Supreme Court

New South Wales

Case Name:	Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group ABN 62 971 068 965
Medium Neutral Citation:	[2023] NSWSC 343
Hearing Date(s):	6 – 9, 13 and 14 February 2023; further written submissions 20, 24 and 27 February, 10 March 2023
Date of Orders:	06 April 2023
Decision Date:	6 April 2023
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Builder not entitled to payment of invoices sued upon; Owners entitled to damages against Builder for incomplete and defective works; Owners entitled to Hungerfords interest; Owners' claim against director of Builder under Design and Building Practitioners Act 2020 not established
Catchwords:	BUILDING AND CONSTRUCTION – contract – damages – defects – whether builder entitled to payment of invoices sued upon – whether building work incomplete – whether building work defective – whether cost of rectifying defects proved – whether owners entitled to claim for Hungerfords interest – whether director in breach of the duty prescribed by the Design and Building Practitioners Act 2020 (NSW)
Legislation Cited:	Design and Building Practitioners Act 2020 (NSW) Environmental Planning and Assessment Act 1979 (NSW) Home Building Act 1989 (NSW)
Cases Cited:	Avonwood Homes Pty Ltd v Jaffer [2003] VCAT 443 Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2) [2022] NSWSC 1368

Clark v Boehm [2015] VCAT 1879
Concut Pty Ltd v Worrell [2000] HCA 64
Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd (2019) 101 NSWLR 679; [2019] NSWCA 185
Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3) [2012] VSC 99
Fulton v Dornwell (1885) 4 NZLR 207
Garzo v Liverpool / Campbelltown Christian School [2012] NSWCA 151
Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689
Hadley v Baxendale (1854) 9 Ex 341; 156 ER 145
Heavy Plant Leasing Pty Ltd (In Liquidation) v McConnell Dowell Constructors (Aust) Pty Ltd (No 2) [2022] NSWSC 1775
Houghton v Immer (No 155) Pty Ltd (1997) 44 NSWLR 46; [1997] NSWSC 608
Hungerfords v Walker (1989) 171 CLR 125; [1989] HCA 8
LJP Investments Pty Ltd & Anor v Howard Chia Investments Pty Ltd (1990) 24 NSWLR 499
Maples Winterview Pty Ltd v Liu & Anor [2015] ACTSC 58
McCartney & Ors v Orica Investments Pty Ltd & Ors [2011] NSWCA 337
Minister for Industrial Affairs v Civil Tech Pty Ltd [2003] SASC 393
Patel v Redmyre Group Limited [2021] NSWCATAP 132
Pooraka Holdings Pty Ltd v Participation Nominees Pty Ltd & Ors (1991) 58 SASR 184
Ratcliffe v Evans [1892] 2 QB 524
Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330; [2007] HCA 42
Sergienko v AXL Financial Pty Ltd [2019] NSWSC 1610
Serong v Dependable Developments Pty Ltd [2009] VCAT 760
Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574
The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659
The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2) [2021] NSWSC 1068

Texts Cited:	N Dennys and R Clay, Hudson's Building and Engineering Contracts (14th ed, 2020, Sweet & Maxwell) P Herzfeld and T Prince, Interpretation (2nd ed, 2020, Thomson Reuters)
Category:	Principal judgment
Parties:	Oxford (NSW) Pty Ltd (Plaintiff/First Cross Defendant) KR Properties Global Pty Ltd trading as AK Properties Group ABN 62 971 068 965 (First Defendant/First Cross Claimant) AS Coaching Pty Ltd atf Calm Properties Unit Trust ABN 19 756 796 114 trading as AK Properties Group ABN 62 971 068 965 (Second Defendant/Second Cross Claimant) Elankeeren Eswaran (Third Defendant/Third Cross Claimant) Ashay Sharma (Fourth Defendant/Fourth Cross Claimant) Pierre Kazzi (Second Cross Defendant)
Representation:	Counsel: T W Lynch SC with A Cameron (Plaintiff/Cross Defendants) J Horowitz (Defendants/Cross Claimants) Solicitors: Fortis Law Pty Limited (Plaintiff/Cross Defendants) Domain Legal Pty Limited (Defendants/Cross Claimants)
File Number(s):	2020/7703

JUDGMENT

1 On 12 November 2014, the first and second defendants ("together, the Owners") entered into a contract to purchase land in Noble Street in Gerringong ("the Land"). The sale settled on 21 October 2015.

2 In the meantime, on 8 October 2015, the Owners entered into a contract ("the Contract") with the plaintiff ("the Builder") pursuant to which the Builder agreed to obtain a construction certificate and thereafter construct a six-unit apartment

building ("the Building") on the Land in accordance with an existing and subsequently modified Development Consent.

3 The third and fourth defendants, Mr Elankeeren Eswaran and Mr Ashay Sharma, entered into a Deed of Guarantee and Indemnity with the Builder pursuant to which they guaranteed the fulfilment of the Owners' obligations under the Contract.

4 The sole director and shareholder of the Builder, Mr Pierre (known as "Peter") Kazzi, and the architect of the Building, Mr Patrick Mahedy, owned and developed the sites to the south and north of the Land. The developments on the three sites are now complete. They are contiguous.

5 The Builder brings these proceedings against the Owners and Messrs Eswaran and Sharma to recover the amounts claimed in nine invoices that the Builder served on the Owners during the course of construction. In the circumstances I describe below, the Builder does not press its case in relation to three of those invoices. For the reasons that follow, I have decided that the Builder is not entitled to payment for any of the invoices.

6 By way of Cross Claim, the Owners claim contractual damages from the Builder in relation to the costs incurred to complete the works, rectify defective works, and interest paid on borrowings used to fund the completion and rectification of the works. The Owners also bring a claim against Mr Kazzi, for damages under s 37 of the *Design and Building Practitioners Act 2020* (NSW) ("the DBP Act").

7 My conclusion is that the Owners have established an entitlement to damages from the Builder. The Owners have failed to establish their claim against Mr Kazzi personally.

The Contract

8 The Contract provided for a total price of $2,090,000 inclusive of GST.

9 The Contract price was broken down into:

(a) "Professional Fees" of $165,000 inclusive of GST; and

(b) "Build Fees" of $1,925,000 inclusive of GST.

10 Clause 15 provided for progress payments as follows:

> "15.2 The owner must pay the contract price progressively as claimed by the builder.
>
> 15.3 The builder must give the owner a written claim for progress payment for the substantial completion of each stage.
>
> 15.4 A progress claim is to state:
>
> a. the amount claimed and not paid for the stages substantially completed …"

11 The "stages" referred to in cll 15.3 and 15.4a were set out in Sch 2 of the Contract as follows:[1]

	Stage	Percentage
1	Deposit	5%
2	Bulk excavation basement level and site preparation	15%
3	Basement block work, ground floor transfer slab preparation including footings	10%
4	Pour ground floor slab	10%
5	Pour first floor slab	10%
6	Pour second floor slab	10%
7	Commencement of roof	10%
8	Internal linings complete, including electrical and plumbing rough-in	10%
9	Commencement of internal fit out including waterproofing, all ceramic tiling installed, interior and exterior painting completed	15%

[1] The parties referred to the stages as "Stages 1 to 10". I have numbered the stages accordingly.

10	Practical completion	5%
	Total $1,925,000.00 (incl. GST)	100%

Proper construction of the Contract

12 Two questions arose as to the proper construction of the Contract.

13 The first relates to the relationship between cll 15.2 and 15.3 and the description of Stage 9 in Sch 2 of the Contract.

14 It is common ground that there is a tension between, on the one hand, the provisions in cll 15.2 and 15.3 that the Owners pay the contract price "progressively" following "substantial completion of each stage" and, on the other hand, the description in Sch 2 of Stage 9 referring to the "commencement of internal fit out".

15 Generally speaking, where a document contains general and specific provisions concerning the same subject matter, it is assumed that the parties intend that the specific provisions will prevail over the general provisions to the extent of the inconsistency.[2]

16 However, Stage 9 continues by describing the "commencement of internal fit out" as "including waterproofing, all ceramic tiling installed, interior and exterior painting *completed*". (Emphasis added.)

17 The provision is awkward, but the better reading of it is that Stage 9 is not complete until internal fit out has been commenced *and* the waterproofing, ceramic tile installation and painting is completed; and not before.

18 The second issue concerned the question of the Builder's entitlement to payment for work done in Stage 9 if the work in earlier stages remained incomplete.

19 The Owners submitted that, on the proper construction of the Contract, payment for works in a particular stage could not be due until the preceding stages had been completed.

[2] See P Herzfeld and T Prince, Interpretation (2nd ed, 2020, Thomson Reuters) at [24.40] and the cases cited therein.

