issued an instruction to proceed.

171 Mrs Visser submitted that Verve did not issue a notice of dispute under clause A8.1, after Mrs Visser failed to pay CV 05.

172 Verve made its claim CV 09 on 12 August 2010, in the sum of $2,359.50 including GST. The claim was in the form of a quote, and the narration was "REDS invoice 2051D – Supply of 3m footing 2.5 sqm lost formwork". Attached was a copy of 'REDS' invoice no 2051D dated 7 December 2009 which was for the supply of a 3m long footing 2.5 sq m lost formwork and 2.5 sq m of shotcrete walls and water stop "as per discussions with site foreman". Verve had paid REDS on 18 January 2010. The architect called on Verve to identify the location on the floor plan in relation to the variation. Verve did not reply. As such the architect did not assess the claim. Under clause A9.1 there is no deemed acceptance or rejection of the claim.

173 Whilst on the face of REDS' invoice and Verve's claim they appear to relate to the same work, it must be borne in mind that the variation was as to the location of the AG drain and the supply of the lost formwork in lieu of Styrofoam. It was not for the construction of the wall itself, which was part of the contract works and which does seem to be part of REDS' invoice ("2.5 sq m of shotcrete walls").

174 Claims CV 05 and CV 09 are quite different. I am satisfied that the approval of CV 04 binds the architect to approve CV 05 and Mrs Visser to pay it. However CV 09 was issued much later as a quotation, and the architect was entitled not to make an assessment in the absence of information that was legitimately requested. In the absence of such information from Verve I conclude that the lost formwork to which it applies is part of the "associated works" and works "reasonably required to complete" covered by the fixed contract price, as mentioned in item 5 of the contract's introduction and clause N1.

175 It follows from the above that Mrs Visser must pay CV04 and CV 05, in the sums of $8,107.00 and $5,869.71, but not CV 09.

176 The claim for payment of CV 09 was also pleaded on the basis of misleading conduct. However, as the parties had entered into a lengthy building contract with detailed provisions about variations, I do not accept that Verve has proven that it was misled in the sense required by the Fair Trading Act. In any event I have already found that Mrs Visser did not act in trade or commerce.

Retaining wall CV 13 and CV 14 $6,148.01

177 On 17 December 2009 REDS issued its invoice 2093D, for $1,601.60 including GST. The narration in REDS' invoice said that on 16 December 2009 it had poured 11.2 cubic metres of "extra over" concrete in the slab and on one of the footings. REDS said that the drawings had called for 43 cubic metres, and that it had poured 54.2 cubic metres.

178 On 23 April 2010 Verve sent the architect a "variation quotation" for $1,601.60 excluding GST ($1,761.76 including GST). It annexed a copy of REDS' invoice. Verve resubmitted an identical variation quotation on 24 May 2010.

179 By Architects Instruction VQR1046 dated 23 July 2010, the architect rejected CV 13, on the basis that there was "no allowance in the contract for excess concrete or minimum allowance amount of concrete". That is, that the supply of all concrete was within the fixed price and that it could not be claimed as a variation.

180 Verve did not dispute the architect's decision. Clause A8.2 of the contract provided that if Verve failed to give a notice of dispute in relation to an architect's decision within 20 working days, Verve was not entitled to dispute the matter at all. If the contract was the sole repository of the parties' rights, that would be an end to Verve's claim to payment of CV 13.

181 Verve says that the extra over concrete was necessitated by voids being left following rock excavation. That does not assist Verve's claim. It would be within the contemplation of a builder who knew that rock was to be excavated, that voids might be left. The appropriate course was to include a provision in the contract allocating the risk of such an event to Mrs Visser. There are no provisions which place that risk on to Mrs Visser.

182 Verve claims payment of CV 13 under section 37(3)(b) of the Domestic Building Contract Act. To succeed under that section Verve must satisfy the Tribunal that there are "exceptional circumstances" or that Verve would suffer a "significant or exceptional hardship", and if it proves either of those, that it would not be unfair to Mrs Visser to pay the claim.

183 I am not satisfied that there are either exceptional circumstances or significant or exceptional hardship. All that occurred was that Verve submitted a quote for a small variation, which was not accepted and which it did not challenge. I dismiss Verve's claim to CV 13.

184 CV 14 arises from the construction of a retaining wall along the rear boundary of the property. The retaining wall was not shown on the architectural drawings. They showed retaining walls down the sides of the property, stopping at a point behind the rear wall of the dwelling. During cross-examination, Mr Raffoul conceded this fact, and that he had instructed Verve to construct this additional area of retaining wall. It is also the fact that one of the claims for damages for defective work made by Mrs Visser in the proceeding, relates to this retaining wall.

185 On 7 December 2009 REDS sent its invoice number 2048D to Verve, for $3,987.50, including GST. The narration was that the charge was made for the supply of labour and materials to prepare and pour footings and for the construction of the retaining wall. On 24 May 2010 Verve submitted CV 14 to the architect, for $3,987.50 plus GST. The effect of this was that Verve claimed a margin of 10%, as it is entitled to do clause H2 of the contract. The claim specifically referred to REDS invoice number 2048D.

186 The architect assessed the claim on 23 July 2010, and in his Architect's Instruction VQR1047 said that the claim was rejected as the retaining wall was part of the original documentation. That assertion is simply incorrect.

187 Verve did not dispute the architect's decision, and as was the case with CV 13 that omission would be fatal to its claim if the contract was the sole repository of Verve's rights. However, in this instance, Verve's claim under section 37(3)(b) of the Domestic Building Contracts Act succeeds. The facts that the retaining wall was not part of the contract works and that the architect instructed Verve to carry out the work, brings the matter within the concept of an "exceptional circumstance", and despite the relatively small amount of the claim, it would be a significant or exceptional hardship to Verve if the claim was not paid. Similarly it would not be unfair to Mrs Visser to be required to pay the claim as she has the benefit of the work. This claim is allowed in the sum of $3,987.50 plus GST.

CV 08 $658.24

188 Verve claims $658.24 as a variation. Under the contract, the swimming pool and associated heating and filtration plant and equipment were excluded from the scope of the Verve's works. They were to be supplied

and installed by Mrs Visser. She employed a contractor directly for this purpose.

189 That contractor and Verve made an arrangement on site, which resulted in REDS digging a trench for the installation of the pool pipes prior to the pool slab being laid. Verve submitted variation claim CV 08 in this respect. There is no evidence on the impact of REDS's work on the amount billed to Mrs Visser by her pool contractor.

190 The claim must be rejected. There was no instruction by the architect to Verve to carry out the work. The pool contractor was not Mrs Visser's agent for the purpose of requesting variations to Verve's contract. Verve may have instructed REDS to carry out this work, on the basis of an assumption that it would be reimbursed, but there was no conduct by or on behalf of Mrs Visser giving rise to that assumption. The claim does not arise under the contract and is not supported by the law of *estoppel* misleading conduct or the like. The claim must be rejected.

CV 15

191 On 7 December 2009 REDS issued its invoice number 2057D to Verve for $2,047.87, including GST. The narration on the invoice said that it was for the removal of three loads of rock and one load of spoil, "due to plumber excavation and his spoil hadn't been removed".

192 On 1 June 2010 Verve submitted variation claim CV 15 to the architect for $2,047.87 plus GST, thus including a margin of 10%. By his Architects Instruction VQR 1048 dated 23 July 2010 the architect rejected the claim on the basis that it "should be charged out to (Verve's) sub-contracting plumber". The grounds for this rejection were not well expressed, but in my view, the architect was attempting to communicate the point that plumbing works were included in the fixed price, and that this removal of rock and spoil was part of those plumbing works. It was not excavation to be charged for separately by Verve under clause 4 of the specification.

193 In giving his evidence Mr Perera of Verve conceded that Verve has not paid REDS in respect of its invoice 2057D.

194 Verve did not dispute the architect's rejection of the variation. Clause A8.2 thus prevents Verve from bringing this claim under the contract.

195 Verve's claim for payment of CV 15 under section 37(3)(b) of the Domestic Building Contract Act must fail. That Verve did not pay REDS nor give evidence of being unable to recover some contribution or credit from the plumber demonstrates that Verve is not subject to any "exceptional circumstances" in this context, nor that Verve would suffer a "significant or exceptional hardship" if it did not recover from Mrs Visser.

196 The claim must be rejected.

CV 16 Blinding concrete $314.60

197 Verve's claim for this sum has been approved by the architect. Mrs Visser must pay $314.60.

CV 17 $1,694.00

198 The contract drawings made provision for 20 m³ of bulk concrete to be poured in the pool area as part of the contract works. Verve's sub contractor REDS supplied and poured 25 m³ of bulk concrete, and on 7 December 2009 issued invoice 2050D to Verve for $1,540.00 including GST, for the additional 5 m³ of bulk concrete.

199 On 1 June 2010 Verve submitted to the architect its variation claim CV 17 for $1,540.00 plus GST, again adding a 10% margin.

200 By his architect's instruction VQR1050, dated 23 July 2010, the architect rejected the claim. He stated that there was no allowance in the contract for excess concrete or a minimum allowance of concrete. However, that was incorrect in relation to bulk concrete to be poured in the swimming pool area.

201 Whilst it is the case that Verve did not dispute the architect's decision within 20 working days, so that clause A8.2 would prevent it from bringing a claim under the contract, this is a claim which is to be allowed under section 37(3)(b) of the Domestic Building Contracts Act. The work has been performed and has been of benefit to Mrs Visser. It is not unfair for Mrs Visser to be ordered to pay for the additional bulk concrete to the pool area. Verve would suffer a significant hardship if it were not paid.

202 The claim is allowed in the sum of $1,540.00 plus GST.

CV 19A $19,755.04

203 Mrs Visser's closing submission was inconsistent with her Defence to this claim. The Defence was an ambiguous non-admission. In the closing submission, however, Mrs Visser conceded that the claim had been approved by the architect in full on 27 April 2010. There was no submission to the effect that the claim ought not be paid on some other basis.

204 In those circumstances, I allow the claim in the sum of $19,755.04.

CV 20 $6,731.74

205 This claim, for payment for the installation of steel beams to support the C1 columns, led to further disputes and claims. The evidence relating to CV 20 is also relevant to Verve's other claims.

206 By March 2010, the installation of concrete panels for the walls was scheduled. The sub contractor installing the panels was Campbell Cranes.

207 On 13 March 2010 Mr Andrew Jeffries, who through his company Third Voice Pty Ltd was sub contracted to Verve as project manager, spoke to

Daniel Campbell of Campbell Cranes. Mr Campbell expressed the view that the concrete columns adjacent to the swimming pool were not of sufficient strength to support the concrete panels. These are the "C1" columns. Neither Mr Campbell nor Mr Jeffries were purporting to be engineers, but this was a matter which went to safety and it was appropriate that Mr Jeffries act conservatively.

208 On 16 March 2010 Mr Jefferies sent the architect an e-mail, in which he asked the architect to obtain the engineer's opinion on the structural integrity of the columns. Mr Jefferies said that "it is our opinion that they are inadequate. Please advise your instruction ASAP, as it is our intention of considering precast panels in this area".

209 By 8 April 2010 Verve had temporarily installed steel pre-formed columns ("pfc's") behind the C1 in-situ columns, in an attempt to improve the lateral stability of the in-situ columns while the concrete panels were installed. Mr Jefferies gave evidence that Campbell Cranes had advised Verve that Campbell Cranes would not install the panels, as in their view the columns were of insufficient strength. On 8 April 2010 Mr Jefferies sent the architect an e-mail, which reported that "as discussed on site at our last site meeting, we have temporarily installed steel pfc's behind the in situ columns to improve the lateral stability of the columns while the panels are installed. We will then be adding a horizontal steel beam within the floor zone to tie the columns together, and remove the temporary columns".

210 On 12 April 2010 Mr Jefferies sent an e-mail to the engineer, saying that the panel installers were concerned about the installation sequence and propping design for the remainder of the concrete panels. Mr Jefferies asked the engineer to attend site at a meeting to discuss his design and to give instructions to proceed. Mr Jefferies said that the matter was urgent and that Verve could not proceed without the engineer's attendance. Mr Jefferies sent a copy of that e-mail to the architect. He said the reason he sent the e-mail to the engineer was that he had been advised that Mr Raffoul was overseas.

211 On 13 April 2010 Mr Daniel Campbell sent Mr Jefferies an e-mail, setting out his views on the work required in installing the panels. The items in the e-mail included:

> "Confirm bracing locations and removal process to facilitate structural steel erection – perhaps site inspection with engineer and steel fabricator/ erector. Confirm bracing sequence and relocations/ temp bracing in 3 hollowcore zones. Try to complete installation without using structural steel as bracing – however, the more bracing the better".

Mr Jefferies forwarded that e-mail to the engineer and to Mrs Visser.

212 Mr Jefferies gave evidence that on 14 April 2010, he met the engineer, and that it was agreed at that meeting that Verve would install structural steel beams to prevent the concrete panels collapsing. Mr Jefferies says that on or

about 21 April 2010 Verve arranged for the installation of the beams. On 3 May 2010 Mr Jefferies sent an e-mail to Mrs Visser and Mr Visser, with a copy to the architect, in which he reported directly to Mr and Mrs Visser that he had met the engineer on site on Friday, and that Verve wanted an urgent meeting with Mr and Mrs Visser to discuss Verve's concerns. Mr Jeffries listed the concerns as the structural integrity of the engineering design, Verve's inability to take verbal or other instruction directly from the engineer regarding his design, and the lack of an installation design or propping design which required Verve to seek immediate verbal communication with the engineer. Verve was concerned that the architect had demanded that Verve only communicate through him. That was the correct approach from the perspective of contract administration, but when issues of the safety of the design were present it was appropriate that Verve seek instructions promptly.

