VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST VCAT REFERENCE NO. BP1661/2016

CATCHWORDS

Domestic building – section 9 *Domestic Building Contracts Act* 1995 – warranties provided by a builder to subsequent owners – whether warranties may be limited by liability of original owner to builder under original building contract – whether the builder may elect to set off amounts owed by original owner against any breaches of warranties under section 9 – interpretation of section 9 – *Delic & Ors v Yahome Pty Ltd* [2012] VCAT 752 – *Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd* [2018] NSWSC 1304 – breach of natural justice to make a determination affecting the rights of a non party – failure to prove on the balance of probabilities that the original owner was liable to the builder – claims for defective work – Multipanel Balcony Substrate Waterproofing System – requirements for thermal breaks in the Building Code of Australia.

FIRST APPLICANT	Mr Timothy Waddell
SECOND APPLICANT	Ms Gemma Crinall
RESPONDENT	JG King Project Management Pty Ltd (ACN 095 695 079)
WHERE HELD	Melbourne
HEARING TYPE	Hearing
BEFORE	Senior Member S. Kirton
DATE OF HEARING	16, 17, 18, 20 July and written submissions received 24 July, 13 August, 13 and 20 September 2018
DATE OF ORDER	9 October 2018
CITATION	Waddell v JG King Project Management Pty Ltd (Building and Property) [2018] VCAT 1531

ORDERS

1 The respondent must pay to the applicant $96,051.00.

2 Interest, costs, and reimbursement of fees reserved with liberty to apply. **I direct the principal registrar to list any such application before Senior Member Kirton for one hour.**

3 The parties must file and serve any affidavit/s they wish to rely on in any application/s for costs and their calculations in respect of interest at least seven days before the hearing of the application/s.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants	Mr S. Ryan of Counsel
For the Respondent	Mr J. Whelen of Counsel

REASONS

1 The *Domestic Building Contracts Act* 1995 ('the DBCA') has been in force for more than 20 years. It was introduced as consumer protection legislation and one of its most notable features was to imply into every building contract certain warranties which a builder must provide to an owner (by sections 8 and 9 of the DBCA).

2 In this case, the respondent ('JGK') argues that the consumer protection provided to a subsequent owner by section 9 may be limited by taking into account the rights and obligations of the builder as against the original owner. This is a novel argument[1] of statutory interpretation, apparently not previously decided in the last 20 years of decisions concerning the DBCA.

3 Apart from this interpretation question, the issues in dispute relate to thirteen defects: their cause, JGK's liability, the reasonable method of rectification, and the reasonable cost of so doing. The defect claims were efficiently argued, with appropriate concessions being made by both parties and with expert evidence given concurrently, which significantly reduced the issues in dispute.

BACKGROUND

4 The home in question is part of a staged development in Lilydale, in which JGK was engaged by a developer, Rand Development Group Pty Ltd ACN 127 751 955 ('Rand'), to construct 46 homes on a large vacant site. The building contract was split into five stages, with the applicants' ('the Owners') home being included in stage 1.

5 The construction of the Owners' home was completed in or about September 2012, with an Occupancy Permit being issued on 5 July 2012. The Owners purchased their home from Rand by contract of sale dated 23 July 2012 and took possession on 15 September 2012.

6 The development stages beyond stage 1 were not completed, as a dispute arose between Rand and JGK during the construction of stages 2 and 3 in early 2013. The building contract was purportedly terminated by Rand on 7 January 2014.

7 There are defects in the Owners' home (including water penetration from the balcony) and during the first year of their ownership JGK attended to rectify these. The Owners were dissatisfied with the speed of repairs, however as at 3 September 2013 they were satisfied that all items known at that time had been addressed.

8 In August 2014 they observed that the balcony started to leak again, and water was present in bedroom 3. Also, the flashing at the back of the garage had failed and water was penetrating the wall inside.

[1] I use the word "novel" to mean new and original, not in the sense of fictional

9 They contacted JGK, who did not provide any satisfactory response, and then made a complaint to the Department of Consumer Affairs. In December 2014 an inspection of the property was carried out by Mr Nick Kukulka of the Victorian Building Authority ('VBA') and his report was provided in February 2015.

10 At that time, the Owners were advised by Mr Chris Morrison of JGK that, notwithstanding the defects identified by Mr Kukulka, they "could not help any further as there was a dispute between the developer and JGK"[2].

11 This proceeding was commenced in December 2016.

THE ISSUES IN DISPUTE

12 The Owners' claims are for the costs to rectify the defects in the building work totalling $112,537, plus a further $5,219 spent on earlier attempts at rectification. In order to mitigate the damage caused by the water penetrating the balcony, they installed a roof over the tiled balcony in December 2016 at a cost of $5,219. They rely on the warranties implied into every building contract by section 9 of the DBCA.

13 JGK's defence is that

a Rand failed to pay it $978,954 plus interest.

b JGK suspended its obligation to perform work pursuant to the building contract with Rand on 17 December 2013.

c In April 2014 JGK elected to set off the amount Rand owed it against any indebtedness it may have to Rand or its successors in title.

d Notwithstanding section 9 of the DBCA, as Rand owes JGK more than the amount claimed by the Owners in this proceeding, there is no amount due by JGK to them.

e Alternatively, if JGK is found liable for any defects, it elects to set off against that amount that part of the money by which Rand is indebted to it, and this is not prevented by section 9.

THE HEARING

14 At the hearing, the Owners were represented by Mr S. Ryan of Counsel. JGK was represented by Mr J. Whelen of Counsel. The matter was listed for hearing for 5 days, but thanks to the collaborative efforts of the parties' legal representatives and experts, the hearing was able to be concluded in 4 days, including a view of the property. The parties then provided written submissions and submissions in reply.

15 Following completion of the hearing, and while my decision was reserved, the Supreme Court of New South Wales handed down a decision in the matter of *Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd* [2018] NSWSC 1304. I formed the view that this decision is relevant to the

[2] Mr Waddell witness statement at [90]

question of the interpretation of section 9 of the DBCA, and I gave the parties the opportunity to make any further submissions before finally determining this proceeding.

THE WITNESSES

16 Mr Waddell and Ms Crinall's evidence was contained in their witness statements and Mr Waddell was cross-examined during the hearing. On behalf of JGK, Mr King provided a witness statement, on which he was cross-examined during the hearing. The Owners' experts were Mr Chris Maher of Sergon Building Consultants and Ms Rachel Dalla Rosa of CRD, who is a quantity surveyor and provided a costing of Mr Maher's scope of works. JGK's expert was Mr Ken Ryan of Ken Ryan Consulting who provided a report as to liability and quantum.

17 The qualifications and expertise of each of the expert witnesses was not challenged. However, the Owners challenged Mr Ryan on one issue, namely that in making his declaration in accordance with his obligations under VCAT Practice Note 2, he failed to disclose a matter which they said was relevant. Mr Ryan had previously been engaged by the developer of the property, Rand, to provide a report for it about one of the other houses in stage 1 of the development. Mr Ryan was critical of JGK in that report (as will be referred to further below) and the owner submitted that this is a matter that should have been declared by Mr Ryan in the present report. Instead he declared "I have made all the enquiries which I believe are desirable and appropriate and no matters of significance which I regard as relevant have to my knowledge been withheld from the Tribunal".

18 I accept Mr Ryan's response when challenged on his declaration. He said that it is common for him to do reports on multiple properties in the same estate. He said that he treats them all separately. He said his recollection of the other report was that it was prepared in response to claims for payment under the contract. I accept that at the time of preparing his current report, he did not consider it relevant to disclose this earlier report to the Tribunal. Having said that, matters in the earlier report did become relevant during the hearing and Mr King was cross-examined on them; however, I am satisfied that these issues were not something that Mr Ryan could have taken into account when considering what was or was not relevant when making his declaration.

THE 'SET OFF' DEFENCE

19 As set out above, JGK's contention is that because Rand owed it more than the amount of the Owners claim in this proceeding (according to its version of events), then it is entitled to limit the effect of section 9 by setting off the monies owed by Rand against the Owners' claim. There are two questions to be answered:

a first, whether or not the meaning of section 9 allows that contention, which is a question of statutory interpretation; and

b second, if it does, then whether factually JGK has succeeded in establishing that it is owed monies under the original building contract which it is entitled to set off against the Owners' claim in the present case.

The interpretation of section 9

20 Section 9 of the DBCA provides as follows:

> **Warranties to run with the building**
>
> In addition to the building owner who was a party to a domestic building contract, any person who is the owner for the time being of the building or land in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 as if that person was a party to the contract [emphasis added].