20 I agree.

21 The stages identified in the Contract were "intended to reflect the sequential completion of different aspects of the building".[3] I agree that "it is the nature of such a construction that the completion of one stage is, generally speaking, a precondition for the completion of the next" and that if a builder "does not demonstrate that each earlier stage has been completed [it] cannot show that a progress payment for a later stage was due".[4]

Mr Kazzi

22 Mr Kazzi was cross-examined over three days.

23 He presented as an evasive and unresponsive witness. He was often not prepared to address questions put to him and inclined to make what appeared to be baseless assertions in response to such questions. I give examples of this below.[5]

24 He also gave evidence that could not be reconciled with objectively established facts.

25 For example, one of the invoices on which the Builder sued was Invoice 691 dated 20 March 2018. The invoice claimed $14,916 (incl. GST) for "scaffold delay fees to date". In cross-examination, Mr Kazzi said that this scaffolding was "all over the shop" and that it was still in place on the date of the invoice, 20 March 2018. But photographs in evidence show that as of March 2018, the only scaffolding on-site was a small amount of scaffolding inside the Building and around the lift well.

26 Another invoice on which the Builder sued was Invoice 6915 with "date of issue" 19 March 2019. This invoice claimed $47,807.96 for "scaffold hire fees" from 20 March 2018 to 19 March 2019 at the rate of $4,000 per month. The Builder tendered a purported invoice dated 29 March 2019 from AM Scaffolding Pty Ltd ("AMS") to prove that the Builder had incurred the scaffolding fees referred to in Invoice 6915. The purported AMS invoice referred to building "scaffold as instructed as per plans" on 5 March 2018 and

[3] Maples Winterview Pty Ltd v Liu & Anor [2015] ACTSC 58 at [84] (Mossop AsJ, as his Honour then was).
[4] Ibid.
[5] See [46], [54], [61], [84] and [86] below.

dismantling the scaffold on 25 March 2019. But AMS was placed into liquidation on 3 January 2018, some 15 months before the date of the purported invoice and two months before the scaffold was allegedly built. The liquidator's records show that no payment was received from the Builder for scaffolding. Photographs in evidence show that there was no scaffolding erected at the site between March 2018 and March 2019, apart from a small amount of scaffolding inside around the lift well. It is clear that the purported AMS invoice, and the Builder's Invoice 6915 does not reflect the facts.

27 Another invoice on which the Builder sued was Invoice 6917 dated 19 March 2019 for $8,829.03. This invoice claimed "fence hire fees" from 28 February 2018 to 19 March 2019 at the rate of $700 per month. To prove that it had incurred these fees, the Builder tendered another purported invoice from AMS dated 29 March 2019. The purported AMS invoice referred to the erection of "temporary fencing" on 5 March 2018 and the removal of "temporary fencing" on 25 March 2019. Again, it is clear that this purported invoice does not reflect the facts. As I have said, AMS was placed into liquidation on 3 January 2018. The liquidator's records show that no payment was received from the Builder for fencing. Photographs in evidence show that at the relevant time the only fencing in place at the site was supplied by a different company, TFH Hire Services Pty Limited ("TFH Hire"). Invoices produced on subpoena by that company show that, at least from September 2018 (invoices were not available for earlier months), TFH Hire supplied temporary fencing to the site at a rate much lower than shown in the purported AMS invoice. In cross-examination, on behalf of the Owners, it was put to Mr Kazzi that photographs to which he was taken showed that the Builder had hired fencing from TFH. Mr Kazzi said that "we never hired from TFH". That evidence cannot be correct.

28 In closing submissions, without explanation, senior counsel for the Builder did not press the Builder's case concerning Invoices 691, 6915 or 6917, nor seek to justify the purported AMS invoices. The Builder thus implicitly, but clearly, accepted that these documents do not reflect the facts.

29 Mr Kazzi was not a reliable witness. I do not accept any evidence given by Mr Kazzi that is not corroborated by other objective evidence.

The Builder's purported suspension of works and the Owners' termination of the Contract

30 In the circumstances I set out below, on 20 March 2018, the Builder sent the Owners an email that, before me, the parties accepted constituted a purported suspension of works by the Builder.

31 The Builder was only entitled to suspend carrying out the works if the Owner was in breach of the Contract.[6]

32 There is a dispute as to whether the Owner was in breach of the Contract on 20 March 2018 and as to whether the Builder was entitled to suspend carrying out works. In any event, the Owners contend that the Builder resumed work after the purported suspension. I return to these matters below.

33 The Owners purported to terminate the Contract on 5 April 2019. The Builder disputes the Owners' entitlement to take this step. Again, I will return to this.

34 What is clear, however, is that the Builder left much work uncompleted.

35 It is also clear that much of the work done by the Builder was defective.

36 In closing submissions, the Builder barely contested these matters.

The incomplete building work

37 The Builder accepts that it did not complete the work specified in a document called "Appendix A - Schedule of Incomplete Building Works" prepared by Mr Mahedy, a copy of which is attached to these reasons.

38 The Builder also accepts "on the premise but without admission, that the [Owners'] claim for completion costs is wholly proved" and taking into account the amount that would otherwise have been payable to the Builder to complete the works, the amount payable by the Builder to the Owners for completion costs is $398,485.06 (excl. GST).

39 The Builder's caveat concerning the claim being "wholly proved" relates to the Builder's contention that the Owners have not proved what part of the costs they have admittedly incurred relates to completion of the works, as opposed to rectification of defects. I return to this below.

[6] Cl 32.1.

The defective work – major defects

40 As to defective work, in opening submissions counsel for the Owners submitted that the Building was "defectively constructed from top to bottom". That may be overstating matters somewhat, but the evidence does establish the existence of a significant number of defects. In closing submissions, this was barely contested by the Builder.

41 The following summary of those defects is largely drawn from the Owners' closing submissions.

42 Much of the evidence before me concerning the Builder's defective building work was given by Mr Mahedy. In addition to being the architect who designed the Building, Mr Mahedy was engaged by the Owners as supervisor of the works.

1 – Failure to build a shotcrete retaining wall along Noble Street boundary

43 Mr Kazzi agreed in cross-examination that the approved construction certificate plans required a retaining wall consisting of piers and shotcrete to be built along the western boundary of the site, facing Noble Street. He also agreed that the plans called for the balconies on the western side of the Building to be supported by those piers.

44 The Builder did not build the retaining wall or provide that support to the western balconies. Mr Kazzi's explanation was that "we got the other diagram which relies on a Rediwall system and cantilever the balconies [sic]".

45 The "Rediwall" system to which Mr Kazzi referred is a polymer-based permanent formwork system which, when filled with ready mixed concrete, creates a concrete wall.

46 There is no reference in any of Mr Kazzi's three affidavits to obtaining any "other diagram" that permitted the Builder to depart from the approved plans. In one of his affidavits, Mr Kazzi asserted that Mr Mahedy had "incorrectly interpreted" the engineering plans. I do not accept that evidence. Nor do I accept Mr Kazzi's evidence that there was some "other diagram". In any event, as the Owners submitted, the Builder was obliged to construct the Building in accordance with the approved construction certificate drawings.

2 – Boundary encroachments

47 There is no dispute that the Builder caused the Building to encroach on the lot to the north of the Property (being a lot owned by Mr Mahedy), the lot to the south of the Property (owned by Mr Kazzi) and the lot to the west of the Property (fronting Noble Street and owned by the local Council).

48 Mr Kazzi agreed that a builder is responsible for doing check surveys on each level of construction after the formwork has been put in place and before the concrete is poured to make sure that the Building is within the property boundaries.

49 Mr Kazzi also agreed that the Builder did not undertake check surveys but only set-out surveys.

50 In his affidavit evidence, Mr Kazzi asserted that the reason for the encroachments was that he had followed the subdivision survey provided to the Builder by the Owners.

51 But, as it accepted in closing submissions, the Builder was obliged to have conducted check surveys. The fact of the encroachments is something for which only the Builder was responsible.

3 – Change to basement perimeter load bearing walls

52 Mr Kazzi agreed that the approved plans required the basement walls to be constructed using concrete block work, and required them to be externally waterproofed.

53 Mr Kazzi claimed that he had approval to build the basement using Rediwall, and that the Rediwall system was certified by an engineer. But the certificate relied upon by Mr Kazzi did no more than certify that the structural integrity of the Rediwall had not been affected by the removal of the concrete wall encroaching onto Mr Mahedy's property to the north.

54 In his affidavit evidence, Mr Kazzi asserted that the Building Code of Australia did not require that a basement be waterproofed. However, during cross-examination, Mr Kazzi asserted that waterproofing of the joints in the basement walls had yet to be completed by the Builder, and was therefore incomplete, rather than defective, work. This cannot be correct. The walls were required to

be waterproofed externally, and the Owners were advised to cause the Builder's successor to excavate the ground around the corner junction of the western and southern perimeter walls to install the waterproofing.

4 – Entry foyer below Noble Street level

55 Mr Kazzi accepted during cross-examination that the Building Code of Australia required that there be street level access from Noble Street to the Building's entry foyer to the west, but that the Builder constructed the foyer slab below street level.