213 In his email Mr Jefferies said that Verve was not disputing the process of the architect approving all variations, and authorising all communications with the engineer. Mr Jefferies was bringing to Mr and Mrs Visser's attention that if that procedure was followed, when issues of structural stability and safety were involved the program would be significantly delayed. Mr Jefferies reported that Verve had proceeded with additional steel structure in the floor zone to brace panels, with the engineer's verbal approval. Mr Jefferies said that the work would be documented and submitted as a variation.

214 Mr Raffoul replied to that e-mail on 4 May 2010. In substance Mr Raffoul said that the engineer had advised him, that the engineer was awaiting advice from Verve of the procedure for the erection of concrete panels and for the erection and removal of props. Mr Raffoul asserted that this information had been requested at the site meeting on 13 April 2010 and had not been provided. Mr Raffoul also said that the engineer had advised him, that the engineer had not given any instruction for extra steel support within the floor structure. Mr Raffoul said that the extra steel had been installed to allow the removal of props, and not for structural integrity.

215 Mr Jefferies replied to Mr Raffoul on 4 May 2010. Mr Jefferies confirmed that Verve had agreed to supply an installation procedure and propping design document to the engineer. However, Mr Jefferies said that Verve had agreed to do this because the engineer had failed to do so.

216 Mr Raffoul replied to that e-mail on 4 May 2010. He stated forcefully that as Verve had had the contract documents for over 12 months, he was surprised that Verve was seeking extra documentation at such a late stage of the installation of panels. Mr Raffoul said that it was not the obligation of Mrs Visser to document a procedure for concrete panel installation. No such document was a contract document, and it followed that this was the task for Verve.

217 Several expert witnesses have given evidence in the case. Whilst their conclusions were not known to the participants at the time of the April 2010 site meeting, the facts were still facts at that time. It is not really a question of the Tribunal looking at the matter with the benefit of hindsight, because Mr Fuzaty and to a lesser extent Mr Raffoul had the qualifications necessary for them to have expert knowledge at that time.

218 Mr Tim Gibney, a consulting structural and geotechnical engineer who gave evidence for Verve, wrote a letter to Verve's solicitors on 18 August 2010 after carrying out an inspection of the building site. At this time, construction work had stopped and the site was in a similar state of progress to what it had been in April 2010. Verve's solicitors sent a copy of Mr Gibney's letter to Mrs Visser's solicitors on 24 August 2010.

219 On page 2 of his letter Mr Gibney said that having carried out a stability check of the structure, he considered it would be unsound when the panel props were removed. The C1 columns providing lateral support to the eastern end of the building were only approximately 50% of the required design capacity to provide stability against lateral wind load. There was no other bracing provided at the eastern end of the dwelling in the engineering documents.

220 Mr Gibney said that the stability of the front western portion of the three-storey section was reliant on the first and second floors providing diaphragm action to transmit wind forces down to the in-situ walls, as there was no wall bracing documented at any level. However, for the diaphragm action to be provided, it would be necessary to brace the roof and floor structures, and as there was no detail or structural note to that effect on the structural plans it was not clear how the stability of the front western precast elevation was to be achieved.

221 Mr Gibney concluded that the existing C1 in-situ columns did not have adequate strength to resist the design wind loads on the northern side wall. The structure had no wall bracing over the back section of the dwelling. Mr Gibney said that the design engineer needed to nominate the walls which had been designed as load-bearing walls, and how those walls were supported. The design engineer should design an adequate bracing system and document a construction sequence to specify when the panel props could be removed.

222 In giving evidence Mr Gibney noted that up to 3 layers of panels were to sit on top of the C1 columns. The wind loads on a building increase by the height of the building, squared, so that the wind loads on a two or three storey building were at least 50% more than on a single storey building. Mr Gibney said that for any building of the size of Mrs Visser's, it would be a "requirement" that the engineer provide a bracing system, to transfer the forces on the building down to the ground, to be taken out by the foundation system. It was not possible for a builder to rely on the light Timber Framing Code to provide that system; it had to be prepared by an engineer.

223 Mr Gibney gave evidence that unless the steel pfc's had been installed, the building was in imminent danger of collapse, and that now, if the temporary props were removed, there was still a danger of collapse.

224 On 14 September 2010 Mr Gibney met Mr Fuzaty on site, with a structural draftsman from Mr Fuzaty's office, and Mr and Mrs Visser. On 15 September 2010 Mr Gibney wrote a letter to Verve's solicitors reporting on this meeting. Mr Gibney said that when Mr Fuzarty expressed the opinion that the use of a diaphragm could change the force path and transfer the lateral forces into longitudinal forces, Mr Gibney explained that Mr Fuzaty's theory was not in accordance with basic structural mechanics, and Mr Fuzarty agreed that additional bracing was required at least at ground level. Mr Gibney reported that he and Mr Fuzaty had resolved that the stability of the structure had to be supplemented. Mr Fuzaty said that he would provide four things: provide bracing walls in two areas, build up a blade column which would require a diaphragm floor membrane, add plywood flooring at the first floor level, and provide a Safe Work Method Statement for the removal of the steel panel props and temporary steel beams. Mr Gibney reported that it was the responsibility of Mr Fuzaty, as design engineer, to check the stability of the structure during construction and for post-construction conditions.

225 In giving evidence at the hearing Mr Gibney was asked about this letter. He said that it accurately recorded his recollection of the meeting. The fourth bullet point identified the potential for the removal of the steel beams which are the subject of CV 20.

226 Mr Gibney was asked whether those temporary steel beams could be removed without any ramifications and without any reference to the other bullet points, and Mr Gibney answered in the negative. He said that the steel beams could not be removed because they were tying the horizontally stacked panels, which had no stability, to the panels on the southern side. They were tying the building together.

227 Mr Fuzaty also wrote a letter recording the meeting on 14 September 2010. It was undated, but refers to the meeting of 14 September 2010 as having occurred "yesterday"; nevertheless it was faxed by Mr Fuzaty on 23 September 2010 and I will refer to it as his letter of 23 September 2010. In his letter Mr Fuzaty said that he was and remained of the opinion that his engineering design and computations were in accordance with the relevant Australian Standards. He said that after he and Mr Gibney had put forward their respective views, Mr and Mrs Visser had stepped in to mediate a possible solution or compromise, and that four points were discussed and agreed. Mr Fuzaty set them out in bullet points, but they are quite different to Mr Gibney's, and it is notable that Mr Fuzaty's version of the fourth bullet point was that the 4 steel beams installed by Verve could be removed as they are of a temporary nature. Mr Fuzarty did not mention a Safe Work Method Statement. Significantly though, Mr Fuzaty's second bullet point

was that a new column C4 be poured next to column C1, or that steel be used: either item of work was directed to strengthening the C1 column.

228 Mr Fuzaty also wrote that Mr and Visser indicated that as the above changes did not appear to be costly, nor require a redesign, they were comfortable to move forward on that basis.

229 On 24 September 2010 the architect issued an architect's instruction to Verve, to proceed in accordance with an amended design prepared by Mr Fuzaty. In that amended design, Mr Fuzaty stated that the dominant side wind came from the south, which was "only temporary till Lot 593 is built which fully shields the building", and that the building is shielded on the north side by an existing dwelling. He said that the floor acted as a diaphragm, and that the load was shared by three columns along grid 4.

230 Mr Fuzaty did not give evidence. I accept Mr Gibney's letter of 15 September 2010 as being an accurate record of the meeting, in preference to Mr Fuzaty's letter of 23 September 2010. When you read the letters together, the idea expressed by Mr Fuzaty that when two engineers disagree - with one holding the view that the building is in imminent danger of collapse - that unqualified owners then mediate a compromise which includes the removal of the steel beams which in Mr Gibney's opinion were holding the building together, is incredible.

231 Mr Fuzaty's letter is also contradicted by an email sent by Mr Ian Visser to Mr Ruggerio of Verve on 28 September 2010, in which Mr Visser said:

> "Hi Adrian, given our agreement to adopt the changes put forward by Tim Gibney in the interest of moving the construction of our home forward I would like to understand what the next steps will be …".

232 Mr Gibney wrote another letter to Verve's solicitors on 29 September 2010, commenting on both Mr Fuzaty's letter of 23 September 2010, and Mr Fuzaty's amended design which had been enclosed in that letter. Mr Gibney elaborated on the flaws in Mr Fuzaty's amended design and letter. Amongst other things Mr Gibney noted that Mr Fuzaty's design methodology was based on a 1989 wind code which had been superseded in 2002. Mr Gibney opined that Mr Fuzaty's design assumption that the building is shielded from the wind by other buildings ought not be made. If other buildings were to be taken into account as shielding the building, it had to be recognised that they only shield Mrs Visser's building up to their height. As to the bracing of the concrete panels, Mr Fuzaty's general note that the bracing was to be in accordance with AS1684 was inadequate; it did not tell the builder what type of bracing to use, and it is unreasonable to expect the builder to determine the number and type of bracing walls required. Those matters were the domain of the design engineer. Mr Gibney concluded by saying that the building "still has significant structural instability problems" which Mr Fuzaty has not addressed, and that no Safe Work Method Statement had been prepared in relation to when the props and propping beams could be removed. He said, "To suggest that the project has been

held up for six months for some small amounts of bracing ply is totally inaccurate".

233 Mr Gibney was cross-examined. He conceded that the installation of the steel beams was one method, but not the only method, of making stable the horizontal panels. He agreed that in theory some of the beams could have been placed outside of the floor level, so that it would have been possible to remove them later if the floors had been constructed with proper diaphragm flooring, but he discounted that theory as the floors had not been designed as diaphragms.

234 In cross-examination Mr Gibney was invited to consider whether a builder could design a bracing system and a construction sequence, and Mr Gibney answered that it was the responsibility of the design engineer because it required engineering judgment. Mr Gibney also said that because, on the basis of his observation, Mr Fuzaty had not defined how he was aiming to stabilise the building it would not be appropriate to expect someone other than Mr Fuzaty to attempt to prepare a propping detail or a construction sequence.

235 The evidence in relation to the possible removal of the beams is relevant to other issues. Of relevance to CV 20 are Mr Gibney's evidence that the installation of the beams was necessary to prevent the collapse of the building, Mr Jeffries' evidence that the beams were installed with the agreement of the engineer given on 14 April 2010, and Mr Fuzaty's admission, recorded in his unsatisfactory letter of 23 September 2010, that Column C1 had to be strengthened.

236 On 5 May 2010 Verve submitted its Variation Quotation CV 20 to the architect, containing the narration "Supply and install additional structural steel supports to precast panels". There was an accompanying document which gave the costing as that for the installation of 4 steel beams and 8 plates and bolts, costed in accordance with Rawlinson's Edition 28, 2010.

237 On 10 May 2010 Mr Raffoul issued Instruction VQR1030, saying that in order to assess the claim he needed a minute of the meeting on 14 April 2010 attended by Verve, the engineer Mr Fuzaty, and the concrete panel installer Campbell Cranes. He also required Verve to highlight the area in which structural integrity was of concern, and to mark up a set of the engineering drawings to show where additional structural steel was required.

238 As is seen from the above, even though by April and May 2010 the events of September 2010 had not occurred, in fact the C1 columns were inadequate and the steel beams which are the subject of CV 20 were necessarily installed. I accept Mr Jeffries' evidence that they were installed with the agreement of the engineer. I find that Verve was entitled to rely on that agreement of the engineer as amounting to an instruction on behalf of Mrs Visser, to carry out the work as a variation. Contrary to his obligation under the building contract to assess Verve's claim, the architect called for

a minute of a meeting, rather than assessing the claim. The architect's call for a minute is not a decision against which Verve was required to issue a notice of dispute. Time does not run against Verve in relation to claiming payment of CV 20.

239 No evidence was given to contradict Verve's proposition that CV 20 was costed appropriately.

240 CV 20 is to be allowed at $6,731.74.

CV 24

241 This claim, made on 16 August 2010, is a claim for $6,414.55, for delay damages of 98 days between 10 May 2010 and 16 August 2010, at the rate of $72.00 per day. The narration on the claim was 'for failure to provide structural information requested by Verve and subsequent Architect's Instruction VQR030a dated 10 May 2010". It arises from the same issue that gave rise to CV 20. Under clause H of the contract, Verve could make a claim to adjust the contract if it was delayed. Read together, Clause H5.1 and schedule 1 item 12 provided that Verve's claim for delay was limited to $72.00 per working day, including GST.

242 The architect rejected the claim, in his Architect's Instruction VQR1052 dated 7 September 2010. The stated grounds were, "We have responded to your CV 20 on 10th May 2010 which is within the day allowable in the contract". The architect seemed to intend to convey that because he had rejected CV 20, he rejected Verve's assertion that he had failed to provide structural information, so that delay was not experienced. The architect recognised that the claim for CV 24 arose from the same issue as CV 20.