JGK's contention

21 JGK's contention is as follows:

a Section 8 of the DBCA gave Rand the right to sue JGK for damages for breach of the domestic building contract where there was a breach of a section 8 warranty. If Rand did so, JGK would be entitled to defend that claim by relying on set offs.

b Section 9 gives a subsequent owner the right to sue JGK for a breach of s.8 warranties.

c As a matter of statutory interpretation, the phrase "as if that person was a party to the contract" (being the last ten words of section 9 of the DBCA) are intended to confer on the Owners a right to take action for damages for breach of the domestic building contract between Rand and JGK. That right would not otherwise exist because the Owners are not parties to the domestic building contract. The phrase "as if that person was a party to the contract" should be construed as putting the Owners into the shoes of Rand such that the rights the Owners can enforce, are those of Rand under the contract. The Owners' rights as subsequent Owners can be no better than the rights enjoyed by Rand. Those rights are subject to whatever defences may be available to JGK in an action brought by Rand under s.8.

d There must be some work for the phrase "as if that person was a party to the contract" to perform. If parliament had intended to confer on subsequent owners a statutory right that was unconnected with the existence and terms of the relevant domestic building contract, parliament could have enacted section 9 without the last ten words.

22 In its submissions[3], JGK relied on the Tribunal's decision in *Delic & Ors v Yahome Pty Ltd* [2012] VCAT 752, where Senior Member Riegler considered the effect on a subsequent owner of a settlement reached between the original owners and the builder. He held:

> 40. In my view, a settlement agreement between an original owner and its contracting builder could affect the rights of a subsequent owner. Although s.9 of the Act gives a subsequent owner rights commensurate with the rights of the original contracting party, it does not create rights greater than the rights of that original contracting party. Therefore one must look at the rights of the original contracting party to determine the rights of the current applicants.
>
> 41. If the vendor compromised her rights with respect to certain defects, then I do not accept that a subsequent owner is able to reignite those rights in reliance upon s.9 of the Act. In my view, the final words in s.9 of the Act, which state "as if that person was a party to the contract" are words which limit the operation of s.9 to effectively put a subsequent owner into the shoes of the original contracting party. Therefore if the original contracting party has compromised its ability to claim for breach of a warranty, then subject to s.10 of the Act, no further action lies against a builder in respect of that particular breach. To construe s.9 in any other way would, in my opinion, be tantamount to restricting rights which crystallise upon there being an accord and satisfaction of a suit. Those rights comprise the right to be free of liability in respect of the matters so compromised. Had the legislature intended s.9 to take away or alter those common law rights, it could have drafted s.9 with clear and express words to that effect."

23 JGK concedes that the present case is not about whether Rand compromised its rights against it via a settlement agreement. But it submits that the Tribunal's logic is equally applicable; the last ten words of section 9 should be construed as putting the Owners into the shoes of Rand. It contends that this means that the Owners' statutory rights as subsequent owners can be no better than the rights enjoyed by Rand under the domestic building contract; or to put it another way, the Owners' rights are subject to whatever defences may be available to JGK in an action brought by Rand.

Discussion and determination

24 I do not accept the interpretation of section 9 contended by JGK. In my view, the meaning and purpose of the ten words at the end of section 9 is to give a subsequent owner a right to bring a proceeding against a builder. It is not a stand-alone phrase as contended by JGK. The words must be read together with the preceding phrase "any person who is the owner for the

[3] Respondent's opening submissions and written submissions received prior to the decision in *Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd* [2018] NSWSC 1304 referred to below

time being… may take proceedings… as if that person was a party to the contract". I note that there is no equivalent phrase in section 8. It is not necessary there, because the original owner has the right to take proceedings for breach of the contract. Without those words in section 9, the subsequent owner would have no cause of action.

25 As was held by Deputy President Aird in *Owners Corporation 1 PS523454S v L.U Simon Builders Pty Ltd*[4], section 9 gives rise to a *chose in action* held by the owner for the time being. The right to bring an action for the breach of the warranties in section 8 is personal to the owner and cannot be brought by another person on an owner's behalf. Section 9 provides that the owner for the time being can bring proceedings for a breach of the warranties set out in section 8, as if they were a party to the contract.

26 That is consistent with my view that the warranties are not stand-alone creatures. They are implied as terms of a building contract. For them to be provided to someone who is not a party to the original building contract, there must be some mechanism by which they pass to a subsequent owner. That is the purpose of the last ten words of section 9: to give that person the ownership of the chose in action - being the entitlement to enforce a contractual term.

27 It is not as JGK contends, to have a subsequent owner stand in the shoes of the original owner, and have their rights subject to whatever defences may be available to the builder in an action brought by the original owner.

28 This interpretation is not inconsistent with the Tribunal's decision in *Delic.* That case turned on whether an agreement to compromise the rights of an original owner would affect the rights of a subsequent owner.

29 The obvious difference with the present case is that there was no agreement between JGK and Rand to compromise Rand's rights. All there is in the present case is a unilateral declaration by JGK that it elected to set off the amount it says Rand owed it against any indebtedness it may have to Rand or its successors in title. That alone is sufficient to distinguish the case of *Delic*.

30 However, in addition to the factual differences, the decision of *Delic* does not stand for the proposition contended by the builder. Instead, what Senior Member Riegler decided (quite correctly in my opinion) was that an original owner could compromise their rights with respect to a breach of a warranty, and that compromise would bind subsequent owners in respect of that particular breach. That is the extent of his decision. He did not decide that a builder may rely on section 9 to have all the rights and obligations of the original owner under the original contract bind a subsequent owner. Nor did he decide that a subsequent owner would stand in the shoes of the original owner in respect of all rights and obligations under the contract.

[4] [2018] VCAT 987

31 Such a conclusion would be inconsistent with the wording of section 8, which sets out specific warranties, including that:

a the work will be carried out in a proper and workmanlike manner, in accordance with the plans and specifications,

b all materials will be good and suitable for the purpose,

c the work will comply with all laws and legal requirements,

d the work will be carried out with reasonable care and skill and completed by the date specified in the contract,

e the home will be suitable for occupation if applicable, and

f the work will be reasonably fit for a specified purpose.

32 There is no suggestion in sections 8 or 9 that other potential contractual issues such as time, delay costs, variations, access, insurance, supervision, inconsistencies between documents, or interference with works, are issues which would be transferred to a subsequent owner by section 9. The benefit (or chose in action) conferred by section 9 is the benefit to take proceedings for a breach of the specific warranties listed at section 8 only.

33 Accordingly, if the original parties to a contract compromise one or more of the warranties, the shoes in which the subsequent owner stands are restricted in size, style and colour to the warranty which has been compromised; and that must be one of the warranties as described in section 8. In the present case, JGK's claims against Rand are largely made up of liquidated damages or delay costs. These are not the shoes meant by Senior Member Riegler or by section 9, as can be seen by his decision to limit the effect of a compromise by reference to section 10 at [41]:

> Therefore if the original contracting party has compromised its ability to claim for breach of a warranty, then subject to s.10 of the Act, no further action lies against a builder in respect of that particular breach.

34 Section 10 of the DBCA provides:

> 10. Person cannot sign away a right to take advantage of a warranty
>
> A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in section 8 is void to the extent that it applies to a breach other than a breach that was known, or ought reasonably to have been known, to the person to exist at the time the agreement or instrument was executed.

35 The scope of sections 8, 9 and 10 is limited to claims for breaches of the warranties listed at section 8. Section 10 allows a warranty to evaporate, but only by a historical act such as a compromise. There is no equivalent provision addressing other claims under the building contract, such as claims for liquidated damages, delays or interest. A set-off claim is not a compromise. It is a separate claim in itself. The legislation does not assign those rights as against a subsequent owner.

36 Moreover, even if there had been a settlement between JGK and Rand, the effect of *Delic* is that the rights of the Owners would be limited only by the matters contained in that settlement. In the present case, there was no settlement, or even any acknowledgement by Rand that the builder was correct in its contention that it was owed close to $1 million. Instead, as set out below, Rand's position was that it was JGK that was in breach of the contract.

Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd

37 I am supported in these conclusions by a recent decision of Justice Hammerschlag of the New South Wales Supreme Court in *Owners of Strata Plan 80458 v TQM Design & Construct Pty Ltd*[5] ("TQM"), which was handed down after final submissions were made in this proceeding, and while my decision was reserved.

38 In that case, the respondent builder's defence was similar to the one contended by JGK in this case, albeit relying on the New South Wales legislation. I made the parties aware of this decision and allowed them to make submissions on its effect, which they did.

39 Although the decision is of the Supreme Court of New South Wales, and I am not bound by it, it is persuasive and I should follow it unless it can be distinguished, or I consider it is plainly wrong.