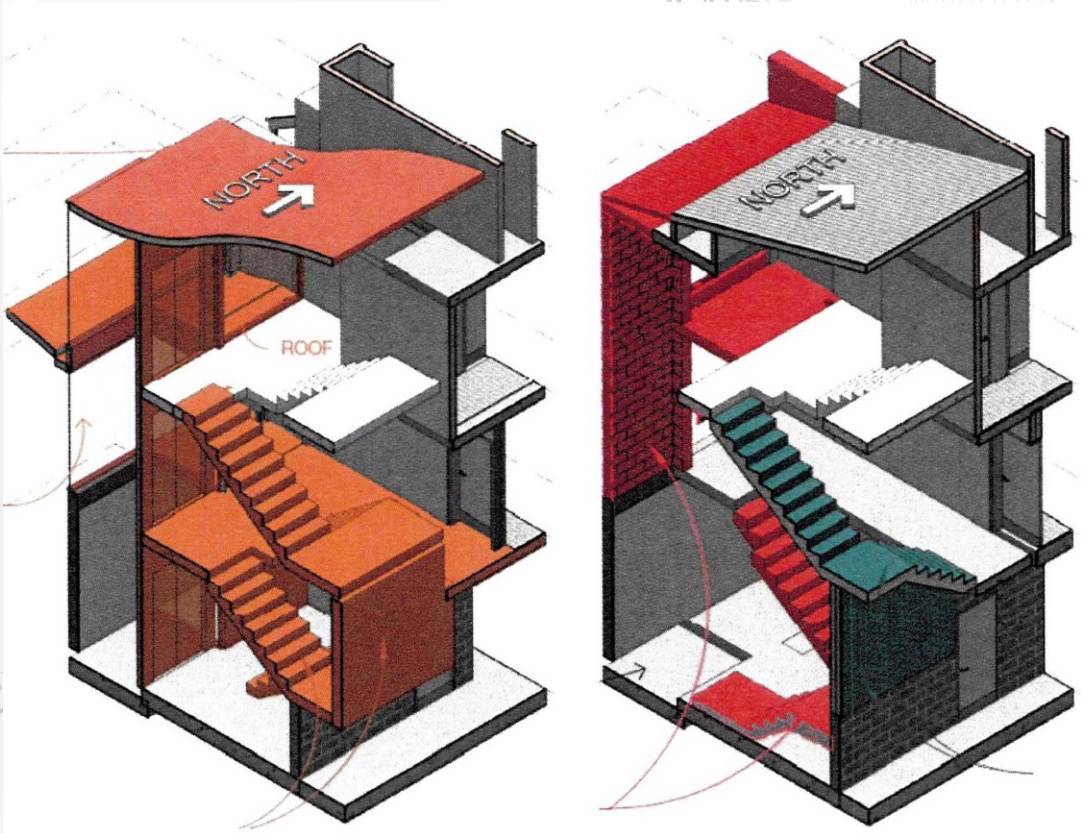
56 Mr Kazzi also agreed that the approved structural engineering plans required the surface of the western half of the ground floor slab, that is that closest to Noble Street, to be built 350mm higher than the eastern half; but that the Builder only built the surface of the western half of the ground floor slab 115 mm higher than the eastern half.

57 Mr Kazzi also agreed that the Builder had not undertaken any check surveys, one of the purposes of which was to ensure that the slab is at the correct level.

5 – Failure to construct foyer, façade and roof in accordance with Development Approval and construction certificate drawings

58 Mr Kazzi admitted during cross-examination that the Builder had constructed the foyer and stairs in a manner different to the construction certificate plans.

59 The dramatic difference between the foyer as designed and the foyer as built is illustrated by the following images created by Mr Mahedy:



Foyer as Designed

Foyer as Built

60 During cross-examination, Mr Kazzi asserted that the Builder did not build the stairs in accordance with the approved plans because they "didn't work … for the lift". However, in his affidavit evidence, Mr Kazzi said that he only found out that the lift supplier could not supply and install a lift to fit the dimensions of the constructed lift shaft in early November 2016, long after the foyer and stairs had been constructed.

61 Mr Kazzi asserted in cross-examination that the engineer, the private certifier and the architect were parties to a rearrangement of the foyer. There is no mention of any such arrangement in any of Mr Kazzi's affidavits. Nor is there any documentary evidence to support the assertion. I do not accept it.

62 The consequence of the Builder's failure to construct the foyer and stairs in accordance with the construction certificate drawings was that the façade of the Building, and much of the lower foyer, had to be demolished and rebuilt.

63 It also resulted in the deletion of the lift from the Building.

64 In his first report, Mr Mahedy gave this evidence, which I accept:

> "The stairs from the basement to the ground floor:
>
> • were built the wrong way around – the first flight going up was built to the south and the second flight going up was built to the north, instead of vice versa; and
>
> • were built 1.2 metres too far to the west.
>
> These defects resulted in there not being the minimum circulation area (approx. 1550mm x 1550mm) in front of the lift required by the BCA for disabled access."

65 As I discuss below, the certifier, Mr Lee Kippax, referred to this issue in an email he sent to the Builder on 18 November 2016:

> "You are also going to need a clear space of about *1550mm in front of the lift* to enable wheelchair manoeuvrability in and out of it." (Emphasis in original.)

66 Mr Kazzi appears to have acknowledged this difficulty in one of his affidavits where he said:

> "I knew that adjusting the dimensions of the lift shaft was problematic. I knew this because I was aware from my experience in the industry that *we needed to leave space in front of the lift to enable wheelchair manoeuvrability in and out of it, and that adjusting the dimensions of the lift shaft would encroach upon this space and have flow on effects for the stairwell in the foyer area in front of the entrance/exit to the lift*." (Emphasis added.)

67 Mr Kazzi also referred to this problem when he wrote to Mr Sharma on 1 December 2016:

> "… *we basically have to remove and reconstruct the stairways* and rebuild a whole new fire rated lift shaft …" (Emphasis added.)

68 Mr Mahedy explained that the consequence was:

> "Because there was no room to fit a [Building Code of Australia] compliant lift in the building as constructed by [the Builder], the lift and lift shaft had to be deleted from the building."

69 I return to this when discussing the events that led to the Builder's purported suspension of the works and the Owners' termination of the Contract.

6 – Failure to separate services passing through penetrations between separate fire compartments

70 The Building Code of Australia requires that electrical cabling be a minimum distance from gas and water pipes when passing through penetrations between separate fire compartments. However, the Builder bundled electrical cabling with gas pipes and water pipes through penetrations in walls and slabs between separate fire compartments.

71 These problems were rectified by a plumber engaged by the Owners. The Owners accept that this work should be characterised as incomplete work rather than defective work.

7 – Use of plastic pipes through penetrations between separate fire compartments

72 The Building Code of Australia requires metal pipes or PVC pipes with fire collars to be used through penetrations between separate fire compartments. The Builder used plastic pipes, for which no fire collars are available, for water and gas services through penetrations between separate fire compartments, such as between the entry foyer and the basement car park.

73 Again, these problems were rectified by a plumber engaged by the Owners and are accepted to be incomplete rather than defective work.

8 – Defective wiring in basement

74 Mr Kazzi accepted in cross-examination that the Builder had left electrical wiring hanging out of the walls and ceiling all over the development for a number of years.

75 Water leaked through the wall and slab penetrations into the Builder's temporary meter room in the basement. When the wiring in the basement was tested by an electrician, some was found to be unusable and to require replacement.

76 Mr Kazzi agreed that a builder doing a proper job would not leave wires hanging out of walls and ceilings for years, exposing the wires to the risk of corrosion.

9 – Failure to install fire-rated door jambs on basement and unit fire doors

77 The Builder failed to install fire-rated door jambs on the basement and unit fire doors. This was despite the fact that, as Mr Kazzi accepted, this was required by the Building Code of Australia and the construction certificate drawings.

10 – Concrete strength of ground and first floor slabs below structural engineer's specifications

78 In closing submissions, the Builder accepted that the concrete used in the ground and first floor slabs was below the structural engineer's specifications.

79 In cross-examination, Mr Kazzi asserted that he had arranged for on-site concrete testing to be done. Mr Kazzi made no mention of any such testing in any of his affidavits. If, as he asserted, such testing was done it did not have the result that the concrete poured was of adequate strength.

11 – Part of first floor concrete slab built to external brickwork

80 Mr Kazzi agreed that the first floor concrete slab was built contrary to the structural engineering drawings in that it had been built outside the brickwork such that the reinforcing steel within it was exposed to the elements.

12 – Pergolas constructed using materials not fit for purpose

81 The Builder constructed the eastern pergolas of units C1 to C6 and the western pergolas of units C3 and C4 using timber of the wrong durability for conditions close to breaking surf, such as existed on the site, and used inappropriate metal supports and fixings.