243 Mrs Visser did not raise in her Defence to this claim any issue of Verve not filing a notice of dispute to the rejection of CV 24 within time. In any event, on 9 September 2010 Verve submitted to the architect, by email, Request for Information no RFI102. This pointed to the conflicting opinions of the engineers in relation to Mr Fuzaty's design, which I have discussed above in relation to the claim for CV 20. In Verve's RFI102 it said that it required immediate instruction on what the architect wished to be constructed, and it stated that delays were being encountered and that extension of time claims would be made. RFI102 stands as a notice of dispute of the rejection of CV 24, within the time allowed under the contract.

244 In the same email Verve also submitted to the architect on 9 September 2010, Notification of Delay no. 15, in which it claimed a 40 day extension of time claim. There is no claim for NOD15 in either proceeding.

245 Also in the email of 9 September 2010 Verve enclosed 4 pages of Computations by Mr Tim Gibney, relating to the engineering design, the building's ability to cope with wind forces and the wind bracing required, the strength of the C1 columns; and a further copy of Mr Gibney's letter to Verve's solicitors dated 18 August 2010.

246 Verve was sufficiently concerned about the deficiency in the design to notify the Building Surveyor, and it instructed its solicitors to write to the Building Surveyor on 16 September 2010.

247 For the reasons stated in relation to CV 20, I accept Verve's claim for these delay damages in CV 24. I find that the progress of the works between 10 May 2010 and 16 August 2010 was caused by the failure of Mrs Visser, through the architect and engineer, to provide necessary structural information.

248 I accept the point made in Mrs Visser's submissions that delay damages apply to working days, not calendar days. I allow 70 working days, @ $72, a total of $5,040.00.

CV 25

249 On 16 August 2010 Verve submitted its 'Variation Quotation' CV 25, claiming $19,928.48 plus GST, as the cost of additional prop hire. It said the charge was for "extra over 28 days allowed". It gave particulars of the claim by annexing an invoice from Westkon to Verve dated 17 July 2010, in which Westkon billed Verve for the supply of 67 props for 12 days in May 2010 and for 30 days in June 2010 @ $2.60 per prop. The charge came to $7,316.40, to which Westkon added 10% for "admin". Verve also charged for 67 props for 62 days in July and August 2010 (which took the charge to the end of August, even though the claim was made mid-month), which added $10,800.40. To the sub total of $18,116.80 Verve added its own margin of 10%, to come to $19,928.48 plus GST, a total of $21,921.32.

250 For the reasons stated in relation to CV 20, I find that Mrs Visser is responsible for the delay in the works after 10 May 2010 and that she caused Verve to incur the additional prop hire fees.

251 Clause L.1.1 of the contract entitled Verve to make a claim for an adjustment of time costs, in respect of a delay affecting working days, caused by "(cause 6) (Mrs Visser's) consultant's failing to promptly provide necessary information which is properly due to (Verve) or which (Verve) has specifically requested in writing". Clause L1.3 defined "adjustment of time costs" as including "any loss, expense or damage reasonably incurred by (Verve) that results from a delay due to" a cause in L1.1. Clauses L1.4 and L1.5 said that such claims were "claims to adjust the contract", and that "the requirements for making a claim to adjust the contract and the procedures to be followed are stated in Section H". The words "requirements" and "procedures" mean that the steps set out in Section H, such as including details of the claim in accordance with clause H2.1, must be taken. Those words do not mean that Schedule 1 item 12 apply, and that Verve's claim under clause L is limited to $72.00 per day.

252 The incurring of the expense of additional prop hire during a period of delay which was caused by Mrs Visser, through her architect and engineer

incorporating design faults which rendered the building in danger of collapse and then in failing to deal with the need for appropriate redesign and the instruction of Verve, was an instance of loss within the meaning of L1.3 which was caused by 'cause 6' in clause L1.1.

253 Clause H required Verve to notify the architect within 20 working days of becoming aware of the event that has resulted in the claim. CV 25 was submitted on 16 August 2010, some 30 days after Westkon's invoice to Verve dated 17 July 2010. However, as I discussed in the context of CV 20, Verve certainly notified the architect of the design fault as early as March 2010 and on 4 May 2010 the architect had emailed Verve refusing to supply a procedure for concrete panel installation. Through the architect, Mrs Visser was aware of the event that has resulted in CV 25. I find that Verve complied with its obligation under Clause H.1 so that it was not disentitled by a time bar to submit its claim in CV 25.

254 By enclosing the copy Westkon invoice in CV 25, Verve complied with the requirement in clause H2.1 to give a breakdown of the claim with a reasonable allowance for Verve's overheads and profit. Verve claimed its overhead and profit by adding a 10% margin.

255 Clause H3 of the contract obliged the architect to promptly assess the claim. The architect was entitled under this clause to request additional information. He did neither.

256 Clause H4 obliged the architect to give his assessment of the claim to Verve. As there was no assessment, the architect did not comply with this clause. However, his failure to do so did not bring about any deemed result: clause A9.

257 I find that Verve is entitled to $21,921.32 including GST.

The claim under clause A4.2

258 Verve has claimed indemnity for two categories of expense: its legal and consultancy expenses, and its internal administrative costs. A lot of time was spent in the hearing on the factual issue of whether the architect or the engineer had been negligent or in default. However I first consider the legal issues.

259 Clause A4.2 said Mrs Visser "must appoint an architect to administer this contract and provide appropriate contract documents for the works, given the nature of the works. (Mrs Visser) must indemnify (Verve) for any liability incurred by (Verve) in respect of any default or negligence of the architect and any other consultant it engages under this contract".

260 In indemnity clauses, as with guarantees, the liability of the surety is *strictissimi juris* and ambiguous contractual provisions should be construed in favour of the surety: see the joint Judgment of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ in **Andar Transport Pty Ltd v Brambles Ltd** (2004) 206 ALR 387.

261 Further, to the extent that there is ambiguity in an indemnity clause, the principles of interpretation require the provisions of the clause to be construed in favour of the surety.

262 In **Andar**, in an indemnity clause which referred to injury to a "person", the word "person" was held not to include an employee of the surety. Mr Wails, a truck driver, provided his labour to Brambles and was injured at work. Rather than being an employee, Mr Wails had been required by Brambles to supply his labour as a sub contractor, through a company. He had incorporated Andar for that purpose; it contracted to Brambles and Mr Wails, as Andar's employee, performed the work.

263 Mr Wails was injured performing the work. Andar owed a duty of care to Mr Wails, as his employer.

264 In the contract between Andar and Brambles, Andar had indemnified Brambles:

> "from and against all actions, claims, demands, losses, damages, proceedings, compensation, costs, charges and expenses for which [Brambles] shall or may be or become liable whether during or after the currency of the Agreement … [from]
>
> 8.2.2 loss, damage, injury or accidental death from any cause to property or person caused or contributed to by the conduct of the Delivery Round by [Andar].
>
> 8.2.3 loss, damage, injury or accidental death from any cause to property or person occasioned or contributed to by any act, omission, neglect or breach or default of [Andar]."

265 Mr Wails sued Brambles for negligence. Brambles claimed indemnity from Andar in respect of Brambles' liability to Mr Wails. Brambles was held to be liable to Mr Wails. At trial, Brambles was held not to be entitled to indemnity from Andar. On appeal, Brambles was held to be entitled to indemnity. Andar appealed to the High Court. Was Mr Wails a relevant person under clauses 8.2.2 and 8.2.3?

266 In their joint Judgment, Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ, discussed the construction of clauses 8.2.2 and 8.2.3. Andar submitted that under them, it was liable to indemnify Brambles for its vicarious liability to third parties, but not to employees of Andar. Their Honours said, at paragraph 25, "On their face, neither cl 8.2.2 nor cl 8.2.3 expressly provides that liability arising on the part of Brambles as a result of injuries suffered to employees of Andar falls within the terms of (Andar's) indemnity". That is, as a matter of construction their Honours did not see "person" to mean "any person", in the context of an indemnity.

267 As to clause 8.2.2, in which the indemnity was limited to liability arising in connection with the 'conduct of the Delivery Round by [Andar]', the effect of cl 2.1 of the agreement was that the Delivery Round could only be "conducted" by Andar through a nominated driver. Their Honours said, "In

the absence of an express provision to the contrary, it is unlikely that the indemnity contained in cl 8 extends to liability arising in respect of injuries suffered by that nominated driver as a result of the conduct of the Delivery Round by that person".

268 As to clause 8.2.3, the words of indemnification contained "two elements: first, an injury suffered by a "person" and, secondly, a requirement that the injury be occasioned, or contributed to, by the conduct of Andar. In the context of the agreement as a whole, the latter element required the involvement of Mr Wail as driver. The structure of the clause therefore suggests that the person mentioned in the first element is a person other than the person necessarily encompassed within the second".

269 Another indemnity clause was relevant. Under clause 4.6, Andar agreed: "… [t]o assume sole and entire responsibility for and indemnify [Brambles] against all claims liabilities losses expenses and damages arising from operation of the Vehicle by reason of any happening not attributable to the wilful negligent or malicious act or omission of [Brambles]".

270 Their Honours held that their construction of clauses 8.2.2 and 8.2.3 "has the advantage of operating consistently with cl 4.6. That clause provides for an indemnity granted by Andar in favour of Brambles which does not extend to liabilities arising from the operation of the truck which are attributable to the negligent acts or omissions of Brambles. The liability for which Brambles now seeks an indemnity clearly falls within that limitation".

271 Finally, their Honours said that "to the extent that cl 8.2.2 and 8.2.3 remain ambiguous, the principles of construction outlined earlier in these reasons require the provisions to be construed in favour of Andar".

272 Verve submitted that clause A4.2 was not ambiguous. It put forward many dictionary and judicial definitions of "liability", but none of them come to grips with the question of whether clause A4.2 applies to liabilities voluntarily incurred. The definitions cover the obvious situations of liabilities not voluntarily incurred such tortious liability (and I would give the example of Verve being sued for injury to a worker caused by the collapse of the dwelling); or a responsibility at law such as the responsibility to pay tax. But these are examples of liabilities imposed from the outside. They are the opposite of liabilities voluntarily incurred.

273 Where Verve incurs consultants' and legal fees in challenging the architect's decisions, it is choosing to incur the expense. Those expenses are not recoverable under the indemnity.

274 The construction of clause A4.2 for which Verve contends would lead to anomalies. For example, Verve could choose the most, or the least, expensive consultants in town, and give them broad or narrow discretion as the amount of work they should perform. The amount for which Mrs Visser would be liable would be affected by Verve's choice of consultants, the

number of consultants, and the breadth of discretion given to the consultants. Alternatively Verve could pay its consultants in advance, receiving their professional services until its credit had run out, but never having a liability for their fees.

275 One definition of "liability" put up by Verve was:

> "A person's present or prospective legal responsibility, duty or obligation. Liability may arise by a party entering a contract, or through tortious or statutory obligation wholly unknown to the party at the material time".

276 That definition does not support Verve's claim. The definition cited *McDowell v Baker* (1979) 26 ALR 277, in which the High Court considered whether workers compensation paid to a worker was to be deducted from the damages subsequently claimed by that worker's widow in a common law action. The workers compensation had been paid without legal proceedings having been issued. The High Court approached the matter as one of construction of the legislation, which used expressions such as the "legal liability of the employer" and the "damages the employer is legally liable to pay". The High Court held that the employer had paid money that it was liable to pay, even though it had done so without being sued. I do not consider that decision to assist Verve. Most people pay their liabilities without being sued for payment. But that does not determine whether a particular obligation is or is not a liability. In any event, *McDowell v Baker* considered a liability imposed by legislation; the employer did not choose to pay the injured worker. However Verve chose to engage consultants.

277 I conclude that clause A4.2 required Mrs Visser to indemnify Verve for liabilities which were imposed on it by law, arising from the default or negligence of the architect or another consultant of Mrs Visser. An example of such a liability, would be Verve's obligation to compensate an employee who was injured by the collapse of the dwelling caused by the design defect. In contrast, the fees which Verve incurs in retaining consultants and lawyers in this dispute are not liabilities within the meaning of the indemnity in clause A4.2. They are overheads.

278 As I noted in paragraph 22(c), it was agreed that I would make a determination on the issue of liability under the indemnity, and leave any assessment to another day.

279 Verve also claimed indemnity for its internal administrative expenses. Verve's Updated Particulars of Loss and Damage dated 10 August 2011 only refer to "legal and consultancy costs" of $340,471.53 in D768/2009 and $488,039.23 in D817/2009.

280 In paragraphs 45 - 49 of its Second Further Amended Points of Claim in D768/2009 Verve only claimed under clause A4.2 its legal and consultancy costs since 23 July 2009.

281 In paragraphs 66 - 71 of its Further Amended Points of Claim in D817/2010, dated 12 July 2011 Verve claimed indemnity under clause A4.2 in respect of the items set out in its Particulars of Loss and Damage dated 27 May 2011. It is necessary to trace the information in that document. Those Particulars were given in respect of Amended Points of Claim dated 13 January 2011 in D817/2010 which are now obsolete.

282 The Amended Points of Claim dated 13 January 2011 in D817/2010 contained the claim for indemnity under clause A4.2 in paragraphs 66 to 71. Those paragraphs also appear in the Further Amended Points of Claim (with the addition of some particulars to paragraphs 66 and 67). Paragraph 70 of both pleadings contains the allegations that the facts alleged in paragraphs 66 - 69 constituted a breach by Mrs Visser of her obligation to appoint an architect to administer and provide appropriate documents for the works given the nature of the works under clause A4.2 and paragraph 71 asserted that Verve was entitled to be indemnified under that clause.