40 The factual similarities between the TQM case and the present case are as follows:

a. In TQM, the plaintiffs were subsequent owners in a multi-unit development, both individually and as part of an owner's corporation. The present Owners are of course also subsequent owners, having purchased from the developer Rand.

b. The defendant, TQM, was the original builder engaged by the developer, as is JGK in the present proceeding.

c. TQM's contract came to an end when disputes arose between the developer (PVD) and TQM over allegations of monies owed under the contract and failures to comply and/or complete the works. TQM suspended the works for non-payment of invoices and the developer responded by taking the works out of TQM's hands and appointing a new contractor to complete the works. No formal steps were taken to determine those disputes, or to terminate the contract, and before Hammerschlag J, the parties "seemed to agree" that the contract "at some stage ... must have been abandoned" (at [43]). This is a similar situation to the present proceeding, where the works were suspended by JGK, on grounds that the developer had delayed the works and had failed to pay monies allegedly owed (Notice of Suspension dated 17

[5] [2018] NSWSC 1304

December 2013). Mr King gave evidence that he decided not to issue legal proceedings against the developer as he thought the costs of such proceedings would likely exceed any recovery. No evidence was led of any formal determination of the contractual disputes.

d. In both cases, the owners became aware of defects in the building works after taking possession of the properties and brought claims seeking to rely on the statutory warranties implied into the building contract for the benefit of subsequent owners.

e. In both cases, the developer was not joined to the proceeding.

f. In both cases, the builder has submitted that the alleged liabilities of the developer to it must be taken into consideration when interpreting the extent of the statutory warranties owed to the present Owners.

41 The material difference between TQM and the present proceeding is the wording of the legislation. Section 9 of the DBCA is set out above. Section 18D of the New South Wales *Home Building Act* 1989 provides as follows:

> **18D Extension of statutory warranties**
>
> (1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.
>
> (1A) A person who is a non-contracting owner in relation to a contract to do residential building work on land is entitled (and is taken to have always been entitled) to the same rights as those that a party to the contract has in respect of a statutory warranty.
>
> (1B) Subject to the regulations, a party to a contract has no right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency by a non-contracting owner.
>
> (2) This section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency, except as provided by the regulations.

42 In TQM, His Honour held as follows at [202] – [209]:

> "202. TQM puts that where s.18D(1) provides that the plaintiffs, as successors in title to the benefit of the statutory warranties, are entitled to the same rights as PVD in respect of the

statutory warranties, this means that the plaintiffs are put in the same position as PVD under the contract between them which incorporates the statutory warranties.

203. It argues that section 18B implies warranties into a building contract and the successor's right is to have the warranties as if they were in that contract. It argues that the legislation envisages that the statutory warranties are to be 'grafted on' and to operate within the existing legal framework of the building contract under which residential building works were undertaken by TQM.

204. I reject this argument. It misconstrues what the words of s.18D(1) say. It incorrectly ascribes to the section an intention to bring about a statutory assignment of rights under a contract, subject to equities. It is well established that this is not how the section operates. It creates new rights: *Allianz Australia Insurance Ltd v Waterbook at Yowie Bay Pty Ltd* [2009] NSWCA 224 at [65].

205. Under s.18D(1) the successor has the same rights as the predecessor in respect of a statutory warranty. It is not the rights of the predecessor. The section uses the word same in the meaning of equivalent.

206. The right is to hold the warranty giver to the obligation to meet the warranty. It is a stand-alone right not dependent on, part of, or affected by any provision of any contract between the original players.

207. The only limitation which the section places on the right is that it cannot be exercised with regard to work and materials where the predecessor has enforced the warranty with respect to that work and those materials. It is to be observed that this limitation is expressed in terms of the predecessor having enforced the warranty, not the right.

208. There is nothing unfair in a builder being responsible to a successor for defective work done in breach of its statutory warranty. After all, the basic object of s.18D(1) is to hold builders accountable for defective work.

209. TQM's entitlement to sue for damages for breach by PVD of the building contract is unaffected. Those damages could conceivably include the amount of TQM's exposure to a successor in title."

43 I agree with the reasoning of His Honour Hammerschlag J. Although the wording of the Victorian and New South Wales sections is different, the purpose and effect of the section, as taken into account by His Honour, are equally applicable when interpreting s.9 of the DBCA.

44 One of the defences argued by the builder in TQM was that because the section provides that the plaintiffs are entitled to the same rights as the previous owner with respect to the statutory warranties it means a subsequent owner's rights are to be 'grafted on' and operate within the existing legal framework of the building contract. The result would be that a subsequent purchaser could not hold any greater right against the builder and that of the original owner. This argument was correctly rejected.

45 In rejecting the argument His Honour made the same points as the Owners do in the present case. His Honour [at 205] noted that the rights are in respect of the statutory warranties only. It does not extend to other parts of the contractual relationship between the original players [at 206].

46 As I said above, s.9 is not a statutory assignment of rights under a contract, subject to equities. The right given by s.9 is to hold the warranty giver to the obligation to meet the warranty. The ten words at the end of s.9 give a subsequent owner the right to enforce the warranty. It is a stand-alone right, or chose in action, not dependent on, part of, or affected by any provision of any contract between the original players.

47 His Honour also agreed with the owner's submission that there is nothing unfair about a section that requires a builder, "being responsible to a successor for defective work done in breach of its statutory warranty" noting that the basic object of s.18D(1) "… is to hold builders accountable for defective work".

48 In the present case, as with TQM, JG King's entitlement to sue for damages for breach by Rand of the building contract is unaffected. Those damages could conceivably include the amount of JG King's exposure to a successor in title.

49 Accordingly, I am satisfied that I should not depart from the decision of His Honour Hammerschlag J, as I consider it to be correct and there are no clear grounds on which it may be distinguished. I do not accept that the different wording used in the two provisions are sufficient grounds.

Is there any amount to be set off?

50 As a result of my findings that s.9 does not have the meaning contended by JGK, I do not need to consider and determine whether JGK has proven, as a matter of fact, that there is an amount to be set off.

51 In any event, I am not in a position to be able to make a determination as to the rights and liabilities between JGK and Rand, for the following reasons:

a. JGK has asked me to make a determination in respect of a dispute between it and an entity which is not a party to this proceeding. Rand is still in existence but has not been given the opportunity to make any submissions or provide any evidence to the Tribunal. As a matter of procedural fairness, I am unwilling to make any findings which would affect the rights and obligations of Rand.

b. Further, based on the evidence I have been provided with, I would find it impossible to accept even on the balance of probabilities that Rand is indebted to JGK at all, or at least in respect of the Owners' property. I note the contemporaneous correspondence from Rand, including its Notice of Intention to Terminate the Contract dated 20 December 2013, its Notice of Termination dated 7 January 2014, the submissions made by Rand and JGK in the adjudication under the *Building & Construction Industry Security of Payment Act*, and letters from Rand's solicitors dated 17 December 2013 and 13 May 2014.

c. Because JGK chose to prosecute this proceeding without joining Rand to it, it was left to the Owners to test JGK's allegations. Counsel for the Owners cross-examined Mr King extensively about his contention that Rand owed JGK approximately $1 million. It was clear from Mr King's evidence that he knew very little around the context of this development, the Owners' claim, and the dispute with Rand. It was also clear from the documents put to him, which he did not deny, that the building contract contained a number of separable portions, and that the amounts which JGK seeks to set off do not relate to separable portion 1, which is the contract governing the Owners' home.

52 For those reasons, I cannot be satisfied that Rand is indebted to JGK, or that if it is, that the debt relates to the Owners' property. I repeat here that these are not findings of fact in respect of the contractual liabilities of Rand and JGK, but rather are the reasons why I am unable to accept the contention put by JGK that Rand owes it approximately $1 million.

THE DEFECTS

53 Prior to the hearing, the experts had met and prepared a joint Scott Schedule, in which they identified items on which they thought they had reached an agreement, and the items which were not agreed. It was anticipated that this joint report would reduce the issues in dispute. However, it became apparent at the commencement of the hearing that the agreements reached were illusory, in part because one expert assumed that the figures included margin, contingency and GST, while the other did not. Further, much of the difference in the costings came down to a disagreement on the scopes of work required to rectify each item. Accordingly, the parties have required me to depart from the Scott Schedule and form my own view on a number of the defects claimed, including whether they are defective, what is a reasonable scope of work to rectify and what is a reasonable costing for that scope of work.

54 Following the view, the hearing resumed at the Tribunal and the experts gave their evidence concurrently. Each of their reports was tendered into evidence. They, together with the parties' legal representatives, also discussed and agreed certain issues outside of the hearing, which sensibly reduced the hearing time and cost. One significant agreement was that a

combined amount of 41% should be allowed for contingencies, margin, preliminaries, overheads, supervision and profit on each item. GST of 10% is also to be added to each item. In my decision, the amounts which I allow have been rounded to the nearest $0.50, which is the practice adopted by Mr Ken Ryan. I think this approach is appropriate, in circumstances where many figures are the result of an agreement, rather than a precise mathematical equation.