82 Mr Kazzi asserted that the pergolas were never intended to be exposed to the elements. Nonetheless, the Builder built the pergolas on the eastern balconies between June and September 2018 so that they were exposed to the elements and then simply left them there without enclosing them.

13 – Water and gas points installed too close to balcony balustrades, enabling children to climb and fall

83 In cross-examination, Mr Kazzi accepted that the water and gas points installed on the balconies were too close to the balustrades, so as to enable children to climb and fall over the balcony.

84 Mr Kazzi asserted that this work was incomplete because privacy screens were to be installed near the water and gas points which would have prevented children from climbing over the balconies. But no privacy screens are shown on the eastern balconies in the construction certificate drawings, as Mr Kazzi accepted. Nor was my attention drawn to any assertion to this effect by Mr Kazzi in his affidavits. The impression I gained when Mr Kazzi gave this evidence was that he was simply making it up.

14 – Leaking through double brick parapet wall

85 Mr Kazzi accepted in cross-examination that the double brick parapet walls should have contained flashings and weep holes to ensure that water did not leak through them into the Building.

86 Mr Kazzi first suggested that the double brick parapet walls did not need flashings or weep holes because they were to be rendered. He then asserted that no flashings or weep holes were necessary at all in parapet walls. Finally, after the luncheon adjournment on the relevant day, Mr Kazzi said that the double brick parapet walls did in fact have flashings and weep holes; an assertion absent from any of his affidavits. In re-examination he was asked to identify, by reference to a photograph, the location of the weep holes. He indicated, with red crosses on the relevant photograph, linear weep holes far below the parapets. Mr Kazzi appeared to me to be making up this evidence as he went along.

87 In any event, the Builder left the walls in a state where they were leaking for some 18 months.

15 – Failure to design or construct wheelchair access to Unit C1

88 The Builder constructed the foyer in such a way that it was not possible to provide an accessible wheelchair path from the foyer to the entrance of the Building.

89 This was despite the fact that on 30 June 2016, the Builder wrote to the certifier confirming that such an accessible path was required.

90 The result was that an alternative path had to be provided through the balcony door of unit C1.

16 – Failure to comply with fire resistance requirements

91 The Builder failed to comply with a number of the Building Code of Australia requirements in relation to fire resistance levels, including a failure to provide fire protection for the external walls of units C5 and C6, and to create a fire separation between the top level of the stairwell and unit C5.

The minor defects

92 The Owners also claimed compensation for "minor defects", only certain of which had costs associated with them, identified in a report by Mr David Tarlinton.

93 I did not understand there to be any dispute about these matters. The parties should confer and agree as to the consequences of the minor defects.

Events leading to the purported suspension of works by the Builder on 20 March 2018 – the lift issue

94 The Building, as originally designed by Mr Mahedy, was to have a lift from the carpark to the upper levels. Ultimately, no lift was installed. Much time was devoted to this issue at the hearing.

95 Prior to entering the Contract, the Owners sent to the Builder a schedule they had compiled for the Builder's predecessor. That schedule included the lift as "Liftshop – Freedomlift 2 or Alternative".

96 The Builder took up the Owners' suggestion that there could be an "alternative" to a Freedomlift and specified, in the schedule of inclusions in the Contract, that the lift be an "Orana MB 1015 Model or similar LIFT".

97 The Owners did not choose this lift.

98 On 29 April 2016, at the request of the Builder, Mr Brendon Mulkearns from the "Lift Shop" sent the Builder two quotations that had been prepared in 2015 for supplying an "Elfolift" to the Property. Those quotations contain detailed specifications setting out, amongst other things, the size of the Elfolift lift car and the lift shaft. The lift shaft was described as 1670mm wide x 1840mm deep (external) and 1550mm wide x 1740mm deep (internal).

99 Mr Kazzi accepted he received this information before pouring any of the concrete slabs. The basement slab was poured on 2 or 3 May 2016, the ground floor slab on 26 July or 3 August 2016 and the first floor slab on 10 October 2016.

100 Mr Kazzi said that the Builder constructed the lift shaft with an internal width of 1250mm and a depth of 1500mm and that this was as "approximately" specified in the "approved plans the subject of the construction certificate". Mr

Mahedy said that he measured the width of the shaft as built by the Builder and that it was 1250mm.

101 When challenged as to whether the lift shaft was built in accordance with the Lift Shop requirements, Mr Kazzi said he caused the Builder to build in accordance "with whatever [the] specs was".

102 In one of his affidavits, Mr Kazzi said that it was in early November 2016 that he learned that the Lift Shop "could not supply and install a lift at the Property to fit the dimensions of the constructed lift shaft". However, in April 2016 the Lift Shop had provided the Builder with the required internal shaft dimensions for the Elfolift (1550mm wide x 1740mm deep) which were larger than the lift shaft that the Builder subsequently built: 1250mm wide x 1500mm deep.

103 During cross-examination, Mr Horowitz asked Mr Kazzi when he realised that there was going to be a problem with the lift shaft. Mr Kazzi replied, "all along".

104 On 10 November 2016, Mr Kazzi wrote to Mr Mulkearns, stating that "moving forward I need the following of you please to satisfy all parties of the lift that's chosen" including "lift shaft internal dimensions" and "lift door opening dimensions".

105 On 16 November 2016, Mr Kazzi wrote to Mr Mulkearns, Mr Kippax and Mr Eswaran, stating "it's not the lift that's the problem it's the structure around the lift that we need to amend".

106 This was obviously correct, because the Builder had constructed the lift shaft with internal dimensions smaller than needed to accommodate the lift proposed by Mr Mulkearns.

107 The following day, 17 November 2016, Ms Chrissy Dodd, the Builder's project manager, wrote to the Owners:

> "Please be aware that the Lift Shop company cannot provide us with the lift that is required as the lift they have quoted us on is the most narrow they can do.
>
> We need to source another company that can provide a more narrow lift."

108 As I have set out earlier, Mr Kippax referred to this issue in an email he sent to the Builder on the following day.[7]

109 As I have also said, Mr Kazzi appeared to have acknowledged this difficulty in one of his affidavits.[8]

110 On 28 November 2016, Mr Kazzi wrote to Mr Kippax, "we are having slight problems with the lift situation on site" and requested a meeting "so we can commit with the appropriate lift company".

111 Mr Kippax replied the same day:

> "Please be aware that any opportunities to absorb additional inspections and time on this project have long gone.
>
> There have been multiple opportunities recently to discuss the lift on site …
>
> Please note, my scope is not to design the building for you, but to advise on compliance/DA matters. You will need your respective consultants to undertake their roles accordingly (including your architect)."

112 On 1 December 2016, Mr Sharma wrote to Mr Kazzi:

> "Thanks for meeting with Lee Kippax and Kieran [Eswaran] yesterday. To make changes to staircase and lift shaft and lodging s 96, will Kieran and I be up for any additional cost?"

113 Mr Kazzi replied the same day:

> "Yes. I am in the final stages of finalising with my engineer and architects, metal fabricators and lift company. We basically have to remove and reconstruct the stairways *and rebuild the whole new fire rated lift shaft*. I am hoping by tomorrow afternoon it will be finished. If not, you will have it by Monday …
>
> In the interim pls feel free to ask Patrick [Mahedy] on how and which commercial lift company he was planning to use to fit into the DA design and comply with all BCA, he might have a cheaper suitable option for all of us." (Emphasis added.)

114 On 4 December 2016, Mr Kazzi sent an email to the Owners with a "proposal of works" in relation to the lift shaft. Mr Kazzi stated that the lift dimensions on both the DA and construction certificate plans were 1500mm x 1500mm, that the "minimum lift car" was 1100mm x 1400mm and that the "minimum lift shaft size" was 1750mm x 2140mm. Mr Kazzi also said that the "fire stairs and landings need to be redesigned and redrawn" and that they needed "to be re-

[7] See [65].
[8] See [66].

engineered to create a new shaft opening size". Mr Kazzi provided a quotation of $71,480 for that work.

115 On 14 December 2016, Mr Sharma and Mr Kazzi had an email exchange in which Mr Sharma enquired "there are additional work for the lift that are included in your proposal … if we do not proceed with lift, these costs should also be deducted, correct?"

116 Mr Kazzi replied "correct but the majority of these works have been underway and undertaken to accommodate the new lift chosen by yourselves nearly 6 months ago".

117 Mr Sharma replied the same day stating:

> "We have not chosen a lift. I have mentioned this to you previously. We are not fussed on the lift as long as it fits BCA and cost allowance in your quote."

118 Mr Kazzi responded, again on the same day:

> " … we did what the lift shop requirements were according to the lift you have chosen …
>
> Furthermore you now know that the lift had to be redirected to comply and needed a landing in all fire requirements in accordance with obtaining final [occupation certificate] from certifier … I'm sorry I don't understand and cannot assist you any further, I'm not getting into an email war with you, you have enough information to determine progress."