283 The Further Particulars under paragraph 71 said that Verve had engaged Joe Arcaro & Associates, Thomsons Lawyers, Joseph Forrest of Counsel, W T Partnership and Third Voice. The money paid to these people would be within the description "legal and consultancy costs".

284 Paragraph (c) of this part of the Further Particulars said that Verve had commenced proceeding D817/2010 – which obviously required a filing fee – and sought an order appointing Mr John McFarlane as Special Referee. Those expenses would also be within "legal and consultancy costs".

285 However, paragraph (l) said that Verve had incurred "additional internal administrative costs … arising directly out of the deficiencies in the structural design of the Dwelling". They are not "legal and consultancy costs".

286 So, when in paragraph 71 of the Further Amended Points of Claim dated 12 July 2011 in D817/2010, Verve says that it claims indemnity in respect of the matters referred to in the Further Particulars dated 27 May 2011, it seeks its "additional internal administrative costs" as well as "legal and consultancy costs".

287 Verve did not abandon its claim for "additional internal administrative costs". As no evidence has been given on the assessment of those costs, one can only speculate on what they are. Presumably they include the value of man hours that, it would be said, would not have been spent were it not for the architect's negligence. Such a claim could be difficult to assess. Without hearing evidence on the internal administrative costs, I am not in a position to say that they necessarily fall outside of the indemnity.

288 For that reason, it is necessary to consider whether the conduct of the architect and the engineer amounted to "default or negligence" under clause A4.2

The architect's conduct

289 I find that the architect did act in default and negligently, within the meaning of clause A4.2.

290 First, I found Mr Raffoul's evidence to be unreliable and that affects my perception of all of the evidence he gave. Numerous documents which had been drafted by Mr Raffoul were tendered in evidence, and they share the characteristics of being poorly expressed and ungrammatical. By comparison, his witness statements are expressed in the precise and organised way which is symptomatic of a lawyer's drafting. Mr Raffoul insisted that he had drafted his witness statements, with no assistance. He said that he had "prepared them, typed them and produced them" and even spoke of the two computers he used to do so. When shown a fee slip from a barrister to Mrs Visser charging her for drafting the witness statements, Mr Raffoul had no explanation. I do not believe Mr Raffoul's assertion that he prepared his witness statements.

291 Mr Raffoul gave evidence about the matter of record keeping in his architectural practice. He said that he had some familiarity with various Guides issued by the Royal Australian Institute of Architects about practice management and the like, although when various passages of the Guides were drawn to his attention he qualified that somewhat. However he said that he knew that the RAIA recommended that an architect keep notes as an element of risk management. He agreed that it was prudent for an architect to give all instructions and recommendations in writing.

292 However despite being required to produce all of his relevant documents earlier in the proceeding, and being served with a summons to do so for the hearing, there were significant issues and periods of time in relation to which Mr Raffoul produced no records. Counsel for Verve put it to Mr Raffoul that in effect the only explanation was that he never created such records, which would be improbable, or that he was concealing them. Mr Raffoul made no concessions, giving such unsatisfactory explanations as these: he did not produce important photographs under the summons because it must have slipped his mind; he was sure that he had diaries for 2009 and 2010, but they were only kept on computer and having not produced them, he would have to check to see if entries had been deleted; whilst the documents he produced pursuant to the summons did not include any record of recommendations that Mr Raffoul made to Mrs Visser or her husband on the structural design and health and safety issues that arose in May 2010, he thought there were and he would have to check his records; when pressed on whether he gave any written report to the Vissers on that point his answer was "possibly yes, possibly no". I do not accept these explanations. They are inherently implausible. I am satisfied that Mr Raffoul deliberately failed to produce documents in answer to the summons.

293 On the issue of the design fault, Mr Raffoul gave evidence that he understood that it was an important aspect of an architect's compliance with his duty of care, to stay within his expertise. Mr Raffoul confirmed that he was not an engineer. He said that if it were suggested to an architect that there was a design deficiency in a building, that architect would have to consider forms of construction and would have an obligation to correct errors in design. As to whether an architect should obtain a second engineering opinion on the structural stability of the dwelling in those circumstances, he said that it would depend on the circumstances and that "there were a lot of circumstances on this particular job".

294 Mr Raffoul said that when he received Mr Arcaro's report from Verve, he was concerned about its contents, "to a degree". Yet on his evidence he rejected Mr Arcaro's report out of hand weeks later in his decision of 1 July 2010. Mr Raffoul made a series of contradictory statements about this. He said that he had consulted Mr Casey the building surveyor about the Arcaro report, but then conceded that neither he nor Mr Casey had any documents to substantiate this. He could not give evidence of what Mr Casey allegedly advised him. Mr Raffoul said that he obtained independent engineering advice from the firm Matrix, but conceded that he had made no mention of that in his witness statements, nor referred to it in his decision of 1 July 2010. Mr Raffoul then said that he "could not recall" whether he obtained a second opinion between 8 June and 1 July 2010. On this subject Mr Raffoul's evidence is unreliable.

295 Mr Raffoul was cross-examined on how he had assessed Verve's claim for rock excavation, where he applied a different conversion rate than Verve and then allowed 15% and then 25% of the result, the latter leading to a figure of $19,599.59. It was put to Mr Raffoul that he had not made the assessment independently, and that he had used artificial calculations to come to a figure less than $20,000.00 which had been mentioned as prime cost allowance for excavation in pre contract negotiations. Mr Raffoul denied those propositions. Again Mr Raffoul produced no documents from his files concerning how he came to the assessments, leading Verve to suggest that the documents would have verified that Mr Raffoul had communicated with and been influenced by Mrs Visser. Mr Raffoul agreed with the proposition that his reasoning supporting an allowance of $19,599.59 was "tortured". Having said that his assessment of 15% was fair, he did not say how 25% was also fair.

296 Mr Raffoul acknowledged that his letter to Verve dated 21 July 2009 said, in relation to the rock claim, "my client and I have accessed *(sic – assessed)*" the claim, and said "we are only able to validate" the claims at a certain figure. Nevertheless he asserted that he alone had assessed the claims. He said that when he wrote "we", he meant that Mrs Visser had done her own assessment, but that the binding final assessment was done by Mr Raffoul. This explanation has the hallmarks of being a recent invention and I do not accept it.

297 Again, Mr Raffoul produced no records of communications between himself and Mrs Visser from around this period, even though Verve's claim for excavation was so substantial and Mr Raffoul's assessment of it was so much less. The lack of records produced caused Verve to infer that Mr Raffoul had not acted independently in making his assessment.

298 Mr John Permewan, consulting architect, filed an expert's report dated 23 June 2011 and gave evidence on the issue of whether Mr Raffoul had committed any default or contravened any duty of care to the owner. Mr Permewan is a senior architect of great experience and I accept his status as an expert witness on these issues. Mr Permewan opined that Mr Raffoul had committed default and contravened his duty of care.

299 Mr Permewan said that the duty of care to the owner would reasonably include carrying out contract administration responsibilities and obligations in accordance with the contract and with the provisions of the *Architects Act* 1991.

300 Mr Permewan referred to Architect's Instruction AI 09205, dated 3 June 2010, which responded to Verve's request for information relating to the installation and propping provisions for the hollowcore slabs. Mr Permewan said that it was quite normal for the design engineer to be asked if any temporary imposed construction loads are within the capacity of the final structure and such matters are reasonably required to be considered by the architect and specifically by the structural engineer. Mr Permewan said that Verve's query about propping potentially raised engineering matters reasonably required to be considered by the consultants. At a minimum, there was a need for consideration of any effect on the structure of the detailed proposals for the construction methods. There were reasonable grounds to carry out a preliminary check of the structural concerns raised by Verve. Mr Raffoul did not act as a prudent architect in issuing this architect's instruction. A prudent architect would have taken a wider view. Failure to adequately answer written queries irrespective of their form is not the action of a prudent architect acting reasonably in accordance with clause A1 .1 of the contract.

301 Mr Permewan gave an opinion on the architect's notice number 1001 – 01 of around 1 July 2010. This was the note in response to Verve's notice of dispute and report of Mr Arcaro. Mr Permewan noted that the architect dismissed the concerns raised by Mr Arcaro without reasons. There was adequate time before 1 July 2010 for the architect to consider the points raised by Mr Arcaro. Further on 15 June 2010, a site meeting had taken place in which the safety of the site was discussed. Mr Permewan said that the architect should not have dismissed the Arcaro concerns without stating reasons. At a minimum, the architect should have caused the engineer to engage in a detailed review to address the matters raised by Mr Arcaro. If agreement could not be reached between the engineer and Mr Arcaro, it would have been prudent for the architect to engage a third engineer. The architect's notice of 1 July 2010 was incomplete and inadequate.

302 Between 14 July 2010 and 24 August 2010 Verve wrote to the architect in relation to the safety of the design. The last of those letters enclosed a copy of a report from Mr Tim Gibney, which confirmed the existence of structural design problems. Mr Permewan said that taken as a group over a period of some six weeks serious matters reasonably raised were not responded to by the architect. The report of Mr Gibney confirmed the assertions of Verve and Mr Arcaro that there were deficiencies with the structural design, and reasonably required careful assessment. The architect is the primary consultant and has a duty to advise and warn the owner of any design issue which arises irrespective of the cause. These duties arise under the Architects Act and in Mr Permewan's opinion clauses A 4.2, A 6.2, and B1 of the contract.

303 Whilst clause J3.1 required the architect to instruct Verve whether or not to proceed with a variation after receiving a notification of a variation, the architect issued amended structural documentation but did not issue an instruction to carry out the changes. Verve's letter of 14 July 2010 requested such an instruction, and that was required to be responded to within five working days under clause J3 .1. Had Verve carried out the changes on the amended documentation without an instruction, Verve would not be entitled to payment and in the absence of an amended building permit would be carrying out illegal works. Mr Permewan gave the opinion that by 24 August 2010 there was clear evidence on reasonable grounds, indicating discrepancies or omissions existing in the contract documents, and that the architect was required to act by issuing a written instruction to Verve with a copy to the owner. The architect failed to act in relation to a major omission or discrepancy in the drawings, and that was not the action of a prudent, reasonable architect.

304 Further, in relation to the architect issuing amended structural drawings, Mr Permewan noted that the Building Regulations require a building surveyor to give approval for all structural works in existing or new buildings. It followed that the amended structural documentation required approval by the relevant building surveyor. There was no evidence of any approval being obtained. It was reasonable for Verve as a registered builder to require a current building permit before works were commenced. The failure of the architect to issue an instruction in respect of the amended drawings did not comply with the provisions of the contract, and delayed the work. The failure of the architect to obtain an amended building permit was not the action of a reasonably competent architect.

305 The architect issued instruction AI 10235 on 24 September 2010, in response to Verve's request for information 102, dated 9 September 2010. The architect’s instruction confirmed that there had been a meeting on 14 September 2010 between the engineer and Mr Gibney. It enclosed a copy of the engineer's letter setting out the agreed new scope of works and it was marked to indicate that the architect recognised there was a change in the scope of works requiring a cost adjustment under section J of the contract.

Mr Permewan noted that while the provisions of the contract indicated that there be a request for a quotation, in paragraph 3 of the Architects Instruction the architect had stated that the owner would not pay delay costs as a consequence of the changes agreed by the engineers. Mr Permewan said that this comment was consistent with the architect following the owner's instructions instead of acting as an independent certifier. Such action was in breach of the architect's responsibility to assess the claim. Mr Permewan reported that the position adopted by Mr Raffoul was inconsistent and not in accordance with the conditions of the contract. The architect failed to provide clear, unambiguous instructions and appeared not to act impartially. These were not the actions of a reasonably competent architect.

306 Mr Gibney's second report, dated 29 September 2010 was provided to Mrs Visser's solicitors on 30 September 2010. That report followed from a meeting between Mr Gibney and the design engineer. Mr Gibney expressed an opinion that sections of the structural design were inadequate. Mr Gibney referred to significant structural instability problems. Mr Permewan said that an architect provided with such an opinion would reasonably be concerned about the matters raised and require confirmation that the structural design was adequate. The previous concerns expressed by Mr Arcaro, and the previous amendments agreed between Mr Arcaro and the design engineer, would emphasise those concerns. It was unreasonable for the architect to make structural judgments on adequacy without structural qualifications and against the recommendation of three engineers. This conduct was not in accordance with Mr Raffoul's duties under the contract and the Architects Act.

307 On the subject of Mr Raffoul rejecting claims for variations and extensions of time, Mr Permewan noted that the architect had refused to act when there was clear evidence of errors and omissions in the documents, which ultimately led three structural engineers, being the design engineer and Messrs Arcaro and Gibney, to agree on rectification to the structural documentation. The architect issued amended drawings without instructions to carry out the amendments. Mr Permewan said that the architect had failed to reasonably consider the structural matters without the detailed knowledge of specialist consultants. The architect had failed to cooperate in resolving errors or omissions in the documentation and had failed to provide instructions on variations when requested. Mr Permewan stated the opinion that Mr Raffoul did not comply with the conditions of the contract as would be expected of a reasonable competent architect. The architect's non-compliance with the contract conditions indicated a standard of care and skill less than that expected from a reasonably competent architect.