1) Water damage to garage ceiling

55 Extensive water damage and black mould growth is visible in the garage, including to the plasterboard ceiling lining, the ceiling cornice and adjacent plasterboard wall lining to the northern half of the garage, and on the bulkhead which runs the full width of the garage from west to east. Directly above this area is the balcony, which until 2016 was exposed to the weather.

56 Both Mr Maher and Mr Ryan agree that moisture is penetrating into the garage through the balcony floor and through the parapet capping in the area of the upright support posts. They disagree on the reasonable scope of works to rectify the problem. JGK has conceded liability for this item of defective workmanship, but does not agree with the scope of rectification works or the quantum proposed by the Owners.

57 Mr Maher described the method in which the balcony had originally been constructed as follows:

a. timber floor joists sitting on the metal frame,

b. onto which was laid a product called 'Multipanel Balcony Substrate Waterproofing System',

c. over which were laid tiles.

58 No separate waterproofing membrane had been applied, as the Multipanel System, if installed correctly, is "a high density, polyurethane composite building panel, ideal for waterproofing balconies as it is lightweight, 100% waterproof, highly versatile and replaces the need for a liquid membrane" (as described by the manufacturer)[6]. According to the manufacturer's instructions, each panel is 2400 x 1200, but may be cut to size. The panels are glued and nailed onto the substrate and joined to the adjacent panel with a tongue-and-groove join and adhesive. Sealant is then applied to the joins and nail penetrations to waterproof them.

59 The Owners gave evidence that they had experienced problems with the balcony since the date of settlement in 2012, including most significantly, the water entry problems. Mr Waddell said in re-examination that JGK had attempted on three occasions to rectify the leaking balcony, including:

[6] TB93

a. an unknown scope of works carried out approximately two weeks prior to them purchasing the property in 2012;

b. then in 2013, removing the tiles and applying a membrane, a screed and new tiles;

c. and when that did not work, removing and replacing all flooring materials including the substrate.

60 Mr Maher's opinion was that as none of the rectification attempts had worked, the only option was to completely remove the existing balcony structure (not just the flooring) and to rebuild it. Mr Ryan agreed that the complete balcony had to be rebuilt. There were four areas of disagreement between them, as follows, which I will discuss in turn:

a. whether the Multipanel System should be used again;

b. whether the glass sliding doors need to be removed and replaced as part of the balcony rectification works;

c. whether the upright support posts need to be modified so that they sit in a stirrup or boot, or whether a pressure flashing correctly applied over the existing post would suffice;

d. how to rectify the balustrades which exceed the maximum span allowed by the Building Code of Australia[7] as published in the Timber Handrails and Balustrades Information Bulletin[8].

61 As well, the Owners sought to amend their points of claim to include a claim for reimbursement of the cost of installing a roof over the balcony pergola, which they say they did to mitigate the water damage to the garage. I will consider this item below.

a) Should the Multipanel System be used again?

62 Mr Maher's original opinion, as set out in his report, was to replace the balcony with the same materials as had previously been used, namely the Multipanel System, but with a layer of fibre cement sheet underneath, to provide stability. However, during the hearing, he said that if he were engaged to carry out the rectification works, he would rebuild the balcony using the more traditional method of a base, a screed, a waterproof membrane and tiles.

63 Mr Ryan's opinion was that provided the Multipanel System was installed correctly, it should work without needing the fibre cement substrate. He said that the manufacturer's installation instructions allow the Multipanels

[7] TB102
[8] TB99ff

to be directly affixed to the joists and this method has been successfully used on other properties he has seen.

64 Mr Ryan was firm in his opinion that the Multipanel System should be preferred over the traditional method of a cement base and waterproof membrane, since Multipanel has been accredited, and the Owners should be provided with "like-for-like"; that is, the flooring system that they had purchased.

65 I pause hereto note that the Building Regulations Advisory Committee accredited the Multipanel System as suitable for use as an external waterproof substrate system for all classes of buildings (provided specified conditions were met), on 27 March 2015. I note that at the time the Owners' home was constructed, Multipanel may not have been accredited, since the accreditation certificate provided to me was dated nearly three years later. However, both experts are of the opinion that Multipanel System could be used for rectification works carried out today, so I do not make any further comment about the date of its accreditation.

66 I was told that the traditional method may be cheaper to construct than the Multipanel System, although the end cost was uncertain as there may be additional items to be factored in. In any event, no costings for this method were actually provided. JGK objected to Mr Maher giving an opinion about the traditional method without it having been contained in his reports. I agree with JGK that it would not be fair to it and to Mr Ryan to make them consider this alternative proposition "on the run". Accordingly, I have considered only the two Multipanel System options as possibilities for rectification.

67 I will allow the cost for the balcony to be stripped back to the floor joists and then to be rebuilt using the Multipanel System, with fibre cement sheet flooring underneath, as recommended by Mr Maher. While the manufacturer's installation instructions state that Multipanels may be applied directly onto timber or steel joists, I accept the Owners' submission that that was what had previously been tried and had failed three times. Further, I note that the manufacturer's installation instructions also allow for the System to be laid on top of a solid substrate[9], which is what is proposed by Mr Maher. Accordingly, both options satisfy Mr Ryan's requirement that the system should be installed in accordance with the manufacturer's instructions. In circumstances where one has been tried and has failed, I do not think it fair or reasonable to require the Owners to accept that method again.

b) Should the glass sliding doors be removed and replaced?

68 There are two glass sliding doors opening onto the balcony, one from the lounge and one from the bedroom. There was no significant moisture damage visible to the flooring inside these doors. I was shown a

[9] TB96

photograph evidencing a minor amount of moisture under the carpet in the bedroom, but this appeared to be old damage and Mr Waddell said that since the balcony roof had been covered, he had not noticed any moisture inside the bedroom.

69 Accordingly, the need to remove and replace the sliding doors is a consequence of the repairs to the balcony. Mr Ryan said that the balcony could be rebuilt, using either version of the Multipanel System, and could achieve the necessary falls to drains without touching the doors. He accepted that the stepdown from the existing doors to the balcony was currently about 50 mm.

70 On the other hand, Mr Maher said the doors would have to be removed, in order to comply with the Multipanel System installation requirements[10]. The manufacturer's instructions specify that there must be an upstand of a minimum of 70 mm below a door unit[11]. At present, there is a step down of approximately 50 mm. Mr Maher said that the only way of achieving the specified 70 mm is to remove the existing doors, to modify the frame so that the doors sit on a timber hob, and then to reinstall them.

71 I will allow the cost of removing and reinstalling the doors. Mr Ryan was firm in his view that the Multipanel System itself is a suitable product for this balcony, and that the reason it failed must have been poor installation. I have allowed for the replacement of the Multipanel System, in part based on Mr Ryan's view that had it been properly installed it should not have failed. A consequence of that view is that I must allow an adequate amount to ensure that the Multipanel System is replaced in accordance with the manufacturer's installation instructions. The only way of meeting the required stepdown of a minimum of 70 mm is to remove and replace the doors, and I will allow those works.

c) and d) How to treat the upright support posts, and how to rectify the span of the balustrades?

72 I will address these two issues together, because the proposed methods of rectification of one will determine the other.

73 A low parapet wall has been constructed along each of the east, north and west sides of the balcony. The wall is covered with a metal capping flashing. Timber upright posts penetrate the metal capping flashing to provide support to both the infill timber balustrade panels and the timber framed pergola structure overhead. It appears that a silicone-type sealant was used to seal the penetration of the timber posts through the metal parapet capping flashing. The experts agreed that moisture is entering

[10] Mr Maher and Mr Ryan also gave extensive evidence about the doors, subsills, flashings and membranes if the traditional method of rectification using a liquid membrane were adopted. I have not considered this evidence further, as I have not accepted that method of rectification.
[11] TB96

through these penetrations, at least at some of the upright posts, and is causing damage to the garage below.

74 Secondly, it was agreed by the experts that the balustrades on the north side of the balcony exceed the maximum span allowed by the Building Code of Australia. At present, there are four upright posts on that side of the balcony, being the two corner posts and two in between them, with the three infill panels spanning between the posts. Although an attempt has been made to provide intermediate supports to the panels, these are ineffectual.

75 In respect of the water penetration issue, Mr Maher said that the solution was to modify the structure so that it was not reliant on silicone as a protection. He suggested to remove each of the four posts, to shorten them and then replace them into metal stirrups or boots, using appropriate gaskets to waterproof the penetration of the parapet capping by the stirrup.