119 On 15 December 2016, Mr Sharma wrote to Mr Kazzi:

> "As discussed we need to continue with a lift/service lift as buyers won't accept removing this. We also want to try keep total cost down so want to find a lift that fits within current shaft and budget.
>
> I have contacted another lift company. To provide a suitable model and quote, they have asked for following information. Can you please email this tomorrow?
>
> 1) Lift shaft
>
> Internal lift shaft width, we have now 1250 inside shaft [and] entry doors
>
> Internal lift shaft depth, we have 1450 but can go up to 1800 – 2 metres
>
> This means maximum internal [width and depth] … "

120 On 19 December 2016, Mr Kippax wrote to the Owners stating that the lift was required to be at least 1100mm wide x 1400mm deep.

121 Mr Kazzi said that in early January 2017 he had a conversation with Mr Mulkearns in the following terms:

> "[Mr Kazzi]: We are going to widen the lift shaft. What's the narrowest lift you can supply?
>
> [Mr Mulkearns]: It will have to be a custom lift. The shaft will need to be 1450mm by 1560mm.
>
> [Mr Kazzi]: Okay. I will confirm that shortly."

122 On 25 January 2017, Mr Kazzi and Mr Sharma had a meeting about what they both described as the "lift issue".

123 Mr Sharma's recollection of this conversation was as follows:

> "[Mr Sharma]: We need to resolve this lift issue. I have no idea what to do. You need to help me.
>
> [Mr Kazzi]: Leave it with me. Pay me $30,000 and I'll sort it out for you.
>
> [Mr Sharma]: Will there be any further variations?
>
> [Mr Kazzi]: No."

124 Mr Sharma said he consulted with Mr Eswaran and then had this conversation with Mr Kazzi:

> "[Mr Sharma]: Peter, we're okay to pay the $30,000 subject to no further variations and that *you'll fix up the whole foyer and find a lift that fits*. Also, we need you to confirm when this project will now finish.
>
> [Mr Kazzi]: Probably another three to four months we should be done." (Emphasis added.)

125 Mr Kazzi gave a different account of the conversation. Mr Kazzi said it started with words to the following effect:

> "[Mr Sharma]: How are we going to resolve this lift issue?
>
> [Mr Kazzi]: We will need to make some changes to the foyer. I'll confirm with the consultants, but we should be able to create a new opening to the shaft and create a new landing in the porch area. We will need to lodge a section 96 application for these changes.
>
> [Mr Sharma]: Do we know exactly how much this will all cost?
>
> [Mr Kazzi]: [It] will be about what I estimated last month. We will invoice for that later.
>
> [Mr Sharma]: Okay – as long as it all complies.
>
> [Mr Kazzi]: Leave it with me.
>
> [Mr Sharma]: Okay."

126 Mr Kazzi said the conversation continued:

> "[Mr Sharma]: How much are we up for in variations?
>
> [Mr Kazzi]: I'll have to get the figures – but let's say $30,000 for now.

> [Mr Sharma]: *Does the $30,000 include the changes to the lift shaft and the foyer?*
>
> [Mr Kazzi]: *No. It's just supply of materials for piers, windows, laundries and additional cost for finding the right lift.*
>
> [Mr Sharma]: Okay, I'll need to speak with [Mr Eswaran]." (Emphasis added.)

127 Mr Kazzi said that later, Mr Sharma telephoned him, after having spoken to Mr Eswaran, and that this conversation took place:

> "[Mr Sharma]: We're okay to pay the $30,000 for the variations to date and for finding the new lift. Is there going to be any more variations?
>
> [Mr Kazzi]: Not at the moment – only if something needs to be changed.
>
> [Mr Sharma]: Okay. When do you think the project will finish?
>
> [Mr Kazzi]: Once we get the section 96, probably another three to four months after that if we have good weather.
>
> [Mr Sharma]: Okay."

128 Had the evidence been left in a state where there was a conflict between Mr Sharma's recollection and Mr Kazzi's recollection, for the reasons I have set out above, I would have preferred Mr Sharma's recollection.

129 However, the matter is put beyond doubt by a number of documents.

130 The first is an email that Mr Sharma sent Mr Kazzi on 25 January 2017, immediately after their conversation.

131 In that email, Mr Sharma requested the Builder to send an invoice for $30,000 "to cover all variations".

132 Mr Sharma continued:

> "As per our phone conversation, you have confirmed that you (Oxford) will … be responsible for the selection of the appropriate lift, *amend staircase and shaft as needed* and ensure compliance with BCA codes and approval by certifier." (Emphasis added.)

133 Mr Kazzi replied to that email by writing "agreed".

134 That email provides contemporaneous confirmation that Mr Sharma's recollection of his conversation with Mr Kazzi is correct, and that their agreement concerning the further payment of $30,000 was that this sum would include the costs of amending the lift shaft "as needed".

135 Also on 25 January 2017, the Builder sent the Owner an invoice for $30,000 for:

> "*Final lift rectification variation*
>
> Supply and installation of lift to comply as per previous correspondence" (Emphasis added.)

136 The passage I have emphasised from the Builder's invoice of 25 January 2017 shows that, contrary to what Mr Kazzi claimed he said to Mr Sharma, the invoice amount of $30,000 was not for "just supply of material for piers, windows, laundries, and additional costs for finding the right lift" but was rather for, to adopt the language Mr Kazzi attributed to Mr Sharma, "the changes to the lift shaft and the foyer" – hence the words that Mr Kazzi used in the invoice: "final lift rectification variation".

137 Although no lift had been, or would be, installed, the Owners paid the $30,000 on 31 January 2017.

138 In the 25 January 2017 email exchange:

(a) Mr Sharma also sought confirmation that the Builder would reach practical completion by the end of April 2017, to which Mr Kazzi again responded "agreed"; and

(b) Mr Sharma sought confirmation that the Builder would lodge an application under what was then s 96[9] of the *Environmental Planning and Assessment Act 1979* (NSW), in relation to any amended staircase and lift shaft, to which Mr Kazzi responded "we are going to try and avoid section 96".

139 Also on 25 January 2017, Mr Mulkearns sent the Owners a "quotation … for the compliant hinged door lift" being an "E1 lift". That lift was stated to have a lift car size 1100mm x 1400mm and internal shaft size 1450mm x 1560mm. The quoted price was $65,750 plus GST.

140 Notwithstanding Mr Kazzi's statement on 25 January 2017 that "we are going to try and avoid section 96", on 17 March 2017 Ms Mirna Abdullah, described in correspondence as a managing director of the Builder, wrote to Mr Sharma:

> "I will have to arrange a lift for you sometime soon.
>
> You will need to lodge the Section 96."

141 Thus, the Builder accepted that, in order that for it to "amend [the] staircase and shaft as needed", the Owners would need to lodge a s 96 application.

[9] Now s 4.55.

142 Mr Sharma replied that same day asking "are you able to lodge the s 96 or did you want me to?", and "are we able to use your draftsman to … draw out the changes or are you able to arrange?"

143 Ms Abdullah replied saying that "our draftsman is away until mid-May on holidays, if you can wait until then we can talk to him upon his return" but that "if it's urgent then I suggest you find someone that can do it".

144 I have mentioned that, in the email exchange on 25 January 2017, Mr Kazzi confirmed that practical completion would take place by April 2017. April 2017 came and went without practical completion being achieved. It seems that work on the site ceased while the proposed s 96 application was being considered.

145 On 30 June 2017, the Builder sent the Owners a quotation of $13,700 for the "architect's price for the s 96 application".

146 On 10 July 2017, Mr Sharma wrote to Ms Dodd at the Builder asking her to "please confirm if the job is now on hold until we have council approval on the s 96 lodgement". Ms Dodd replied, "work will continue up to a certain point but it is in everyone's best interests to attend to the s 96 as soon as possible" and enquired as to whether the Owners wished the Builder's architect "to keep going or are you going to appoint someone else?"

147 It was common ground before me that the date for practical completion under the Contract was 4 July 2017. But, as was the case in April 2017, July came and went without practical completion being achieved.

148 Between July 2017 and March 2018 there were discussions about what should be included in the proposed s 96 application.

149 This included on 12 October 2017, when Ms Dodd wrote to the Owners and Mr Kippax:

> "Please note we need confirmation from Lee Kippax if wheelchair access is required, Yes or No.
>
> We are not yet in a position to finalise and lodge the s 96 and we need this information before it can be finalised.
>
> In relation to completion, this cannot be confirmed until the s 96 has been finalised.
>
> Completion will be 4 months after the approval of the Section 96 application."

150 Mr Kippax replied the same day saying, in effect, that one way or another, wheelchair access was required and that the s 96 application drawings should reflect whatever option was taken to provide for wheelchair access.

151 It appears that Mr Kazzi met with Council representatives to discuss the wheelchair access issue on 21 November 2017. Ms Dodd wrote to Mr Sharma and Mr Kippax the following day stating that once the Builder and the Council agreed on what was to be done, the Council would then "allow" the Owners to lodge a s 96 application and that "construction will commence on formal approval" of the s 96 application.