308 In cross-examination, Mr Permewan was asked, having referred to various contractual conditions, whether he was purporting to offer a legal opinion. Mr Permewan said that he was not doing so, but instead giving an opinion on the professional conduct of an architect in administering a contract. I

find that his views on how a contract should prudently be administered was not giving a legal opinion. Similarly, when Mr Permewan used the expression that the architect had contravened its duty of care, (and I note that those words appeared in a question put to Mr Permewan, not an answer by Mr Permewan) Mr Permewan said that he was giving an opinion on the architect's conduct.

309 I accept that it is difficult for an expert in Mr Permewan's position, asked to give an opinion on whether an architect acted appropriately, to avoid drifting into questions of construction of contractual terms and the required standard of care. Nevertheless, I find that Mr Permewan did not go beyond his expertise as a senior architect. He did not purport to give legal opinion. He gave opinion as an expert in architectural matters. I accept Mr Permewan's evidence and I find that Mr Raffoul acted in default and negligently, within the meaning of clause A4.2.

The engineer's conduct

310 Turning to the engineer Mr Fuzaty, I note that he did not give evidence.

311 Mr John McFarlane structural engineer was appointed by the Tribunal as a special referee to provide opinions regarding the structural engineering design prepared by Mr Fuzaty. Specifically, he was instructed to give opinion on whether the engineering design was flawed, deficient, contrary to good engineering practice, contrary to any aspect of relevant building Codes or Standards, or contrary to the Building Act 1993 and building regulations. Mr McFarlane was instructed to give opinions on the same matters as to the amended engineering design issued pursuant to an architect's instruction, and the amended engineering design the subject of architect's instruction AI 10235, dated 24 September 2010.

312 Mr McFarlane said that the most significant issue with the design related to the lateral stability at the rear of the building and the structural inadequacy of the three C1 columns to support significant building loads are required to resist bending action in the north-south direction due to lateral wind loads and seismic forces.

313 Mr McFarlane noted that the computations of Mr Fuzaty did not include any wind load analysis or earthquake load analysis. Mr Fuzaty had said that an extensive analysis of wind loads was not required because the building was fully shielded on the north side and would be fully shielded on the south side after the construction of the adjacent building. Mr McFarlane noted that the construction of the adjacent building had not commenced.

314 Mr McFarlane stated that the structural design with respect to concrete wall panels, the C1 columns and lateral building stability was flawed, deficient, not in accordance with good engineering practice, in breach of the Building Code of Australia and the relevant Australian Standard. Further, that the structural drawings documentation was below the standard expected by good engineering practice.

315 As to the engineering design amended by way of the Architects Instruction A1 109212 dated 1 July 2010, Mr McFarlane gave the opinion that those instructions and any amended structural documentation did not satisfactorily address the significant issues regarding the design of the C1 columns, building stability and structurally inadequate concrete wall panels.

316 As to the amended engineering design issued on 24 September 2010, which included fresh computations by Mr Fuzaty, Mr McFarlane gave the opinion that the calculations were incorrect because they wrongly assumed that all lateral wind loads from the south or north would be transferred through the C1 columns in an east west direction, which was incorrect, contrary to basic engineering practice and fundamentally flawed. The calculations did not consider the vertical axial loads. Mr McFarlane concluded that the C1 columns were not structurally adequate. Mr Fuzaty proposed that one additional column be poured next to the C1 column on grid line B. However, Mr Fuzaty did not provide calculations for the proposed new column. Where Mr Fuzaty proposed plywood bracing to a number of walls, he did not provide calculations for the bracing. The bracing specified in the design was inadequate.

317 Mr McFarlane also gave opinion on a letter from Mr Fuzaty to the architect, dated 15 November 2010. Where that letter referred to Matrix Engineering Group checking the structural design, Mr McFarlane said he was not aware of Matrix carrying out a full design check and that he had not seen any documentation from Matrix regarding any such checking. Mr McFarlane had been given some calculations by Matrix, but they did not include a stability analysis for the full building or any check calculations for the C1 columns. Mr McFarlane considered the wall bracing recommended by Matrix to be significantly deficient.

318 Mr McFarlane noted that in Mr Fuzaty's letter he had used the fact that the Building Surveyor had not requested a report on earthquake loading analysis as evidence that Mr Fuzaty had complied with the necessary building process. Mr McFarlane rejected that assertion. In his view an engineer must comply with all requirements of the Building Code of Australia whether or not a specific request was made by a Building Surveyor.

319 Also in the letter Mr Fuzaty had said that “Wind load movements can only happen if we have full wind loading and the building reacts and moves, with diaphragm action of the three levels of floors. Two side windows coupled to each other via a floor system will secure the building from movement”. Mr McFarlane said that this comment indicated a significant lack of relevant engineering knowledge.

320 Mr McFarlane commented on the health and safety issues arising from the deficiencies in the structural design. Mr McFarlane said that without design modifications and construction changes, there is a significant risk of collapse during construction, posing a real threat to the health and safety to

workers. If the building was completed in accordance with the current structural drawings the C1 columns would be significantly overstressed. Lateral building loads in the north-south direction due to wind or earthquake loading could very likely cause catastrophic collapse. The risk to the health and safety of the occupants would be extremely high.

321 Mr Donald Haworth consulting engineer gave evidence for Mrs Visser. Mr Haworth filed a report dated 20 February 2011 and gave evidence on the issue of building defects, which I refer to elsewhere, but also from paragraph 34 of his report, on the structural engineering design. Mr Haworth opined that Mr Fuzaty's design approach employed the "working stress method" rather than the "ultimate design approach" in the Australian Standards. Mr Fuzaty had not considered the load created by the wall dividing the two bedrooms on the first floor, which might increase deflection beyond recommended values.

322 Mr Haworth noted that "computations and an explanation of how to prove the stability of what is a tall four level building was to be achieved was missing" from the design documents. He expected that the owners wanted to maximise their views east to the city, and that the architectural design sought to give them that. He said:

> "Whilst architectural objectives are understandable, it is my belief based upon my experience that it is the responsibility of the structural engineer to introduce necessary structural engineering components (shear walls, wall frames etc) in order to integrate these into the design to afford stability of the building. In my opinion, that process should take place at the outset. My inspection of the documentation suggests there is no evidence of such discussion and consultant liaison having taken place on this issue of stability".

323 Mr Haworth noted that there are substantial walls provided in the dwelling to resist applied horizontal loadings in the east and west direction. However, only at the western end were there any reasonably substantial walls that could accept horizontal loads from the north or south. It would have been appropriate during the design process for the consultant team to recommend steel portal frames at the eastern end between grids A and C. Instead, Mr Fuzaty appears to have attempted to provide the 3 C1 columns to support the vertical and horizontal loads from the panels above. He said:

> "The computations of both Gibney and McFarlane illustrate that the size and connections of the three slim columns are insufficient to resist the proportion applied loads. I support their view".

324 Mr Haworth rejected Mr Fuzaty's suggestion that the dwelling was protected from wind loadings by the adjacent house to the north. The intended adjacent house to the north was to be smaller than Mrs Visser's. Consequently, the vulnerable eastern end of the house is likely to be exposed to winds from the north and northeast. Thus, the building was potentially exposed to wind loads to which it was not designed.

325 Mr Haworth noted that Mr Fuzaty suggested that the house did not have to be designed to resist earthquake loads because of his interpretation of AS 1170.4. Mr Haworth said that he had seen no evidence that Mr Fuzaty produced a design check, required by that Standard, and so Mr Haworth believed it was reasonable to assume that earthquake design was appropriate in this instance. This is an interesting assumption by Mr Haworth, but not conclusive.

326 Mr Haworth concurred with Messrs Gibney and McFarlane that it was important that the floors are designed and constructed to be braced so they act as horizontal plates that can transfer the horizontal loadings back to new shear walls or frames.

327 Mr Haworth disagreed with Mr Gibney's criticism of Mr Fuzaty for not establishing a methodology for the removal of props. Mr Haworth went on to suggest ways in which the deficiencies in the design could be addressed. Mr Haworth says, then, that Mr Fuzaty's design was deficient but by concluding with comments on how to rectify the situation he takes away the emphasis on the design faults.

328 Whilst I take into account Mr Haworth's views, I consider that taken together the evidence of Mr McFarlane and Mr Haworth, with the further opinions of Mr Arcaro and Mr Gibney, establish that the design was deficient. I am satisfied that Mr Fuzaty acted in default and negligently for the purposes of clause A4.2.

The claim for damages

329 Even though the conduct of the architect and engineer includes acts of default or negligence within the meaning of clause A4.2, Verve's claims for legal and consultancy costs do not come within the indemnity. For the same reason, they are not compensable as damages. Verve engaged Mr Arcaro and Mr Gibney to assist it to assert rights under the contract. It engaged lawyers to advise it in relation to the conduct and to prosecute this litigation. The expenses incurred are not damages.

The claim under s41(1) of the DBC Act

330 On 13 December 2010 Mrs Visser terminated the contract under section 41 (1) of the DBC Act.

331 On 8 March 2011 Verve issued its final claim for $964,733.03 including GST. Clearly that claim was for a different sum than it sought in the VCAT proceedings.

332 Section 41(5) of the DBC Act says that if a contract is brought to an end under section 41 "the builder is entitled to a reasonable price for the work carried out to the date the contract is ended".

333 Section 41(6) says, "However, a builder may not recover under subsection (5) more than the builder would have been entitled to recover under the contract".

334 Verve submits, correctly, that the expression "reasonable price" is not defined in the DBC Act. Section 3 contains a definition of contract price, but that is a different term. Neither the Endnotes nor explanatory details of the DBC Act make reference to the expression "reasonable price".

335 Verve submits that there are no reported decisions on the meaning of "reasonable price" and that ordinary principles of statutory interpretation ought be employed.

336 The *Interpretation of Legislation Act* 1984, says at section 35(a) that the preferred construction of an Act is one which promotes the purpose or object underlying the Act. That principle has been recognised at common law.

337 The statement of purposes in section 1 of the DBC Act is of no guidance. Verve submitted that the statement of one of the objects of the Act, in section 4 (b) is relevant. It says that that object is "to enable disputes involving domestic building work to be resolved as quickly, as efficiently and as cheaply as is possible, having regard to the needs of fairness". Verve submitted that it would be fair for the Tribunal to resolve this dispute in Verve's favour.

338 I am not persuaded by this aspect of Verve's submission. It is clear that section 4(b) of the Act is speaking of the manner in which litigation is to be conducted. Of course, the manner in which the Tribunal conducts hearings, and the prehearing steps, must be fair. It would be stretching section 4 (b) to argue that it had some impact on the outcome of Verve's claim to payment. Section 4(b) is directed to the way in which the Tribunal conducts itself, not the results of litigation before it.

339 Verve also submitted that when section 53 (1) of the Act says that the Tribunal may make any order it considers fair, it does not codify common law with respect to building contracts. I accept that submission. Section 53(1) confers jurisdiction on the Tribunal. If, for example, the common law was to the effect that a court or tribunal could only award damages, s53 (1) might give jurisdiction to the Tribunal to order a builder to rectify defective work. I give that only as an example because of course the common law makes available the remedy of the injunction. But s53 (1) might empower the Tribunal to order the parties to take some steps which would not usually be ordered by way of injunction.

340 Verve then says that the significance of this is that at common law the unlawful termination of a building contract by a proprietor entitles the builder to accept that as repudiation of the contract and to terminate the contract. The measure of loss and damage suffered by the builder flowing from such a termination is recognised as either the payment of damages for breach of contract or payment on a quantum meruit.

341 However, Verve must recognise that Mrs Visser did not repudiate the contract. She terminated it pursuant to a statutory right. No claim in damages flows from termination under the statute.

342 Verve then made submissions in relation to quantum meruit, but in those submissions overlooked section 41(6) of the DBC Act, which says that the builder may not recover more than it would have been entitled to recover under the contract. There is no such limitation on a claim for quantum meruit.

343 Verve says that when awarding a reasonable price pursuant to section 41 (5), the Tribunal should interpret those words as meaning a reasonable price in accordance with the payment schedule agreed between the parties in the contract.

344 Verve relied on a report from Mr L. M. Thomas of WT Partnership dated 21 April 2011, which contained his calculation of the reasonable sum which Verve was entitled to be paid following termination of the contract.

345 That report shows that Verve had estimated its claim under section 41(5) [leaving aside the variations, which are dealt with above] as $483,331.38 comprised of:

Deposit	$ 57,539.45
Earthworks and sub-structure concrete	$218,649.91
Precast concrete panels	$207,142.02
Total	$483,331.38

346 WT Partnership's analysis was that Verve had included in the above items amounts for structural steel, in ground services, and a deposit that Verve had paid to the supplier of the lift that was to be installed in the dwelling, but that it was appropriate to show those things separately. The result was that, in WT Partnership's analysis, Verve was entitled to considerably less in relation to the three items, but more in other areas. Its analysis was:

Deposit	$nil
Earthworks and sub-structure concrete	$125,099.00
Precast concrete panels	$138,420.00
Structural steel	$ 24,535.00
In ground services	$ 11,345.00
Lift deposit (paid by Verve)	$ 19,444.00
Preliminaries	$ 50,610.00
Margin	$ 36,946.00
Total claim under section 41(5)	$406,408.00

347 WT Partnership's assessment is $76,923.38 less than Verve's claim.

348 In response to WT Partnership's assessment, Mrs Visser submitted that, by using current rates, WT Partnership had overstated its figures to a degree. She also relied upon expert evidence of Mr Douglas Buchanan, quantity surveyor.