76 Mr Ryan on the other hand said that the existing method of construction should be retained but flashed with a correctly applied pressure flashing and caulking. There would be no need to remove the posts with his scope.

77 In respect of the balustrade issue, Mr Maher's recommendation was to insert a fifth post on the north side, so that the span of each balustrade panel would be less. If his scope of works in respect of the upright posts is accepted, then only a minor amount of extra work will be required to insert a fifth post.

78 Mr Ryan proposed leaving the upright posts in place, and suggested that the balustrade issue could be solved by increasing the size of the handrail. The Building Code of Australia ("BCA") allows for longer spans depending on the thickness of the handrail. He proposed using a 140x45 treated pine rail or similar, and replacing both the north and east sides to match.

79 Mr Maher did not disagree with this method of rectification, but said that if the upright posts are to be removed as part of his water penetration rectification, it would be a cheaper and simpler solution to install a fifth post, cutting down and reusing the existing balustrade panels as far as possible. The Owners also expressed concern about whether the owners corporation would allow them to change the style of the handrail as it would no longer match the other houses in the development.

80 I also note the report prepared by Mr Ryan for Rand in 2013 in relation to another property within the development[12]. In that report Mr Ryan had observed that JGK had constructed pergola posts and beams on the balconies in stages 1 and 2 of the development from timber, while the contract specification called for them to be steel. Mr King, in his evidence, agreed that he accepted Mr Ryan's opinion generally, and that he thought that Mr Ryan is a well-respected expert. In cross examination, Mr King conceded that JGK had not complied with the specification to construct the balcony posts from steel and could not identify any relevant variation. He

[12] STB147

also agreed that one of the reasons Rand refused to pay JGK was this non-compliance and that JGK had not changed the pergolas.

81 In my view, the reasonable scope of work required to rectify the water penetration issue is to replace the existing upright posts with posts on stirrups. I have reached this conclusion based on a number of factors, including:

a. the existing method of construction has clearly failed;

b. the existing method of construction was in breach of the contractual specification; and

c. it would not be reasonable to require the Owners to accept a method which was non-compliant in the first place and has consistently failed since construction.

82 As a result of my decision that the posts should be removed and replaced, I accept that the most cost effective and efficient method of rectifying the balustrade issue is to allow the installation of a fifth post.

The costings

83 I now turn to consider the reasonable cost of carrying out the scope of work which I have accepted above, namely, to replace the balcony floor with the Multipanel System laid on fibre cement sheet, to remove and replace the sliding doors, to modify the four upright support posts, and to install a fifth post.

84 Ms Dalla Rosa provided an estimate of the reasonable cost of this scope of works, being $22,662 (excluding margin, contingencies, GST). I accept that amount, in circumstances where Mr Ryan's costings were for a different scope of works. I will allow $35,148, calculated as follows:

Item 1 in Dalla Rosa report		**$22,662.00**
Contingencies, margin, etc. as agreed	41%	9,291.00
		31,953.00
GST	10%	3,195.00
	Total	**35,148.00**

The roof on the pergola

85 At the commencement of the hearing, the Owners sought leave to amend this item of their claim to add a further amount of $5219, being reimbursement of the costs of installing a roof on the pergola. JGK objected to this late amendment, on grounds including that:

a. notice of the claim was first given the last business day before the hearing;

b. it is not pleaded;

c. neither the claim nor its quantum have been the subject of expert evidence, which would have been necessary given that the claim is based on mitigation and the question of reasonableness;

d. the applicants have produced a quote and bank printout showing that the quoted amount has been paid, but this alone does not mean that JGK is liable to reimburse them;

e. the Owners have obtained benefits from the roof which should be taken into account.

86 I will allow the amendment to the claim, in circumstances where there was no real prejudice caused to JGK. The amendment was raised before the experts gave their evidence, and it was open to either party to adduce expert evidence about the cost and or benefit of the roof. Neither party did so.

87 Mr Waddell gave evidence of the cost that was actually spent and I accept his evidence. I also accept that he had the roof built based on advice from JGK that it may reduce the water problems. The Owners do not rely on that advice to make out this head of damage; instead they say the cost was incurred as a reasonable effort to mitigate against further water ingress.

88 I accept that it was reasonable for the Owners to have the roof constructed. However, I also accept JGK's contention that the Owners have obtained the benefit from the roof over and above the mitigation of water ingress. They now have an outdoor space which is usable in all weathers. Accordingly, I will reduce the amount allowed for this claim by 50%, to take account of the improvement. I will allow $2609.50.

2) Rear garage wall – mould and water damage

89 According to Mr Waddell and Mr Maher, the rear wall of the garage had been damaged by water entry and mould. Photographs of the damage were tendered. The damage was no longer visible when Mr Ryan inspected, because Mr Waddell had rebuilt the wall, in order to include a door opening. The damages claimed were the cost of removing the damaged plaster, cleaning, replastering (including new cornice) and painting.

90 Ms Dalla Rosa said that a reasonable amount for that work was $916.50, which included repainting half the garage ceiling in order to match the new paintwork of the new cornice. Mr Ryan provided his rough estimate during the hearing of $600, and said that it would not be necessary to repaint half the garage ceiling as the colour was "ceiling white" which is easy to match.

91 After some discussion, both parties agreed that the cost for this item should be $600 (excluding margin, contingencies, GST). I will allow $930.50, calculated as follows:

Rear garage wall - agreed quantum		**$600.00**
Contingencies, margin, etc. as agreed	41%	246.00
		846.00

GST	10%	84.50
	Total	**930.50**

3) External rear garage wall and ceiling - flashing missing

92 The experts agreed that the rectification of this item is included as part of the works allowed at item 2.

4) Bedroom 3 - water damage and mould

93 The Owners' complaint is that water is entering into bedroom 3, causing mould build up and staining in the four corners of the room. The roof above this bedroom is a skillion roof, located on the south side of the dwelling. The experts agreed that there were defects in the roof, but disagreed on the extent of those defects. Three issues arise for consideration:

a. the agreed items for the south skillion roof;

b. whether the skillion roof on the north side of the home suffers from the same defects (and if so, the parties agreed that the cost to rectify would be the same as the cost for the south side skillion roof); and

c. whether the moisture damage inside the bedroom was caused by water entering or by condensation.

a) The agreed items

94 JGK conceded liability for some defects in the roof above bedroom 3 (items 4, 6, 7, 8, 9 and 10 of Mr Maher's scope of works) and the parties agreed that the cost for these items is $1386 (excluding margin, contingencies, GST).

b) The north side skillion roof

95 Mr Maher said that the north side skillion roof was constructed in the same manner as the south roof and would therefore suffer from the same defects. This comment is made in one sentence of his report, without any photographs or other evidence to back up this opinion. It is not clear whether Mr Maher even inspected the north roof in any detail. JGK did not agree that the defects are replicated on the north roof. Mr Ryan was not able to access that roof. There is no evidence of any leaks or moisture damage in the rooms underneath the north roof.

96 In the absence of any evidence of specific defects, or of any damage in the rooms underneath the north roof, I am not prepared to make an assumption that the north roof was constructed in the same manner as the south roof, with the same defects. Accordingly I dismiss this claim.

c) The cause of the moisture damage inside bedroom 3

97 There was no disagreement that there is evidence of moisture damage and mould in bedroom 3. Mr Maher's opinion is that moisture has been allowed to enter through a combination of roofing defects, including missing areas of eave lining, incorrect fall in box gutter, roof sheets not turned up in the correct manner, the lack of fall in the roof, inadequate parapet cappings and flashings.

98 Mr Ryan suggested that the build-up of moisture and mould in bedroom 3 was not caused by the roof defects, but instead by condensation. In his opinion, the fall of the roof is adequate, the eave linings are adequate (even though incomplete), the box gutter is adequate apart from some cappings which need re-angling. He said there is no evidence to confirm where the moisture is coming from. There is no sign of any moisture damage in the rooms adjoining bedroom 3. This room is on the south side of the house and if it is not heated and aired regularly, condensation is likely to build up.

99 I do not accept Mr Ryan's contention. The Owners gave evidence that the room was used regularly, originally as the bedroom for their son. The house is centrally heated, including that room. Mr Waddell said that he regularly washes the walls to remove the mould, for the sake of the health of his family. He observed that the moisture and mould is predominantly at the top corners of the walls. He has not observed moisture collecting on the windows, which is what would be expected if there was condensation. Mr Maher said that condensation is usually more visible on a floor and around glass, not in the top corners of a room, on painted plasterboard, which is where the damage is located in bedroom 3. Further, JGK has agreed that there are defects in the roof located directly above bedroom 3. I consider it more likely than not that the moisture damage is caused by defects with the roof than by condensation.