152 The proposed s 96 application was not finalised until 1 March 2018 on which date Ms Dodd, on behalf of the Builder, wrote to Mr Sharma enclosing "S96 plans and lodgement form for Kiama Council to enable you to lodge".

153 I was not taken to any evidence of what, if any, building work was done on the site during the period in which the s 96 application was evidently prepared, being between around July 2017 and March 2018. Nor was I taken to any evidence showing that the Owners were seeking to press the Builder to accelerate the progress of the s 96 application during this period.

154 In those circumstances, the Builder submitted that "the parties accepted that from about July 2017, pending approval of the s 96 application, there was very little that could be done towards completing the development" and that July 2017 "was implicitly or tacitly abandoned as the date for practical completion without another date having been agreed, and in any event a new date was dependent on the date of determination of the proposed s 96 application".

155 That may be a correct assessment of the situation, as far as it goes. But the reason for the s 96 application and the delay beyond July 2017 that was thereby caused was that, as Mr Kazzi agreed on 25 January 2017, the staircase and lift shaft had to be amended, this being a matter for which Mr Kazzi then agreed to be responsible, as part of the "variations" for which the Owners paid $30,000 on 31 January 2017.

156 And although Mr Kazzi then said "we are going to try and avoid making a s 96 application", Ms Abdullah said that one was necessary on 17 March 2017.[10] This was all caused by the Builder's failure to construct the foyer and stairs in accordance with the approved plans and its failure to construct the lift shaft with sufficient dimensions.

157 Nonetheless, it appears that the Owners had allowed the matter to drift in the period leading up to March 2018.

158 The Owners forwarded the proposed s 96 plans to Mr Kippax asking "can you please have a quick review to ensure you are happy before we formally submit to Council".

159 On 8 March 2018, evidently following discussions with Mr Kippax, the Owners wrote to the Builder stating:

> "Lift Size – the internal lift floor dimensions to be at least 1100mm wide x 1400mm deep. On the revised plans, the Width is 1,560 (which is fine) but the depth is 1,300. According to [Mr Kippax], the depth needs to be at least 1,400 so the drawings is [sic] 100mm short. Can the architect recheck (with [Mr Kazzi] etc) and update drawings …
>
> Appreciate if you can address these with the architect and resend drawings. We are planning to go Gerringong on Monday to physically do the submission".

160 On 14 March 2018 Mr Eswaran wrote to Ms Dodd at the Builder under the heading "Update on s 96 submission" asking whether the Builder's architect had "revised plans per … feedback from [Mr Kippax]" and said that "[Mr Sharma] and I will be going to submit the s 96 application but need the plans ASAP".

161 Ms Dodd replied on 14 March 2018 saying that Mr Kazzi "will discuss all of this with you at your meeting" and that "I will ensure all items are passed onto [Mr Kazzi for] his observation before then". Ms Dodd also contended that "these two items" (evidently referring to Mr Eswaran's 8 March 2018 email) had "nothing to do with the lodgement of your s 96".

162 There the proposed s 96 application rested.

[10] See [140].

163 Instead of engaging further with the Owners concerning the proposed s 96 application, and the matters raised in Mr Eswaran's 8 March 2018 email, on 20 March 2018, Ms Dodd on behalf of the Builder sent the Owners an email that before me the parties agree amounted to a purported suspension of the works by the Builder.

The purported suspension of works by the Builder

164 Ms Dodd's 20 March 2018 email read:

> "Attached please find invoices for your attention and immediate payment as works have already been completed at least 5 months ago.
>
> We need confirmation of actual payment dates urgently *so work can recommence.*
>
> Also please note the lift storage fees will be ongoing monthly until no longer required at the following rates: …. $935 per month.
>
> Please send me your payment confirmation as requested above." (Emphasis added.)

165 Ms Dodd attached three invoices to the email.

Invoice 6880

166 This invoice is one of those on which the Builder sues in its claim in these proceedings.

167 It is dated 3 November 2017 and seeks payment, as a variation, of $17,784 for fire compliance works in units C5 and C6. It described the work as:

> "Consultation with certifier in relation to internal fire compliance of units C5 and C6
>
> Consultation with Gyprocker in relation to fire compliance suggestions and method
>
> Supply and install extra (2 layers) double fire rated fire check sheeting to top floor units C5 and C6 walls and ceilings
>
> Supply and install cart, delivery and crane in accordance to compliance"

168 Mr Kazzi agreed in cross-examination that the construction certificate drawings specified that the Building was to be built with fire resistant construction in accordance with the relevant provisions of the Building Code of Australia, and that the Builder was required to construct according to those specifications.

169 Nonetheless, consistent with the claim in Invoice 6880 for a variation, Mr Kazzi claimed in cross-examination that building the external walls of units C5 and C6 was an item that did not fall within the Contract.

170 In cross-examination, Mr Kazzi contended that this work was an "extra" because:

> "This whole system has changed. It's not full brick. This is single timber skin. We amended the top floor, with the [O]wners. With a lightweight …. That's different to the plans".

171 But in his affidavit of 27 October 2021, Mr Kazzi said:

> " … the external walls of units C5 and C6 were constructed using timber and cladding (not brickwork) in accordance with the approved plans the subject of the construction certificate and could not achieve the required fire resistance level."

172 The work the subject of this invoice was not an "extra" but was work that the Builder was required to carry out under the Contract for the contract sum. The Builder was not entitled to claim the amount in this invoice as an extra.

Invoice 690

173 This is a further invoice on which the Builder sues in its claim in these proceedings.

174 It is dated 28 February 2018 and sought payment of $86,210 for 26 items of work.

175 In his affidavit of 27 July 2021, Mr Mahedy made the following observations about the work claimed to this invoice:

Item	Description	Comment
1	Entry Foyer: entry/exit – do we need to have wheelchair access from Noble Street?	This is a question, not work done
2	Create new main cupboards for NBN	Not built.

	and other associated bodies at entry foyer. 500x1200 approx.	
3	Create new exit eg. rest of stairs through first storage room and out to basement car park	Because Oxford built the stairs from the basement to the ground floor incorrectly, there was insufficient headroom in the stairwell to reach the stairs from the car park. To remedy this defect, Oxford cut a hole in a load bearing wall, which we had to fill in. …
4	New entry door to foyer stairs from basement	No door installed.
5	Amend entry foyer door to provide wheelchair access/lift	No work done.
6	Entry/exit to main entry foyers of Noble Street. Council, heights, ramps, accessibility needs to be determined by the certifier	No work done.
7	Adjust/repair stairs at entry	No work done.
8	Create landing on level C3/C4 to accommodate new lift	This landing was not built in accordance with the structural engineering drawings and was

	design for accessibility 2.5x1.5 approx.	demolished.
9	Create lift landing wall to support new slab	The concrete block wall supporting the slab referred to in the previous item was not built in accordance with the structural engineering drawings and was demolished.
10	Building brick hob to accommodate new design	The brick hob on the first floor was not built in accordance with the structural engineering drawings and was demolished.
11	Supply and install new glazing commercial fixed to new landing	The DA required the foyer façade to be glazed.
12	Re-cut and re-shape for new elevator entry/exit	This was rectification work arising from defects in Oxford's building works.
13	Create new water meter cupboards to landing in foyer	Not installed.
14	Create new communication cupboard on level 1 600x600	Not installed.
15	Create window to ensuite C5 and C6,	The DA plans show window in unit C5's ensuite. The window installed

	300x500	by Oxford in unit C6's ensuite did not comply with fire regulations and was dealt with in the Fire Engineering Report dated 19 December 2019.
16	Supply and co-ordinate fire screen to all openings of windows/doors within boundary as per PCA	Not installed.
17	Create laundry C1	The DA plans show a laundry in unit C1.
18	Create vanity shower toilet C1	The DA plans show a vanity, shower and toilet in both bathrooms of unit C1.
19	Remove entry doors to kitchen. Leave openings C1, C2, D1 and D2	D1 and D2 are units in the building at [x] Noble Street (owned by Mr Kazzi). No internal doors had been installed anywhere in units C1 or C2 as at 5 April 2019.
20	Remove cavity slider to wire C1	The DA plans show a cavity slider in unit C1 between the bedroom and ensuite, but the cavity slider could not be installed because Oxford built a solid brick wall – instead of a timber frame wall – where the cavity slider was supposed to be.
21	Create new entry	No door or door frame installed …

	door to ensuite C1	
22	Balconies – extra floor waste	There are two floor wastes on each of the eastern balconies. These are large balconies which warrant two floor wastes, and accordingly, these should have been installed as part of the original contract works.
23	Bathrooms – extra shower	There are no extra showers in any of the units, as compared to the DA plans.
24	Traffic Control	It is not known what this item relates to.
25	Foreman / Site Supervisor Fees	It is not known what this item relates to.
26	Site Amenities & associated costs	It is not known what this item relates to.