349 WT Partnership's analysis was based on taking quantities of work from the drawings, and then applying market rates current at March 2011. That is, its method was based on the 'value' of the work, not the contract.

350 When Mr Kells of W T Partnership gave evidence, he reduced his figures by 3.7% to take his price calculation to those applicable in the mid point of the construction period.

351 In cross-examination Mr Kells conceded that by "de-escalating" his price to the mid point of the construction period in this way, he was still taking it to a later date than the time of tender; the implication being that a further de-escalation of the price was called for.

352 Mrs Visser referred to a document called the "full estimate summary", which recorded in headings, not broken down into components of work, Verve's internal calculations during the contract negotiations. Verve had given the document to Mrs Visser during those negotiations. For example, that document contained a figure of $175,418.00 for the concrete panels.

353 In Mrs Visser's submission, having regard to the figures in the "full estimate summary" Verve's claim for $483,331.38 assumed that 95% of the earthworks and sub-structure concrete and 90% of the precast concrete panels were complete. Mrs Visser argued that those estimates of completion were excessive.

354 Mrs Visser's expert Mr Buchanan, quantity surveyor, made a report on the section 41(5) claim dated 1 April 2011. Mr Buchanan opined that the value of works completed (excluding variations) was $311,517.00 plus GST comprising:

Earthworks and sub-structure concrete	$143,817.00
Precast concrete panels and slab	$133,063.02
Structural steel	$ 23,074.00
Preliminaries	$ 14,164.00
Less a deduction given by Verve	-$ 2,600.00
Total	$311,517.00 plus GST

355 Mr Buchanan's assessment is $94,891.00 less than WT Partnership's.

356 Mr Buchanan said that his assessment was based on Verve's "full estimate summary". So for example Mr Buchanan's assessment of "preliminaries" was based on a calculation of 4.75% of the budget, because that was the percentage that preliminaries took up in the "full estimate summary". W T Partnership's allowance for preliminaries was 16%.

357 Mr Buchanan had inspected the site and made a calculation of the proportion of works completed and then applied that to the allowance for those works in Verve's "full estimate summary". In relation to valuing the pre cast concrete panels, Mr Buchanan noted that the "full estimate summary" allowed $175,418.00 for the panels. Mr Buchanan's inspection showed that most of the panels had been erected. Mr Buchanan took the whole price allowed in the "full estimate summary", deducted a sum for panels which had not been installed or which were damaged, and so came to his assessment of $133,063.02. Similarly, the "full estimate summary" allowed $48,164.00 for structural steel and having regard to the percentage completed, as found on his inspection, Mr Buchanan assessed the sum at $23,074.00.

358 In cross-examination Mr Buchanan resiled from his calculation of $133,063.02 for the panels. He conceded that he ought not reduce the allowance for panels on the basis that some had to be replaced, where no engineer had advised that replacement was necessary. If the "full estimate summary" was to be the basis of the calculation, Mr Buchanan's assessment of the reasonable price for the panels should be treated as being $175,418.00. The effect of this is to add $42,354.98 to Mr Buchanan's assessment.

359 Mr Buchanan also admitted that his valuation of works completed by Verve was less detailed than his costing of the rectification of defects.

360 In relation to the assessment of preliminaries, the cross examination of Mr Buchanan showed the significance of his use of the full estimate summary. When Mr Kells' figure of 16% for preliminaries was put to Mr Buchanan, he said that he was not assessing a reasonable price in the market place. However that comment seemed to draw too much of a distinction between "reasonable price" and "value". Later Mr Buchanan said that a fair figure for preliminaries would be 11%. That concession would take his preliminaries figure of $14,164.00 to $32,994.94, which would add a further $18,830.94 to Mr Buchanan's assessment.

361 To summarise, in cross examination Mr Buchanan made concessions of around $61,000.00 on his figures, without changing his approach of using the "full estimate summary". However, there is a problem with using that document at all. First, the "full estimate summary" was not a contract document. It was one internal document of Verve, and its release to Mrs Visser was merely one step in the parties' agreeing on a contact price. The contract provided for a lump sum price, plus excavation, and the contract sum could be adjusted in accordance with the contract.

362 Secondly, whilst section 41(6) places a limit on what can be recovered under section 41(5), by providing that the sum cannot exceed the builder's entitlement under the contract, the primary provision is section 41(5) which speaks of "a reasonable price". Once the word "reasonable" is taken into account, section 41(5) does provide for the builder to be paid a fair value

for the work performed. It is only at a point where the fair value equals the sum payable under the contract that section 41(6) comes into play.

363 For these reasons I prefer WT Partnership's evidence on the matter. I reduce their figure by 4% to de-escalate the figure back to the date of the contract, as opposed to the mid point of the construction period. The allowance, therefore, is $390,151.68. This sum is similar to Mr Buchanan's, once Mr Buchanan's concessions of around $61,000.00 are considered. Whilst I do not consider Mr Buchanan's reasoning to be correct, I am reassured by the similarity between Mr Buchanan's and W T Partnership's figures.

The "warranty of buildability"

364 Whilst Mrs Visser did not plead the absence of a "warranty of buildability" in her Defences, her Counsel referred to it in his opening and closing submissions. It is related to these clauses of the contract: *Item 5 of the Introduction* ("all associated works"); *clause A3.3* (Mrs Visser relies on Verve's skill and judgment); *clauses B1 & B3* (architect to resolve a discrepancy in any contract document, and if not resolved by the order of precedence of contract documents, Verve entitled to payment); and *G2.1* (Verve to direct the manner of performance of the necessary work).

365 Mrs Visser submitted that at common law she gave no implied warranty that the design was capable of being constructed – which is called the "warranty of buildability": *Thorn v The Mayor and Commonality of London* (1876) LR 1 App Cas 120. Mrs Visser submitted that it follows that Verve cannot seek extra payment for work required to realise the design, unless a variation instruction is given, and nor could Verve abandon or suspend the work for that reason. Mrs Visser submitted that Verve's claims arising from the defective design must fail because of this principle.

366 I reject Mrs Visser's submissions on the effect of *Thorn* for these reasons. *Thorn* was decided under a significantly different set of contractual conditions to those in Mrs Visser's contract with Verve. *Thorn* was confined to that one issue of whether such an implied warranty by the owner existed: it did not decide that a builder could not claim payment on other grounds (such as quantum meruit or under express terms of the contract) if a defective design put the builder to extra expense.

367 *Thorn* arose from the replacement of a bridge over the Thames in London, commencing in 1864. To enable work to be carried out below the water level the contract called for the construction of cassions - large watertight chambers, open at the bottom, from which the water is kept out by air pressure. The builder, Mr Thorn, built the cassions in accordance with the contract but found that they did not work. He incurred delay and expense because he could only work at low tide. The City paid the contract price and the costs of extra work rendered necessary by alterations to the cassions, but it refused to pay compensation for loss of time and labour occasioned by the

attempt to execute the original plans. Mr Thorn sued, and pleaded that London had:

> "guaranteed and warranted that the bridge could be built according to certain plans and the specification without tide work and in a manner comparatively inexpensive, and that certain cassions shown on the plans would resist the pressure of water during construction of the bridge, (which induced Thorn) to contract with (London) for a certain sum which was less than he otherwise would have done".

368 The alleged warranty was contrary to the express terms of the contract. Article 77 of the Specification said:

> "All risk and responsibility involved in the sinking of these cassions will rest with the contractor, and he will be bound to employ divers or other efficient means for removing and overcoming any obstacles or difficulties that may arise in the execution of the works".

369 The case reached the House of Lords on the equivalent of a pleading summons. All members of the House of Lords held that there was no implied warranty of the kind alleged.

370 It is immediately apparent from the facts in *Thorn* that the situation there was markedly different to the situation between Verve and Mrs Visser. The tender documents and contractual deed expressly allocated the risk of various matters to Thorn. Far from including clauses such as A4.2 (owner to provide appropriate contract documents) and B1 (architect to resolve discrepancies) which appear in Mrs Visser's contract, the contract between Thorn and London contained Article 77 ("all risk and responsibility … will rest with the contractor").

371 Lord Cairns said at page 127 that when the cassions were found wanting it put the contractor in a dilemma. I quote his Lordship:

> "Either the additional and varied work which was thus occasioned is the kind of additional and varied work contemplated by the contract, or it is not. If it is the kind of additional or varied work contemplated by the contract, the contractor must be paid for it, and will be paid for it, according to the prices regulated by the contract. If, on the other hand, it was additional or varied work, so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that is not within the contract at all; then, it appears to me, one of two courses might have been open to him; he might have said: I entirely refuse to go on with the contract – *Non haec in fedora veni*: I never intended to construct this work upon this new and unexpected footing. Or he might have said, I will go on with this, but this is not the kind of extra work contemplated by the contract, and if I do it, I must be paid a *quantum meruit* for it. Or, for aught I know, for I wish to express no opinion upon the subject, having gone on with it, he might now, if this is not extra work within the contract, have maintained a proceeding for remuneration upon a *quantum meruit* for the extra work he so did. I repeat, I give no opinion whatever upon that point; but it appears to me that those courses were the only courses open to him. But that

> which he comes here for now is not remuneration under the contract at all; it is neither remuneration fixed by the engineer, nor remuneration on a *quantum meruit*. It is a proceeding … upon a warranty, and for damages as for breach of the warranty".

372 The above passage also shows how different was *Thorn* with the current case. Lord Cairns stated that variations of the kind contemplated by the contract would be paid. It was only work "so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, that is not within the contract at all" that would not lend itself to a claim for a variation, and even then His Lordship left open the possibility that such work might be remunerated on a quantum meruit. Clauses A2.1, A3.3, A4.2, A6.2, B1 and B3 in Mrs Visser's contract show that work necessitated by design faults were not so peculiar unexpected and different as to fall outside of the contract. On the contrary, the possibility of design faults was anticipated and mechanisms were created in the contract to deal with them. In submitting that *Thorn* prevented Verve from claiming additional payments in connection with the defective design, Mrs Visser failed to recognise the express terms of her contract with Verve.

373 The cassion in *Thorn* was a novel or radical means of construction, in a river affected by tides. The construction of a dwelling using pre cast concrete panels, in suburban Melbourne, is not analogous.

374 The absence of a "warranty of buildability" does not give Mrs Visser a defence.

Mrs Visser's claims for defective work

375 Mrs Visser terminated the contract on 13 December 2010, not for breach of contract but under section 41(1) of the *Domestic Building Contracts Act* 1995. Naturally the identification of defects is a fundamental issue, and as the works are incomplete there is a debate over whether items alleged by Mrs Visser to be defects are examples of incomplete work. Where items are defects, and the Tribunal must assess the cost of rectification, there is a question of whether the assessment is to be based on the cost which Mrs Visser would incur in having the defect rectified by another contractor, or whether the assessment should be based on the cost which Verve would incur in carrying out the repair, were it given the opportunity to do so. There is also the complication brought about by the design fault: Mrs Visser gave evidence that she was contemplating having the building redesigned, and Verve submitted that Mrs Visser could suffer no damage in relation to items of defective work which would be demolished and not reappear in the redesigned building. The counter argument is that on Verve's own figures Mrs Visser has paid $247,305.53 and to the extent that she has paid for defective work she has suffered damage, even if the defective work is to be demolished in the course of the redesign. Also, even if Mrs Visser is considering obtaining a new design, the extent to which it would not use Verve's work is uncertain.

376 On the issue of defective work Mrs Visser called expert evidence from Peter Haworth structural engineer, Douglas Buchanan quantity surveyor, and Tony Croucher building consultant. Verve called evidence from Tim Gibney structural engineer, Liam Kells quantity surveyor, and Andrew Jefferies architect.

377 Verve was rigorous in seeking to confine Mrs Visser's experts to giving evidence on matters which were within their expertise. Of course expert witnesses are only of use to the Tribunal on matters within their expertise and that is made clear in the VCAT PNVCAT2. It would be absurd, for example, for a plumber to opine on electrical issues. Nevertheless there is a point where Verve's approach on this subject was a bit overdone, at least in relation to Mr Croucher. Mr Croucher is a building consultant with considerable experience and I reject Verve's suggestion that he should only comment on issues identified by Mr Haworth, and form no independent view on whether or not an item of work was defective. In some respects Mr Buchanan purported to identify items of defective work, rather than stay within the scope of his expertise by giving evidence on the cost of rectifying defects.

378 One might expect that Messrs Haworth and Croucher would identify defects, and that Mr Buchanan and Mr Croucher would give opinions on rectification costs, in that way ensuring that they confined their opinions to matters within their expertise.

379 Mr Haworth's Report was dated 20 February 2011. It said at paragraph 10 that he was retained to do three things: to consider the project engineering design and computations and provide an opinion on their soundness; if unsound, to advise on the changes needed to make the engineering sound; and to provide an opinion as to whether or not the as constructed works are deficient.

380 The third part of the retainer was thus relevant to this issue of defective works, and the first went to the issue surrounding Mr Fuzaty's engineering design.