100 The cost to rectify the cause of this moisture entry has been allowed above. This claim is for the cost of rectifying the internal damage to bedroom 3. The parties have agreed that the appropriate amount for these works is $984.47 (excluding margin, contingencies, GST).

Amount allowed

101 I will allow $3676.50 for this claim, made up as follows:

a) Roof items – agreed quantum		$1386.00
c) Bedroom 3 - agreed quantum		$984.50
		2370.50
Contingencies, margin, etc. as agreed	41%	972.00
		3342.50
GST	10%	334.00
	Total	**3676.50**

5) Water damage plasterboard wall lining garage door opening

102 Mr Maher identified an area of damage to the plaster above the garage door opening. His opinion is that the damage was caused by a leak, and this opinion is supported by evidence of water staining on the timber jam beneath the plaster. Mr Ryan did not accept that the damage was caused by water. He noted there were areas of rough plastering and painting throughout the dwelling and thought this was more of the same.

103 I viewed and felt the area in question during the site visit, and based on that observation, together with evidence of water staining on the timber jam, I am satisfied that the visible damage to the plaster was caused by moisture. Further, the area is beneath the leaking balcony and it is more probable than not that the signs of water on the timber jam have come from that location.

104 Accordingly, I will allow the cost to repair this area. Mr Maher has provided an expansive scope of works, which include removing the garage door to gain access to the area in question, replacing 1m² of plaster and painting up to 6m² in order to match colours. Ms Dalla Rosa has provided a costing for this scope of works, totalling $1007.51 (excluding margin, contingencies, GST).

105 Mr Ryan said the work could be done without removing the garage door and he would allow only half an hour for the painter to touch up the plaster and repaint, while he is attending to the other garage works at item 1.

106 From my observation of the site, I agree with Mr Ryan that the work can be done without removing the garage door. However, I think that more than a half hour paint touch up is required, as the water damaged plaster must be replaced. Accordingly I will allow Ms Dalla Rosa's estimate of $1007.51 less the garage door removal of $758.50, being $249.01 plus the agreed allowances, making a total of $386, as follows:

Garage door opening repair, less cost of door removal		$249.00
Contingencies, margin, etc. as agreed	41%	102.00
		351.00
GST	10%	35.00
	Total	**386.00**

6) Metal framework – no thermal break

107 The Owners' home is constructed with a fully metal frame. Part 3.12.1 of the BCA (as was applicable at the time) contains provisions to address the energy loss issues which may occur when using a metal frame. In particular, in certain circumstances it requires a "thermal break" to be installed, as a barrier between, on the one hand spaces which are artificially

heated or cooled, and on the other hand the exterior of the building, or other spaces that are not artificially heated or cooled[13].

108 Because of the high thermal conductance of metal, and the effect of conductive thermal bridging by the framing members, a "thermal break" is used to ensure that the thermal performance of a metal roof system or metal framed wall is comparable to that of a similar roof or wall with timber purlins or battens or timber framework. Materials such as timber, expanded polystyrene strips, plywood or compressed bulk installation may be used to provide the break.

109 In this proceeding, the Owners allege that their home has failed to meet the requirements for "thermal breaks" in the following areas:

a. the external walls of the residential part of the home, but excluding the subfloor, contrary to clause 3.12.1.4(b) of the BCA,

b. the external walls of the subfloor, contrary to clause 3.12.1.4(b) of the BCA, and

c. the two skillion roofs, contrary to clause 3.12.1.2(c) of the BCA.

I will address each of these in turn.

a) The external walls of the living space

110 During the hearing, the parties agreed that JGK is liable for this item of claim. They also agreed that the reasonable cost to rectify is $22,473.59 (excluding margin, contingencies, GST). I will allow that amount.

b) The subfloor space

111 The parties do not agree on whether a thermal break should be installed to the external walls surrounding the subfloor area. If it is required, they have agreed that the appropriate quantum of the claim is $8194.75 (excluding margin, contingencies, GST).

112 The BCA Clause 3.12.1.4(b) (as it was at the date of construction of this home) and the following Explanatory Information provide as follows:

(b) A wall in Table 3.12.1.3(a) that –

(i) has lightweight external cladding such as weatherboards, fibre cement or metal sheeting fixed to the metal frame; and

(ii) does not have a wall lining or has a wall lining that is fixed directly to the metal frame,

must have a thermal break, consisting of a material with an *R-Value* of not less than 0.2, installed between the external cladding and the metal frame.

Explanatory Information:

[13] BCA volume 2 definition of "envelope"

1. The thermal performance of metal and timber framed walls is affected by conductive thermal bridging by the framing members and convective thermal bridging at gaps between the framing and any added bulk installation. Metal framed walls are more prone to conductive thermal bridging than timber framed walls.

2. Because of the high thermal conductance of metal, a thermal break is needed when a metal framing member directly connects the external cladding to the internal lining or the internal environment. The purpose of the thermal break is to ensure that the thermal performance of the metal framed wall is comparable to that of a similarly clad timber framed wall.

   A thermal break may be provided by materials such as timber battens, plastic strips or polystyrene insulation sheeting. The material used as a thermal break must separate the metal frame from the cladding and achieve the specified *R-Value*.

   For the purposes of 3.12.1.4(b)(ii), expanded polystyrene strips of not less than 12 mm thickness … are deemed to achieve an *R-Value* of not less than 0.2. [Emphasis added]

113 The experts have agreed that this clause does not strictly apply to the subfloor walls, because the space is open to the weather. However, Mr Maher expressed the opinion that because all the cladding to the whole dwelling above the subfloor must be removed, packed with a thermal break and then replaced, it would be appropriate to also do the same work to the subfloor area.

114 He says this because the residential part of the home which is to be reclad with thermal breaks (as agreed by the parties above) occupies approximately the top 2/3 of the building. The subfloor and garage sit underneath the residential part and because of the sloping site, they occupy approximately the lower 1/3 of the building. The addition of thermal breaks to the residential part will result in the new cladding to the upper 2/3 of the building sitting proud of its existing location. The BCA requires the polystyrene strips used to make the break to be at least 12mm thick (which is agreed by the experts), meaning that there will be a 12mm lip between the upper cladding material and the lower cladding interior. The Owners describe this as an aesthetic disconnect.

115 Mr Ryan suggested that this disconnect could be resolved by installing a flashing around the entire property. Mr Maher's (and the Owners') concern with this option is that it will provide another possible entry point for water ingress, and given the history of the home they submit that any further possible points for water ingress should be avoided.

116 The Owners submit that in making a determination as to the appropriate scope of works, I should be mindful of the High Court's comments in *Bellgrove and Eldridge*[14] where the court commented that because damages

[14] [1954] HCA 36; (1954) 90 CLR 613 at p.620

are assessed "once and for all", the law must be astute to ensure that the measure of damages accurately reflects the restoration of the Owners to the position they would have been in had JGK not failed in its duty. The Owners should recover the amount of damages necessary to enable them to own a house free of risk. They say that I should prefer the scope of works which carries the least risk, particularly in light of the history of the home.

117 Because this is an aesthetic issue, I have decided the matter based on my observations on site. I noted that different cladding materials are used on the home, with corrugated colourbond sheeting to the subfloor, and a combination of fibre cement weatherboard cladding or plywood panels to the garage and residential areas of the home. There is already a demarcation line between the top of the corrugated colourbond and the cladding above. In my view, from an aesthetic point of view, an adjustment of 12 mm to the cladding above will not be visually noticeable. The corrugated metal at present does not sit completely flush with the cladding above, because of the nature of corrugations.

118 Further, it is the upper cladding material that is to be made to protrude 12mm over the lower cladding material. In those circumstances, there is a reduced chance of water entering at the join, as the join will be partly covered from above by the upper cladding. A flashing is an acceptable method of dealing with this join. As the High Court held also in *Bellgrove v Eldridge*, the rectification method must also be a reasonable course to adopt.[15]

119 I accept JGK's contention that it would not be reasonable to replace the whole of the lower cladding in order to address a risk which has not been proven to exist, or, even, on the balance of probabilities, to be more likely than not to occur. Accordingly, I dismiss this item.

c) The skillion roofs

120 The parties did not agree on whether a thermal break is required for the two skillion roofs. If it is required, they have agreed that the appropriate quantum of the claim is $3484.35 (excluding margin, contingencies, GST).

121 On 19 July 2018, during the hearing, I made a determination in respect of this claim. I published my order on that date at the request of the parties. The reason for doing so was to avoid the expense and inconvenience of recalling expert witnesses on the following day, which would have been necessary had the issue been outstanding.

122 My determination was as follows:

> For reasons which will be provided in due course, I determine that the Building Code of Australia 2009 (which is the applicable Code for this property) requires there to be a "thermal break" in the areas of the

[15] Ibid at p.618

two skillion roofs. The parties have agreed that a reasonable cost to remedy this item is $3484.35 (excluding margin, contingency, GST).