176 Objection was taken to some of the comments made by Mr Mahedy in this table. However, Mr Mahedy made a later affidavit in which he stated that his comments were based upon his inspection and observation of the works, and what the Builder had and had not built and installed. Mr Mahedy was not challenged about these matters in cross-examination.

177 Further, in so far as this invoice sought payment for lift rectification works, the Owners had already paid the Builder $30,000 for the 25 January 2017 invoice for the "final lift rectification variation" to which I have referred at [135] above.

Invoice 691

178 This is the invoice to which I referred at [25] claiming $14,916 for "scaffold delay fees to date" in circumstances where the scaffolding was allegedly present as at the date of the invoice, 20 March 2018.

179 It is also one of the invoices upon which the Builder sued in these proceedings.

180 As I have said, in closing submissions the Builder did not press its claim in respect of this invoice.[11]

181 It must follow that it could not have provided a legitimate basis upon which the Builder could purport to suspend works on the site.

182 For that reason alone, the purported suspension of works was not effective.

Invoices 685 and 686

183 In closing submissions, the Builder also relied on the Owners' non-payment of Invoices 685 and 686. These invoices were not referred to in the Builder's purported notice of suspension.

184 Each of Invoices 685 and 686 was dated 1 June 2017.

185 Invoice 685 was for $75,000 and was stated to be for:

> "Progress Claim - Commencement of internal fit out including waterproofing, all ceramic tiling installed, interior and exterior painting completed
>
> Stage 2: Due 13th June, 2017 as agreed"

186 Invoice 686 was for $63,750 and for:

> "Stage 3: Due on completion - Progress Claim - Commencement of internal fit out including waterproofing, all ceramic tiling installed, interior and exterior painting completed"

187 Thus, both invoices recited the description given in the Contract for Stage 9.[12]

188 I have found that the better reading of the Contract is that Stage 9 was not completed until all waterproofing, ceramic tiling and painting had been completed; and not before.[13]

189 It is common ground that, as at 20 March 2018, the Builder had not completed all ceramic tiling and painting.

190 In any event, there is no dispute that, as at the date of Invoices 685 and 686, 1 June 2017, and as at the date of the purported suspension of works, 20 March

[11] See [28].
[12] See [11].
[13] See [17].

2018, the Builder had not completed Stage 8 of the works: internal linings, including electrical and plumbing rough-in.

191 For the reasons I have set out, on the proper construction of the Contract, payment for works in Stage 9 was not due until the preceding stage, Stage 8, had been completed.[14]

192 Further, the Owners had paid the Builder $192,500 for Stage 8,[15] despite the fact that Stage 8 was not complete. The Owners were therefore, in effect, in credit by at least $192,500 with the Builder.

193 Accordingly, even if Invoices 685 and 686 were payable on 13 June 2017, the Owners were sufficiently in credit with the Builder that they were not required to make any further payment in respect of that invoice.

194 As for Invoice 686, it stated on its face that the amount claimed was "due on completion". There is no dispute that Stage 9 was not completed.

195 Thus, the Builder was not entitled to payment for any of the invoices upon which it relied to suspend works. It was therefore not entitled to suspend the works.

Resumption of work by the Builder

196 In any event, the Builder resumed work on the site after its purported suspension of the works.

197 In one of his affidavits, Mr Kazzi said:

> "In the period from June 2018 to August 2018, [the Builder] completed some minor work at the Property within the context of without prejudice negotiations [between the parties' solicitors] in good faith. However these negotiations were ultimately unsuccessful and none of [the Builder's] invoices were paid."

198 In cross-examination, Mr Kazzi agreed that the "minor" work done between June and September 2018 included laying tiles in the units and on the balconies, installing joinery carcasses in most of the kitchens, building pergolas on the eastern balconies, and the conducting of a waterproofing inspection by Mr Kippax.

199 The work was hardly "minor".

---

[14] See [21].
[15] Invoice 657.

200 Mr Eswaran gave unchallenged evidence that this work was done by the Builder without providing any notice to the Owners and that such without prejudice negotiations as were then being carried out did not result in any agreement being reached between the Builder and the Owners concerning any further works to be undertaken.

201 By returning to the site and doing this work, the Builder waived such entitlement as it might otherwise have had to rely upon its purported 20 March 2018 suspension of the works.

Conclusion concerning the Builder's purported suspension of the works

202 Clause 32.1 of the Contract entitled the Builder to suspend the carrying out of the works if the Owners were in breach of the Contract.

203 The breach of contract relied upon by the Builder was the non-payment of the invoices to which I have referred. For the reasons I have set out, the Builder has not established any such breach.

204 Accordingly, the Builder was not entitled to suspend the works.

Events thereafter

205 On 23 March 2018, three days after the Builder's purported suspension of works, the Owners engaged a quantity surveyor, Mr John Portelli, to "determine how much work has actually be completed" on the Land. It appears this step was taken at the insistence of the Owners' financier, National Australia Bank Limited ("NAB").

206 Thereafter, as I have said, the Builder returned to the site and did further work.

207 There were, evidently, also discussions between the parties as to the possible completion of the project. Thus, on 23 August 2018, the Builder's solicitor wrote to the Owners' solicitor stating that "I understand that our clients have been in recent discussions and that there is an agreement of sorts re the finalisation of this project".

208 There was delay in production of Mr Portelli's report as quantity surveyor of the project.

209 Much of the delay is unexplained.

210 The Report that Mr Portelli ultimately delivered on 6 March 2019 recorded that he had inspected the site on 27 March 2018 and again on 17 December 2018.

211 However, on 6 December 2018, the Owners' solicitor wrote to the Builder's solicitor stating that "our client has been in contact with the QS and is trying to arrange an inspection. We will let you know when we have the available dates for the QS".

212 The Builder's solicitor replied the same day saying that this was "insufficient" and that "it is now more than three weeks since I invited your client and his consultant QS to inspect the site and finalise its position".

213 The Owners did not enter a costs agreement with Mr Portelli's company until 6 February 2019, on which date they accepted Mr Portelli's fee proposal of 9 January 2019.

214 On 19 February 2019, the Builder's solicitor wrote to the Owners' solicitor stating "we continue to await the report from the QS".

215 As I have said, Mr Portelli's report was ultimately delivered on 6 March 2019. I received evidence only of the fact of that report and the accuracy of the photographs referred to in it. Those photographs confirm that, as is now common ground, a substantial amount of work remained to be done.

Termination of the Contract

216 Clause 33 of the Contract entitled either party to terminate the Contract for "substantial breach".

217 In the case of the Builder, a substantial breach included suspending carrying out of the works otherwise than as provided for in cl 32, that is, following a breach of the contract by the Owners.

218 It follows from the Builder's purported and unwarranted suspension of the works that the Builder was in substantial breach of the Contract.

219 Subclause 33.3 of the Contract provided that if a party was in substantial breach of the Contract, the other party could give the party in breach a notice stating the "details of the breach". Subclause 33.3 also provided that if the

breach was not remedied, the party "giving the notice of default may end this contract by giving a further written notice to that effect".

220 The Owners gave the Builder such a notice on 22 May 2018 but did not act on it.

221 As I have set out above, between June and September 2018 the Builder did some work on the site.

222 However, by October 2018 the Builder had ceased all work on the site. Mr Eswaran said that between October 2018 and March 2019 he made regular visits to the property but on no occasion saw workers on the site nor saw any progress made to the building works.

223 My attention was not drawn to what, if any, communications took place between the parties during this period.

224 The Owners gave the Builder a further notice of breach on 20 March 2019.

225 In its letter of 20 March 2019, the Owners stated:

> "[The Builder] has effectively suspended the Building Works as there has been no one on Site since March 2018 with only minor works having been completed since this date. No one on site since September 2018. No formal notice to suspend the Building Works has been provided pursuant to clause 32."

226 The Owners' letter went on to explain why the invoices named in the purported notice of suspension, Invoices 680, 690 and 691, were not payable.

227 The Owners continued:

> "In light of the above, [the Builder] is not entitled to suspend the works, nor has it done so in accordance with clause 32 of the Building Contract. As a result, [the Builder] is in **substantial breach** as expressly set out in clause 33.1(b) of the Building Contract, as it has suspended '*the carrying out of the Building Works other than under Clause 32*'. Additionally, [the Builder] is also in **substantial breach** of the Building Contract by both failing to undertake the works with due diligence or reach practical completion by the date of practical completion (clause 38.1(d)).
>
> We note that clause 33.1 does not seek to exhaustively define what a 'substantial breach' is, it only seeks to list two of these items as it states, 'includes but is not limited to'. Accordingly, [the Owners'] position is that [the Builder] is also in substantial breach pursuant to clause 33.1 by failing to complete the works within a reasonable time given the works are now at least 21 months late in reaching practical completion.