381 Experts in cases in the Domestic Building List generally identify defects in paragraph numbers and the Practice Note expressly requires them to do so. Mr Haworth's report is in a narrative form, although it does contain paragraph numbers. I discuss the experts' evidence in detail below but I first set out a brief table, which shows that in some respects Messrs Haworth, Croucher and Gibney did not discuss the same items. I do not use a table to summarise the conflicting expert evidence on quantum because it would be unhelpful. The table :

Defects identified by Mr Haworth, para number and item	**Items identified by Mr Haworth, but not identified as defects**	**Defects identified by Mr Croucher**	**Mr Gibney's reply**

20 steel connecting plates& rust		Says Mrs Visser instructed that all metal connections were to be galvanised	
	21 C1 columns	Under-designed	
	22 cold joint in C1 columns	Cold joint exacerbates weakness	
24 ground floor pre-cast panels, cut			
26 joint widths between pre-cast panels		Concurs with Mr Haworth	Rectification only required where gaps are less than 15mm.
27 joint widths between pre-cast panels		Concurs with Mr Haworth	
28 east end of panel above C1 column out of alignment		Concurs with Mr Haworth	Rectify by scrabbling
29 one connecting panel of incorrect width, cut		Concurs with Mr Haworth	
30 shotctrete rough on east retaining wall		Defective. Demolish this wall as it is not on the title boundary	
31 no movement joints in retaining walls		Concurs with Mr Haworth	Engineering design did not call for movement joints
32 pipe in lift well projecting	32 hairline cracks are not defects		Hairline cracks are not defects
33 door created in a panel, not on engineering drawing			
		Instructions from Mrs Visser: Swimming pool solar pipes defective	
		Instructions from	

		Mrs Visser: Sewer drains for external shower not installed	
		Instructions from Mrs Visser: excess concrete in rear of property	
		Instructions from Mrs Visser: gap between dwelling and retaining wall	
		Instructions from Mrs Visser: southern retaining wall not on title boundary [same as Mr Hawoth's paragraph 30]	
		Instructions from Mrs Visser: internal walls were to be left raw, now require render	

The reports relied on by Mrs Visser

382 Mr Haworth identifies some defects in his Report.

383 In paragraph 20, he refers to some inadequate connections between steel connecting plates and keeper plates which are used to anchor concrete panels, and some rusting of plates.

384 In paragraph 21 Mr Haworth refers to the C1 columns, which he notes were specified to contain four N24 vertical bars with R10 links at 300 mm centres. Mr Haworth notes that the concrete strength of the columns had not been specified.

385 In paragraph 22 Mr Haworth refers to the vertical steel "strong backs" that have been installed on the three C1 columns. It is a fact that the columns were not poured in one sitting, and that the concrete has a "cold joint". Nevertheless, Mr Haworth did not comment on this, and a reader would presume that he regarded it as irrelevant to the issue of the strength of the columns because of their internal vertical bars. I mention this point at this stage because Mr Croucher commented on the cold joints, and was vigorously criticised for doing so in cross-examination.

386 In paragraph 24, Mr Haworth said that the underside of some ground floor precast panels have been cut out to enable the in-situ concrete columns beneath them to be fitted.

387 In paragraphs 26 and 27, Mr Haworth said that the engineer called for the joint widths between concrete panels to be 16 mm, and that generally Mr Haworth found a selection of the joint widths to be approximately 15 mm wide. He regarded 15 mm to be satisfactory. He found that joint widths between some panels varied from zero to 48mm, and he considered the extremes of this range to demonstrate defective work.

388 In paragraph 28 Mr Haworth said that the east end of the panel above column C1 was 20 mm out of vertical alignment. He reported that the heads of two of the C1 columns, columns C1(b) and (c), had been broken away.

389 In paragraph 29 Mr Haworth said that the basement wall was designed to be 200 mm thick and the precast concrete panels above 150 mm thick, leaving a 50 mm step. One of the connecting panels on the north wall, grid C, was not formed at the correct thickness and had been cut back in an attempt to make it fit.

390 In paragraph 30 Mr Haworth said that the shotcrete retaining wall is very rough at the top. Mr Haworth calls this the southern wall, but it is the east wall.

391 In paragraph 31 Mr Haworth said that in the substantial lengths of retaining walls, no movement joints had been formed. I observed that to be so at the view.

392 In paragraph 32 Mr Haworth said that there are hairline cracks in the surface of the reinforced concrete stiffened floor raft slab. He did not regard the cracking is being structurally significant.

393 Also in paragraph 32 Mr Haworth referred to a projecting pipe within the recess for the lift, in the north west corner of the basement. He said that the pipe might interfere with the position of the lift.

394 In paragraph 33 Mr Haworth identified a complex steel connection between concrete panels. He says the connection may have been inserted because of the inclusion of a door in a panel on grid F, which was not shown on the engineering drawing.

395 In his Report dated 7 April 2011, Mr Douglas Buchanan gave an opinion on the cost to rectify defective works performed by Verve and not caused by any design defect issues. Mr Buchanan gave an assessment of the cost of rectification of defects at $152,951.00. Mr Buchanan lists the documents to which he had regard, and they included the above Report of Mr Haworth.

396 In paragraph 6 Mr Buchanan noted that he took some instructions from Mrs Visser directly about her concerns that a drain had not been provided for the external shower, and that the agricultural drain around the base of the pool had not been installed. Mr Buchanan says that he made an allowance to

rectify these items. These were not items identified by Mr Haworth. I am satisfied that Verve's contract did not require it to create an external shower, and that the swimming pool was constructed by a contractor of Mrs Visser. Mr Buchanan has made an error in relying on Mrs Visser's instructions that these items were Verve's defects.

397 At paragraph 7 Mr Buchanan said that he had relied on his own measurements from drawings and site inspection of the works.

398 Mr Buchanan set out his costing of rectification in appendix A to his report. He identified five overarching items: preliminaries, precast panel rectification, waterproofing, in situ concrete rectification and hydraulics. He broke those items down in a further three pages of appendix A. Mr Buchanan's assessment of the cost of rectification of defects was $152,951.00. That sum was made up of rectification costs of $132,425.00, a contingency of 5% being $6,621.00, and GST of $13,905.00.

399 The components of the $132,425.00 were preliminaries of $30,795.00, rectification of precast panels $28,913.00, waterproofing $29,576.00, in situ concrete rectification $28,971.00, and hydraulics $14,170.00.

400 The rectification of precast panels allowed for the removal of six concrete panels and their replacement with new panels. It also allowed for the rectification of vertical joint widths where necessary, the rectification of rusting connecting panels and the replacement of missing bolts at connections.

401 The waterproofing work was comprised of three items. Where waterproofing of an in-situ wall was required under the contract but had not been provided, Mr Buchanan's method was the application of two coats of XYPEX, then the construction of an internal masonry wall inside the retaining wall with a strip drain in the cavity between the two, which can be drained to a sump and then pumped into the stormwater line.

402 The method for in-situ concrete rectification was basically the cutting of control joints in in-situ concrete walls. Where the pipe was in the wrong location in the lift well, an allowance was made to cut out the concrete, redirect the pipe and make good the slab.

403 The item for hydraulics included a small sum to reconnect pipework at the swimming pool, an amount of $1,950.00 to connect the alleged external shower at the basement level, and the sum of $11,920.00 to provide an AG drain around the base of the swimming pool.

404 As a separate matter, Mr Buchanan assessed the cost of completing the works at $1,198,889, excluding rectification of defects.

405 Mr Tony Croucher inspected the site on 14 June 2011 with Mrs Visser and provided a Report dated 22 June 2011. In the summary of his Report appearing on page 2, Mr Croucher said that he had examined the report of Mr Haworth to consider the items of defective work identified in it, and "identified further items as advised by Ms. Visser". Mr Croucher expanded

on this comment in the balance of his Report. During cross-examination Verve suggested that Mr Croucher had acted inappropriately by taking instructions from Mrs Visser about the existence of defects. On page 3 of Mr Croucher's report he listed the documents with which he had been provided, item 2 of which was a "List of Rectification Items identified by the owner, consisting of nine points on one page".

406 Commencing on page 4 of his Report Mr Croucher set out his observations and opinion. He sought to use the numbering system contained in Mr Haworth's Report.

407 In relation to item 21 of Mr Haworth's Report, where he had stated that there was rusting of some of the metal connections between concrete panels, Mr Croucher stated, "I am advised by the owner that the structural engineering drawings state all connections are to be galvanised", and he then went on to comment on how the connections might now be rust proofed. With respect to Mr Croucher, who no doubt is retained from time to time by owners when problems first arise in a building project, as distinct from being retained as an expert witness, one can see that by repeating what the owner had advised him about the contents of engineering drawings Mr Croucher would make himself vulnerable to criticism during cross-examination. That said, it seems to me that Mr Croucher was not purporting to say in this paragraph that the contract required all connections to be galvanised. He was disclosing that he was repeating what he had been told. There is nothing inappropriate in Mr Croucher's conduct. The substance of his comment on item 20 of the Haworth Report was to state how metal plates could be rust proofed.

408 Mr Croucher commented on paragraphs 21 and 22 of the Haworth report. He repeated Mr Haworth's comment that the C1 columns were under designed, and then went on to opine that "the problem has been further exacerbated by a 'cold joint' approximately in the middle of each column as the concrete was not poured continuously and is not monolithic". In my view Mr Croucher went beyond his expertise by making this comment. Mr Haworth did not regard the cold joint as being at all relevant. There is no basis in terms of expert evidence for the assertion that the problem with the under designed columns was exacerbated by the cold joint. Mr Croucher does not purport to be an engineer. I disregard Mr Croucher's opinion in relation to paragraphs 21 and 22.

409 Mr Croucher went on to note that Mr Haworth had identified that steel channels had been bolted to the interface of each of the C1 columns, and that whilst Mr Haworth had not set out a rectification methodology, Mr Croucher said it could be appropriate to scabble the surface of the existing columns, insert dowels and cast additional concrete. The surface of the columns would be unsightly with vertical joints apparent, so an allowance to render coat the columns would be appropriate. Mr Croucher also noted that this view required confirmation by a structural engineer, and that the

columns might be replaced altogether. That would of course have an impact on the cost of rectification.

410 In relation to paragraphs 26, 27 and 28 of Mr Haworth's Report, Mr Croucher commented that where joint widths were less than 15 mm, it would be necessary to saw the panels to open up the joint widths. He said that in other areas it would be necessary to insert dowel in the panels and to insert concrete infill in-situ, and in some cases to replace the panels. He said he would allow five panels to be replaced. In cross-examination, it emerged that Mr Croucher had not identified particular panels that required replacement, and he was criticised for making an allowance of five panels. In my view this aspect of Mr Croucher's report is more appropriately contained in a preliminary report, perhaps, given in an initial report to a proprietor before the commencement of litigation. It was not a considered view which founded a claim for damages based on rectification costs.

411 Mr Croucher concurred with paragraph 29 of Mr Haworth report.

412 Mr Croucher identified the shotcrete wall referred to in paragraph 30 of Mr Haworth's Report as being the east rear wall. Mr Croucher said that the east boundary wall would have to be demolished as it did not align with the boundary line. It was put to Mr Croucher in cross-examination that the demolition of the whole wall would be excessive, and that to the extent that the wall was not plumb and true it could be rectified. Mr Croucher maintained his opinion.

413 In relation to paragraph 31 of Mr Haworth's Report, Mr Croucher said that articulation joints could be sawn into the retaining walls. In my view, this was a comment which reflected Mr Croucher's endeavour to give non-partisan expert opinion. Clearly the creation of articulation joints by means of saw cuts is a much cheaper method, and thus would amount to a concession to the builder.

414 Mr Croucher concurred with paragraph 32 of Mr Haworth's Report.

415 Mr Croucher said in relation to paragraph 33 of Mr Haworth's Report that it would be necessary to replace the concrete panel over the doorway with one that bears on the lower concrete panel, removing the need for the metal connection.

416 Commencing on page 12 of his Report Mr Croucher commented on the additional items which had not been listed in the Haworth Report which were raised by Mrs Visser. Mr Croucher went on, of course, to cost the rectification of these items for the purpose of assessing Mrs Visser's damages.

417 During cross-examination, Mr Croucher was criticised for this part of his report, on the basis that by including the items Mr Croucher rendered himself an advocate for Mrs Visser, rather than maintaining his role as a neutral expert witness. Mr Croucher also left himself open to repeating assertions of Mrs Visser which may have had no basis in fact. I reject any

suggestion that Mr Croucher acted in bad faith. Mr Croucher's expertise enables him to comment on defects and the cost of rectification, and that if Mr Croucher has found that an item is a defect, and then commented on it, his comments are only as strong as the assumption. As is apparent from the items in this part of Mr Croucher's report, there are instances where Mr Croucher's assumptions were unwarranted. The additional items are as follows:

> "Additional Item (a)" [I will use the abbreviation 'AI' below] That the swimming pool contractor had been engaged by Mrs Visser but was directed and managed by Verve, and that the contractor had ineffectively installed solar heating pipes. Having heard the evidence in the hearing, I reject the assertion that Verve managed Mrs Visser's swimming pool contractor and I reject this part of Mr Croucher's report.
>
> "AI(b)" That an external shower is meant to be installed on the south side, between the building and the retaining wall, but that sewer drains have not been installed in this location. The architectural drawings do not in fact show an external shower. This is not a defect and I reject this part of Mr Croucher's report.
>
> "AI(c)" That excess concrete has been left at the rear of the property and requires removal. Mr Croucher says that the concrete, now dry, will need to be jack hammered to be removed. The parties and the Tribunal attended a view of the premises at the commencement of the hearing, and there is certainly excess concrete at the rear of the property. Mr Croucher would undoubtedly have seen this himself and he cannot be criticised for including this item in his Report, even if Mr Haworth did not refer to it.
>
> "AI(d)" That a gap of approximately 300 mm in width exists between the house and the retaining wall, and Mr Croucher said that the retaining wall needed to be extended to close the gap. There is a photograph of this item and it is plainly a defect. Mr Croucher cannot be criticised for including this item in his Report. It is certainly not a matter where, in the absence of it being identified as a defect by Mr Haworth, Mr Croucher should have disregarded it.
>
> "AI(e)" That the southern retaining wall is noted by Mr Croucher to be 200 mm outside of the boundary at the southern corner and 100 mm inside the boundary of the north corner, and that the wall must be demolished, removed from site and replaced. This is the wall referred to in paragraph 30 of Mr Haworth's Report, but the issue identified is different. Mr Croucher expressly relied on a re-establishment survey commissioned by Mrs Visser, and in listing the documents to which he had regard on page 3 of his report, Mr Croucher referred to a plan

> of survey made on 31 January 2011. I do not consider that Mr Croucher has inappropriately adopted the views of Mrs Visser in relation to this issue. I accept that Mr Croucher is expressing his independent view on this retaining wall being defective.
>
> "AI(f)" Mr Croucher said that Mrs Visser's intention was to leave all concrete panels in a raw state internally. He said that due to the amount of rework now required a render coat would have to be applied to all internal walls. It was established by other evidence, though, that at least some of the walls referred to by Mr Croucher were never intended to be raw, or were not to be internal in that they would be hidden behind other structures.