123 I now provide my reasons for this decision.

124 It is not possible to view the make-up of the skillion roofs without destructive testing, which was not done. Mr Maher said that it is highly probable that the skillion roofs have been constructed the same way as the pitched roof (which he was able to observe), with metal sheet roofing fixed to metal battens via concealed metal clips. The battens have then been fixed to metal truss rafters. The plasterboard ceiling linings are fixed directly to metal ceiling battens or to the metal rafters. There is no intermediate material between any of those metal areas.

125 Mr Ryan did not concede the method of construction of the roof, although he did agree that the plasterboard ceiling linings are fixed to metal ceiling battens. In his report he referred to the possibility that a thermal break material, being *Air-Cell by Kingspan*, had been installed; however, no mention of this was made during the concurrent expert evidence and I take it that he no longer holds that view.

126 JGK is the only party in this proceeding with direct knowledge of the construction of the roof. The Owners purchased the property after it had been completed. JGK gave no evidence as to the method used. If Mr Maher's opinion about the method of construction was incorrect, JGK could have provided instructions to Mr Ryan or could have produced evidence to disprove Mr Maher. It did not do so. Accordingly, I accept Mr Maher's version of what was constructed.

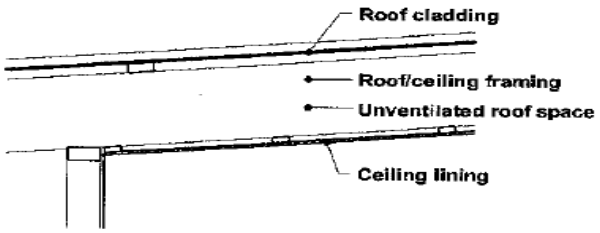
The BCA

127 I will now turn to the requirements of the BCA in respect of metal roofs. Clause 3.12.1.2(c) relevantly provides:

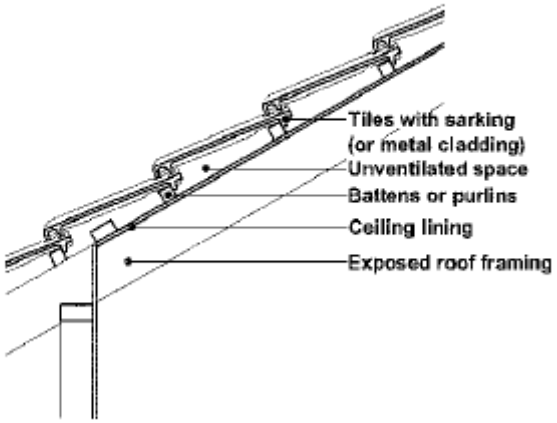
> **3.12.1.1 Building fabric thermal insulation**
>
> …
>
> (c) A roof that –
>
> (i) is *required* to achieve a minimum *Total R-Value*; and
>
> (ii) has metal sheet roofing fixed to metal purlins, metal rafters or metal battens; and
>
> (iii) … has a ceiling lining fixed directly to those metal purlins, metal rafters or metal battens (see Figure 3.12.1.1(b)),
>
> must have a thermal break, consisting of a material with an R-Value of not less than 0.2, installed between the metal sheet roofing and its supporting member.
>
> (d) A roof, or roof and associated ceiling, is deemed to have the *Total R-Value* required by Table 3.12.1.1 if it complies with Figure 3.12.1.1.
>
> …

Figure 3.12.1.1

(a) Flat roof, skillion roof and cathedral ceiling — Ceiling lining under rafter



(b) Flat roof, skillion roof and cathedral ceiling — Exposed rafters



…

Explanatory Information:

…

3. Thermal bridging:
   Irrespective of the framing material used, the minimum added *R-Value* specified in Figures 3.12.1.1, … is deemed to include the effect of thermal bridging created by framing members in situations other than described in 4.

4. Thermal break:
   Because of the high thermal conductance of metal, a thermal break is to be provided where the ceiling lining of a house is fixed directly to the underside of the metal purlins or metal battens of a metal deck roof…
   The purpose of the thermal break is to ensure that the thermal performance of this form of roof construction is comparable to that of a similar roof with timber purlins or timber battens.
   A thermal break may be provided by materials such as timber, expanded polystyrene strips, plywood or compressed bulk installation.
   The material used as a thermal break must separate the metal purlins or metal battens from the metal deck roofing and achieve the specified *R-Value*.

The submissions

128 The Owners submitted that this requirement is unambiguous. The roof in the present case fits within the construction method described in clause 3.12.1.2(c), and thus requires a thermal break.

129 On the other hand, JGK submitted that:

a. The roof in this property is not described in clause 3.12.1.2(c), because subclause (iii) expressly refers to Figure 3.12.1.1(b), which is a drawing of exposed rafters. The roof in this property is more closely depicted in Figure 3.12.1.1(a), which is not referred to in clause 3.12.1.2(c).

b. Further or alternatively, the wording of the "Explanatory Information" indicates that the need for a thermal break only arises where "the ceiling lining of a house is fixed directly to the underside of the metal purlins or metal battens of a metal deck roof". In the present case, the ceiling is not fixed directly to the underside of the metal battens; instead the ceiling is fixed to metal truss rafters which are fixed to the metal battens. This adds an intermediate layer, which is not included in the Explanatory Information.

Discussion

130 It can be seen that the image at Figure 3.12.1.1(a) depicts roof cladding fixed to the upper side of roof/ceiling framing by battens or clips and ceiling lining fixed to the underside of the roof/ceiling framing by battens or clips. That is the method of construction used in the Owners' home according to Mr Maher. The image at Figure 3.12.1.1(b) is for a different type of roof in that it refers to exposed rafters.

131 The questions then are whether the clause requiring a thermal break should be interpreted to refer only to the Figure at 3.12.1.1(b), and/or whether the Explanatory Information overrides the clause. For the following reasons, I do not accept that the clause applies only to roofs with exposed rafters.

132 In interpreting the BCA, the following clauses in the introduction to the BCA are relevant:

1.1.7 Interpretation of diagrams
Diagrams in the *Housing Provisions* are used to describe specific issues reference [sic] in the associated text. They are not to be construed as containing all design information that is *required* for that particular building element or situation.

Explanatory information:
Diagrams are used to explain the requirements of a particular clause. To ensure the context of the requirement is clearly understood, adjacent construction elements of the building that would normally be required in that particular situation are not always shown. Accordingly, aspects of a diagram that are not shown should not be interpreted as meaning these construction details are not *required*. [Emphasis added]

133 The loose-leaf commentary on the BCA published by LexisNexis on this clause states as follows:

> "…the interpretation of BCA diagrams is often problematic. In regards to the BCA interpretation hierarchy, a diagram is used to explain the requirements of a particular clause. The diagrams cannot be interpreted in isolation of the initiating clause. The correct steps for reading a diagram are as follows:
>
> Step 1 read the initiating clause.
>
> Step 2 refer to the diagram to interpret the requirements of that clause…"[16] [Emphasis added]

134 Further, the LexisNexis commentary provides the following comments on subclause 12.1.1.2(c):

> "The BCA requirements for roofs include a number of important concepts that must be understood as follows: …
>
> (c) subclause (c) introduces a requirement for a thermal break when a metal roof is fixed directly to a metal frame. This is to reduce the effect of thermal bridging which travels through the metal components and can have a significant impact on the effectiveness of the roof insulation. The thermal break material must achieve the required R-Value and essentially acts as a buffer to slow the transfer of heat from the inside to outside of the building. A thermal break is not required where a suspended ceiling lining has been installed or the ceiling lining is fixed to timber battens."[17] [Emphasis added]

135 The BCA also contains the following clause regarding the interpretation of Explanatory Information:

[16] At page 100,223
[17] At page 170,262

> **1.1.8 Explanatory information**
> These elements of the *Housing Provisions* are non-mandatory. They are used to provide additional guidance on the application of the particular Parts and clauses and do not need to be followed to meet the requirements of the *Housing Provisions.* The ABCB gives no warranty or guarantee that the Explanatory Information is correct or complete…" [Emphasis added]

Accordingly, to the extent that the Explanatory Information contradicts he clause, I prefer the meaning of the clause.

136 Further, although subclause 3.12.1.1(c) refers to Figure 3.12.1.1(b), subclause 3.12.1.1(d) refers to Figure 3.12.1.1 as a whole – which includes both images and more.

137 Based on the method of interpretation set out in the BCA, and the LexisNexis commentary, I am satisfied that the requirement for a thermal break applies to all metal roofs where there is only metal framework (including metal purlins, rafters, battens, clips) between it and the plaster ceiling below. For the clause to apply only to the type of roof depicted in Figure (b) would make a nonsense of subclause (c). The purpose of the thermal break is set out clearly in the BCA. The roof depicted in Figure (a) will allow the transfer of heat from the habitable room through the ceiling plaster by travelling through the metal components above.