418 In attachment B to Mr Croucher's report, he opined that the cost of rectification work would be $161,726.00. Comparing Mr Croucher's costing alongside Mr Buchanan's assessment of $152,951.00, I note the following. I comment in narrative form because the two sets of figures do not lend themselves to being set out in a table.

419 Mr Croucher's assessment of preliminaries was $23,870.00, compared to Mr Buchanan's $30,795.00. Mr Croucher's assessment includes a far greater sum for scaffold hire ($6,000.00 v $3,795.00) and a 40% margin.

420 Mr Croucher's assessment of rectifying concrete panel joints, which included replacement of some panels, was $21,729.00 plus $8,624.00 for repairing rusted connections, plus $2,510.00 for replacement of the panel identified in paragraph 33 of Mr Haworth's report and $1355.00 for repairing the panel referred to in paragraph 29; compared to Mr Buchanan's total of $28,913.00.

421 Mr Croucher's assessment of in-situ concrete rectification was $12,350.00 for the creation of articulation joints, compared to Mr Buchanan's $7,896.00 (within his figure of $28,971.00), and $3,911.00 to rectify the top of the retaining wall compared to Mr Buchanan's $3,800.00. This is the same retaining wall that Mr Croucher said should be demolished. Mr Croucher allowed $1,817.00 for the pipe in the lift well compared to Mr Buchanan's $1,420.00.

422 From Mr Croucher's total of $161,726.00, costings for the so called additional items AI(a), AI(b) and AI(f) must be subtracted. They total $47,016.00.

423 Mr Croucher's methodology was to assess the cost of labour at rates based on the average rates for a small to medium builder; assess the cost of materials; and to add a 40% margin and GST. There was debate over whether a 40% margin is excessive, and Mr Croucher sought to justify it on the basis that a builder rectifying another builder's work will seek a substantial margin. I accept that reasoning where a rectifying builder works on a complete or substantially complete building, where defects might be hidden behind completed works. But I consider a 40% margin to be

excessive in relation to this project, where the pre-cast concrete panel walls do not hide defects and where the dwelling is at a very early stage of construction.

424 Excluding Mr Croucher's allowance for the three additional items, his costing is $114,710.00.

The reports relied on by Verve

425 Mr Gibney's report in response to the Haworth Report is in the form of a letter dated 9 March 2011 to Mr Andrew Jefferies then working for Verve. Mr Gibney said that in the Haworth Report, Mr Haworth identified a small number of building defects, which were not major defects and would not normally be a significant problem. I will refer to Mr Gibney's comments using the paragraph numbers in Mr Haworth's Report.

426 Haworth Paragraphs 26 & 27: The widths of the panel joints could not be rectified, but they would not adversely affect the structural performance of the precast panels. The other items of defects could be rectified.

427 Mr Gibney supplemented his comments in a letter dated 9 May 2011 addressed to Verve's solicitors. He commented as follows:

> Haworth Paragraphs 26 & 27: No rectification work was needed on panel joints where the width of the joint was greater than 15 mm. Where joints were less than 15 mm, it would be necessary to provide articulation in the plasterboard that would be attached to the precast concrete walls. This opinion presumes that the concrete walls would be hidden behind plasterboard and that articulation joints would be provided in the plasterboard.
>
> Haworth Paragraph 28: The damage to the top of the in-situ columns could be repaired by scabbling the concrete back to sound concrete and repairing the column with an epoxy-based concrete. Mr Gibney commented that this repair was not particularly difficult to carry out, and could be undertaken by a competent tradesman.
>
> Haworth Paragraph 31: The lack of movement joints in the in- situ retaining wall was not a building defect because the location of movement joints in such walls is the responsibility of the design engineer, and no such joints had been detailed in the engineering drawings.
>
> Lack of an AG drain behind the retaining wall. Mr Gibney noted that the engineering design called for the AG drain to be placed on the adjoining property, outside of Mrs Visser's title. Thus Verve could not have installed the AG drain in accordance with the design

documentation. It is not possible to retrofit an AG drain behind an existing boundary retaining wall.

Omission of tanking membrane to the southern retaining wall. Mr Gibney opined that it is not possible to install an applied tanking membrane to the soil side of an in-situ wall. Mr Gibney said it is not clear how the design engineer envisaged the installation of the tanking membrane. The engineer showed the inclusion of Xypex waterproofing additive, which Mr Gibney said was an additive normally used to waterproof in situ concrete walls designed for hydrostatic pressure behind the wall. It is not possible to install a tanking membrane on the soil side of the existing retaining wall. It is possible though to batten off the existing retaining wall and clad the wall with a moisture resistant cladding, such as a Villaboard sheet.

Haworth Paragraph 32: The hairline cracks in the floor slab were seen by Mr Gibney to be mere shrinkage cracking and not structural. He did not consider it to be a building defect. Neither did Mr Haworth.

The damage to the precast panels at the junction of grids 3 and D could be simply repaired in the same manner as the damage to the top of the in situ columns.

428 Mr Gibney said that Verve was not "totally responsible" for the damage to the top of the in situ columns, and the damage to precast panel at junction of grids 3 and D. Further, that the other defects were not critical, and had not been documented clearly by the design professionals.

429 Mr Liam Thomas of the quality surveyors WT Partnership prepared a costing of the defective work identified in Mr Gibney's letter of 9 May 2011. On the basis that Mr Gibney said that Verve was only "totally responsible" for two items, Mr Thomas only costed the rectification of those two defects. Mr Thomas's costing of the rectification of those two items at $3,652.00. This included a margin of 10%, which is notably different from Mr Croucher's margin of 40%. Mr Thomas's decision not to cost the other items at all is curious, partisan and unhelpful. It is perhaps an extreme opposite of the approach taken by Mr Croucher. Mr Thomas has been too quick to exclude issues from his attention. I disregard Mr Thomas's evidence on this matter.

430 Verve gave evidence that if it rectified the items of defective work, it would absorb much of the cost or require its subcontractors to do so on the basis that they were responsible for the defects. On this analysis Mrs Visser's damages in respect of defective work would be negligible. However Verve's analysis is artificial. The contract has been terminated. Verve has no contractual right, such as under a maintenance provision, to carry out rectification work. The parties' relationship has broken down, and Mrs

Visser would not allow Verve to rectify. Verve's view of its own cost to rectify is irrelevant to the quantification of Mrs Visser's damages for defective work.

431 I assess the rectification costs at $83,845.50. I accept Mr Croucher's costing, less the three additional items ($47,016.00), reducing his 40% margin from $42,008.00 by $20,000,00, and subtracting one-half of Mr Croucher's assessment of rectifying concrete panels ($10,864.50).

The liquidated damages and the notices of delay

432 Mrs Visser claimed 183 days of liquidated damages between 13 June 2010 and 13 December 2010. The contract provided for the date for practical completion to be 27 April 2010, subject to a PIC number being approved prior to 20 April 2009. A PIC number is an authorisation from the Plumbing Industry Commission, enabling work to commence. The PIC number was issued after 20 April 2009 but Verve had commenced work on the site before that date. I proceed then on that basis that the date for practical completion was 20 April 2010. Mrs Visser says that the architect made decisions granting Verve extensions of time until 13 June 2010 so that the period after that date then amounted to delay. Clause M8 of the contract, read with Schedule 1 item 18, entitled Mrs Visser to liquidated damages of $72.00 per calendar day including GST.

433 Clause M8 is less emphatic than one might expect. It required the architect to notify Mrs Visser and Verve in writing of Mrs Visser's entitlement to liquidated damages, and required Mrs Visser to advise the architect in writing whether she intends to enforce the entitlement against Verve. Clause M9.1 provided that if Mrs Visser advised the architect that she wished to enforce the entitlement to liquidated damages, the architect must immediately advise the contractor in writing. There is no pleading by Mrs Visser to the effect that any of these steps were taken, nor evidence by Mrs Visser, Mr Visser or Mr Raffoul that those steps were taken.

434 In my view that is sufficient to dispose of the claim for liquidated damages. I note though that my findings above that the design defect existed in April 2010, and that the architect failed to take the appropriate steps in relation to it would put Verve in a position to assert an entitlement to extensions of time sufficient to defeat Mrs Visser's claim for liquidated damages.

Conclusion

435 I have found Mrs Visser to be liable to pay Verve's various claims as follows:

Variation No.	Amount claimed including GST	Amount allowed including GST

CV01A)		
CV06)		
CV11)	$132,658.40	$121,221.00
CV12)		
CV27)		
CV03	$283.14	$283.14
CV04	$8,107.00	$8,107.00
CV05	$5,869.71	$5,869.71
CV08	$658.24	Nil
CV09	$2,359.50	Nil
CV13	$1,761.76	Nil
CV14	$4,386.25	$4,386.25
CV15A	$1,647.66	Nil
CV16	$314.60	$314.60
CV17	$1,694.00	$1,694.00
CV19A	$19,755.04	$19,755.04
CV20	$6,731.74	$6,731.74
CV24	$6,414.55	$5,040.00
CV25	$21,921.32	$21,921.32
		$195,325.60

436 For the reasons stated in paragraphs 329 – 362 I have found that Verve is entitled to be paid, under section 41(5) of the Domestic Building Contracts Act, $390,151.68.

437 The variations and s41(5) claim come to $585,547.28 [$195,325.60 + $390,151.68 = $585,547.28].

438 To this must be added interest on the variations. Clause N15.1 of the contract provided for the payment of interest by a party on "any money that it owes the other but fails to pay on time. In the case of (Mrs Visser) this includes any delay caused by the failure of the architect to issue a certificate on time". The interest rate stated in the schedule is "10 per cent". That item in the schedule should have said "10 per cent per annum" but because clause N15.3 says that interest is to be calculated daily, I construe the rate to be 10 per cent per annum. If I was to construe the rate as not relating to

time, the clause could not operate. It is obvious that the clause could not mean 10 per cent per day.

439 Clause H set out the procedure in respect of payment for variations. Under clause H4 the architect was to issue his "written decision specifying any adjustment" within 20 working days of receiving Verve's claim. Clause N2 said that payment for adjustments was to be made in accordance with clauses N4 - N 7. Relevantly, under clause N3 Verve could issue one progress claim per month. Schedule item 20 was designed to state a date in each month after which a progress claim could be made, but that item was not completed in that way and is irrelevant. It follows that Verve could issue one progress claim per month, on any date it chose.

440 Under clause N4, the architect was to assess the claim and issue a certificate within 10 working days after receiving the progress claim.

441 Under clause N5.1, Verve was obliged to prepare a tax invoice, and under clause N6 Mrs Visser was obliged to pay Verve's invoice within 7 calendar days of her receipt of the certificate.

442 Verve will need to prepare file and serve a schedule setting out its claim for interest in accordance with those clauses. In respect of the variations that are payable, some are the subject of certificates, some are the subject of certificates for amounts that I have found to be incorrect, and some have not been certified at all. In respect of each of the variation claims set out in paragraph 435, the interest will run from "X" in this equation:

> Date of variation claim + 20 working days (cl H4) + 1 day (cl N3) + 10 working days (cl N4) + 1 day (cl N5.1) + 7 calendar days (cl N6) = X.

443 From the sub total of $585,547.28 plus the interest on the variations, must be deducted Mrs Visser's payments of $247,304.53 and $83,845.50 in respect of rectification costs.

444 Verve has claimed interest on the sum payable under s41(5) of the DBC Act, and that interest is to be calculated at the rate under the Penalty Interest Rates Act 1983 from the date of commencement of proceeding D817/2010. The calculation of this claim for interest must be on the sum of $59,001.65 [being $390,151.68 – ($247,304.53 + $83,845.50)] calculated at the rate under the Penalty Interest Rates Act 1983 from the date of commencement of proceeding D817/2010. Verve will need to prepare file and serve a schedule setting out the calculation of that interest.

445 I will reserve the question of costs.

DEPUTY PRESIDENT I. LULHAM