138 Further, the Explanatory Information is a guide only; it is the clause itself which contains the requirement. In any event, the Explanatory Information refers to all images in Figure 3.12.1.1, which includes the Figure (a).

Amount allowed

139 I will allow $40,261 for this claim, made up as follows:

a) External walls - agreed		$22,473.59
c) Roofs - agreed		$3,484.35
		25,958.00
Contingencies, margin, etc. as agreed	41%	10,642.75
		36,601.00
GST	10%	3,660.00
	Total	**40,261.00**

7) Sarking membrane - inadequate installation

140 The experts agreed that the rectification of this item is included as part of the works allowed at item 6.

8) Pitch of metal skillion roofs

141 Mr Maher is of the view that the pitch of both metal skillion roofs fails to comply with the required pitch of 2°. He provided a photograph showing he had tested the pitch in one area of the south roof and it was 1.8°. He said he has measured the north roof and the pitch was worse. Mr Ryan agreed that

the required pitch is 2°, and he took a number of measurements of the south roof and found that the pitch of that roof varied between 1.7° and 2.1°. He conceded that the roof did not strictly reach the required pitch, but said the difference was negligible, and could be due to factors such as movement since construction, thermal expansion and deflection of the structure. Further, he said there is no evidence of water ponding on the roof sheeting and the south side metal roof appears to be performing as intended. He was not able to inspect the north side roof.

142 As a result of my decision above that the roofs must be removed and replaced to install thermal breaks, much of the cost of this item falls away. The parties agreed that if I were to require the pitch to be adjusted, the method of doing so would be to install battens when the roof is replaced after the thermal breaks are installed. They agreed that the cost of doing this is $868 for both the north and south skillion roofs (excluding margin, contingencies, GST).

143 I am satisfied that the failure to achieve a roof pitch of 2° is a breach by JGK of the warranties implied into the contract. I am also satisfied that the Owners have suffered damage by reason of this breach, based on my findings that it is more likely than not that the water damage in bedroom 3 was caused by defects in the roof, which include the inadequate fall.

144 I accept that both the north and south roofs require rectification, based on Mr Maher's evidence that he took measurements of the north roof which revealed that its pitch was less compliant than the south roof. This is tangible evidence, as opposed to the claim at item 4 for defects in the north roof, which I did not accept because Mr Maher could only say it was likely that the defects had been duplicated in both roofs.

145 I will allow $1346 for this item, calculated as follows:

Battens to north and south roof – agreed quantum		$868.00
Contingencies, margin, etc. as agreed	41%	356.00
		1224.00
GST	10%	122.00
	Total	**1346.00**

9) Shower recess water egress

146 During the site inspection, the shower was turned on while we stood underneath the house in the subfloor area. After a few minutes, water began dripping through the particleboard flooring above our heads, directly underneath the location of the preformed shower base. The water was visible running down the outside of the water supply pipes where they penetrated the flooring, and was also visible as drips coming through the flooring itself. Continuing the inspection inside the house, Mr Maher put a flexible camera inside the wall cavity adjacent to the shower. Water was evident on the floor of the cavity.

147 Following the view, Mr Ryan agreed with Mr Maher that this is a defect. JGK did not dispute liability, as the defect was due to the method of construction, but said I should prefer Mr Ryan's estimate of rectification costs over the Owners' experts. Mr Ryan's opinion was that there was no evidence of structural damage in the bathroom, either from the subfloor or through the inspection holes cut into the cavity behind the shower. Mr Maher's concern was that there may be structural damage that cannot be seen, particularly if there has been seven years of moisture affecting the particleboard flooring. Mr Ryan said that he would expect to have seen signs of damage after seven years, such as exfoliation of the particleboard.

148 Based on his concerns, Mr Maher has allowed to strip out and replace much of the bathroom, including:

a. remove, set aside for reinstallation and reinstall the door, the vanity unit including basin and tapware, the shower screen, corner shelf unit and shower tap ware, the bath and bath tap ware, the wall mounted towel rails and all electrical fixtures;

b. remove existing, supply and install new vanity mirror;

c. remove existing, supply and install new shower base;

d. remove existing, supply and install new architraves to the door and window openings;

e. remove existing, supply and install new wall linings to the existing tiled areas of the room;

f. apply a new waterproof membrane to the entire room;

g. remove existing, supply and install new wall and floor tiling similar to existing;

h. decommission and recommission electricity and water;

i. painting and clean-up.

149 Ms Dalla Rosa provided an itemised estimate of the cost of that scope of work, which totalled $10,177.16.

150 Mr Ryan's opinion was that the existing fittings, such as the shower base, vanity, towel rails, door, architraves, and the existing walls and floor should be left in place, and instead rectification work would be carried out only to the area around the shower base. He provided a scope of works, together with a sketch of his proposed method of rectification, which included:

a. remove shower screen, wall tiles, shower rose, taps and plaster to shower recess only;

b. supply and install stepped flashing sealed to shower base and fixed to wall (located behind the wall tiles);

c. replace 4 m² of wall sheeting;

d. allowance to waterproof walls within shower recess;

e. supply and install new wall tiles;

f. reinstall shower screen;

g. caulking, painting and clean-up.

151 Mr Ryan estimated that the scope of works would cost a total of $2780 excluding contingencies, margin and GST. He then allowed a 5% contingency in case structural damage was discovered. During the hearing, he conceded that that amount would not be enough if the sheet flooring has been damaged. In cross examination, he suggested that a contingency of $3000 may be appropriate, to allow for replacement of sheet flooring under the shower base (if necessary), with some waterproofing and retiling to join the existing.

152 Both experts agreed that the damage caused to the plaster in the hallway by cutting open inspection points must be repaired. Mr Ryan estimated $732.50 excluding contingencies, margin and GST for this work.

153 I accept Mr Ryan's opinion in respect of this item. There is no evidence of any structural damage visible from the subfloor, or from the inside of the wall cavity behind the shower. Had the leak been occurring for a sufficient period of time to cause structural damage, it is more likely than not that signs of that damage would have appeared, such as in the particleboard subfloor, in loose or drummy tiles, or in the flooring visible in the wall cavity.

154 In those circumstances, I do not find it reasonable to strip out and replace the whole bathroom. I will allow Mr Ryan's scope of works and the estimate of costs provided by him for that scope, together with the contingency he suggested of $3000, and the cost of repairing the hallway wall. I will allow a total of $9669.50 made up of the following:

1.	**Shower recess replacement**		**2780.00**
	Contingencies		3000.00
			5780.00
	Margin[18]	35%	2023.00
			7803.00
	GST	10%	780.00
		Total	**8583.00**

[18] As a separate amount has been allowed as the contingency for this item, I have not used the agreed figure of 41%, but instead used the experts' original figure for margin and overheads of 35%.

2.	**Repair of inspection points in hall**		**732.50**
	Contingencies per Mr Ryan	0%	-
			732.50
	Margin	35%	256.00
			988.50
	GST	10%	98.00
		Total	**1086.50**

10) Gas supply pipe not sheathed, and

11) Exhaust fan in bathroom not vented, and

12) Exhaust fan in toilet not vented, and

13) Rangehood not vented

155 It was agreed by all parties that JGK is liable for these four items and that the reasonable cost of rectifying them is $1304.75 (excluding margin, contingencies, GST). I will allow a total of $2024, calculated as follows:

Gas supply pipe, exhaust fans in bathroom and toilet, rangehood		$1305.00
Contingencies, margin, etc. as agreed	41%	535.00
		1840.00
GST	10%	184.00
	Total	**2024.00**

Reconciliation of claims for defects

1.	Garage ceiling - water damage and mould	$35,148.00
	Reimbursement of pergola roof	2609.50
2.	Rear garage wall - water damage and mould	930.50
4.	Bedroom 3 - water damage and mould	3,676.50
5.	Garage door opening - plaster damage	386.00
6.	Thermal breaks missing	40,261.00
8.	Pitch of skillion roof	1,346.00
9.	Shower leak	9669.50
10, 11, 12, 13	Gas supply pipe, exhaust fans in bathroom and toilet, rangehood	2,024.00
Total		**$96,051.00**

ORDERS

1. The respondent must pay to the applicant $96,051.00.

2. Interest, costs, and reimbursement of fees reserved with liberty to apply. I direct the principal registrar to list any such application before Senior Member Kirton for one hour.

3. The parties must file and serve any affidavit/s they wish to rely on in any application/s for costs and their calculations in respect of interest at least seven days before the hearing of the application/s.

SENIOR MEMBER S. KIRTON