> In accordance with clause 33.3(b), we put [the Builder] on notice that if it does not resume the Building Works immediately and provide a detailed program showing how [the Builder] rectify major defects and reach practical completion with a reasonable time which is satisfactory to [the Owner] within 10 working days, we reserve our right to issue a further notice terminating the Building Contract in accordance with clause 33.4." (Emphasis in original.)

228 It can be seen in the final paragraph that I have set out, the Owners required the Builder to resume work immediately "and provide a detailed program" showing how it proposed to rectify major defects and reach practical completion.

229 The Builder submitted that the Owners had no contractual entitlement to require such a "detailed program" and the inclusion of such a requirement in its letter somehow vitiated or rendered ineffective the Owners' subsequent termination of the Contract relying on the "details of the breach" given in the 20 March 2019 letter.

230 I see no basis for that submission and to the extent that there is support for it in the authority to which counsel for the Builder referred,[16] I do not agree with it.

231 In closing submissions, the Builder submitted that assuming that the default notice was effective, its effect was only to require the Builder to resume work on the site and that this was a matter relevant to the Owners' claim for delay damages. I will return to this below.

232 On 28 March 2019 the Builder, by its solicitor, responded to the Owners' default notice of 21 March 2019 by stating that:

(a) the Builder had completed "all but the final stage of the contract works" set out in the schedule to the Contract and that, accordingly, "all amounts up to that point are payable";

(b) the only major building works remaining to be completed were:

(i) installation of lighting;

(ii) installation of toilets, sinks and benchtops in bathrooms and kitchens;

(iii) hanging doors;

(iv) installation of the lift;

(v) completion of the common areas; and

[16] Patel v Redmyre Group Limited [2021] NSWCATAP 132 at [35] (F Marks, Principal Member and D Robertson, Senior Member).

(vi) completion of works relevant to the NBN; and

(c) it was not appropriate to require any defects to be rectified before completion of the works.

233 These statements were not correct.

234 The Builder had not completed all but the final stage of the build,[17] as the Builder's statement as to the major building works remaining appeared to acknowledge. As I have said, it is now common ground that much work remained uncompleted at this stage.

235 And, contrary to the final statement made in the Builder's letter, it obviously *was* appropriate to require the defects to be rectified before completion of the works.

236 Subclause 33.4 of the Contract provided that if 10 days had passed since notice of default was given pursuant to subcl 33.3, "the party giving the notice of default may end this contract by giving a further written notice to that effect".

237 On 5 April 2019, the Owners gave the Builder such a written notice.

238 The Owners' letter stated that:

(a) a number of items had not been built in accordance with the construction certificate;

(b) some of the major defects in the building works included:

(i) the concrete basement stairs and landing were built in the wrong location;

(ii) the entry foyer was constructed at least 350mm below the level of Noble Street and the adjoining footpath;

(iii) windows and sliding doors were non-compliant;

(iv) the eastern and western terraces were unfinished and without roofing or linings;

(v) the kitchen joinery cabinets were not installed correctly, nor were there any shelving units to any robes or fixout of skirtings;

(vi) the painting had not been completed throughout the Building;

(vii) there were no doors, locks or fittings of any kind installed in the Building; and

[17] Achieving practical completion.

(viii) the ventilating garage door and ventilation grills were not installed;

(c) the Owners had been advised that it would take approximately six months to complete the works;

(d) the Builder had failed to remedy its defaults, as set out in the Owners' default notice, or demonstrated that it was ready, willing and able to complete the works; and

(e) as a result, the Owners were terminating the Contract immediately.

239 The Builder contended that this notice was ineffective by reason of not being served within a reasonable time of the breaches relied on.[18] That submission was not developed. In any event, the delay is explained in the evidence. As I have set out, following the Builder's purported suspension of the works on 20 March 2018, the Owners engaged a quantity surveyor to express an opinion as to the amount of work that had been completed. It is now common ground that a significant amount of work was incomplete; as the quantity surveyor ultimately opined. The Owners acted promptly after the quantity surveyor's report was ultimately received on 6 March 2019. Further, in the meantime, there had evidently been discussions between the parties. I am not satisfied that the Owners' notice of termination was ineffective by reason of the effluxion of time since the breaches relied on.

240 Thereafter, the Owners caused the building works to be completed.

241 The Owners obtained an occupation certificate for the Building on or about 29 June 2020. The strata plan was registered at about that time. It was only then that the Owners were able to give effect to pre-sales of the six units in the Building.

242 The six units in the Building have now been sold.

The claim against the Builder

243 I have found that:

(a) the Builder did not complete the works;

(b) the Builder performed much of the work defectively;

[18] Referring to Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd (2019) 101 NSWLR 679; [2019] NSWCA 185 at [99]-[111] (Bell P, as the Chief Justice then was).

(c) the Builder purported to, but was not entitled to, suspend the works; and

(d) the Owners were entitled to terminate the Contract.

244 Clause 36.1 of the Contract provided that if the Owners ended the Contract under cl 33 they "must complete the building works and keep records of the costs incurred".

245 Clause 36.2 of the Contract obliges the Owners to "take all reasonable steps to minimise the cost of completing the building works".

246 Clause 36.4 provided that if, as is the case here, the costs incurred by the Owners were more than the unpaid balance of the Contract price, the Builder "must pay the difference to the [Owners]."

247 Clause 38 of the Contract contained a warranty by the Builder that the "building works [would] be performed in a proper and workmanlike manner and in accordance with the plans and specifications attached to the contract".

Damage

248 As I have said, the Owners claim $398,485.06 from the Builder for the cost of completing the work.[19]

249 The Owners also seek rectification costs of $420,719 from the Builder under the Contract. The Owners also seek to recover the rectification costs from Mr Kazzi under the DBP Act.

The methodology adopted by the Owners

250 The methodology adopted by the Owners to prove their loss was to engage Mr Mahedy to prepare a schedule, being a document called "Appendix C".

251 I attach the final iteration of that document to these reasons.

252 In Appendix C, Mr Mahedy set out all of the invoices received and paid by the Owners concerning the completion and rectification of the works, together with an allocation of the amount of those invoices to three categories:

(a) incomplete works relating to Stages 2 to 8;

(b) incomplete works relating to Stages 9 and 10; and

[19] See [38].

(c) rectification works.

253 The Builder does not dispute that the Owners have paid the invoices and amounts in Appendix C.

254 So far as the Owners' claim against the Builder is concerned, there is no significance in the distinction between payments in respect of completion of the works and payment in respect of rectification of the works. That is because the Builder was obliged both to complete the works and to rectify the defects to which I have referred.

255 The position is different in relation to Mr Kazzi because, as I discuss below, and as the Owners accept, the claim against him under s 37 of the DBP Act is, and can only be, in respect of defective works.

256 The Owners have not sought to prove the costs they have incurred by reference to the particular work that had to be completed nor to the 16 particular defects that I have set out.[20]

257 Rather, the Owners rely on the allocation made by Mr Mahedy of the amounts of particular invoices to incomplete works on the one hand, and rectification works on the other.

258 As can be seen from Appendix C, Mr Mahedy has first listed a large number of invoices commencing with an invoice dated 6 November 2019 from Integrity Locksmiths and concluding with an invoice of 3 February 2020 from Jean Metal Fabrication, and has, without explanation, allocated those invoice costs to either incomplete work or rectification work.

259 Mr Mahedy then listed a number of invoices from Shellharbour City Skip Bins that, again without explanation, Mr Mahedy has allocated 30% to incomplete work and 70% to rectification costs.

260 Mr Mahedy then dealt with a number of invoices for plumbing and, again without explanation, has allocated all of those costs to incomplete work.

[20] Other than in respect of a few, relatively insignificant, instances; for example, Mr Mahedy estimated the cost of rectifying defect 13 that I have discussed above, water and gas points being installed too close to the balcony balustrades, to have been approximately $1,000.

261 There then follow five invoices from a variety of service providers that, again without explanation, Mr Mahedy has allocated to either incomplete work or rectification work.

262 Mr Mahedy has then identified payments made for electrical works to Evison Little, totalling $101,993.50, in respect of which, without explanation, Mr Mahedy allocated $9,240.07 to rectification work. However, in supplementary submissions, Mr Horowitz has identified three invoices, totalling $5,596.18 which, on their face, appear to be in respect of rectification work.

263 Appendix C then refers to the fees paid to Mr Shayne Seage, the builder retained by the Owners to complete and rectify the work. Mr Seage's fees totalled some $216,000, the largest single item in Appendix C.

264 Mr Mahedy has allocated Mr Seage's fees 40% to completion works and 60% to rectification works.

265 In one of his affidavits, Mr Mahedy gave this explanation for this apportionment:

> "I made this apportionment based upon my intimate knowledge of the building works as both architect and project manager. I consider this to be a conservative apportionment, as the rectification work undertaken by Mr Seage and his workers took significantly more time – and used significantly more materials – than the completion works undertaken by them."

266 Appendix C then lists a variety of payments, including to labourers and painters, that Mr Mahedy has allocated to completion or rectification works, again without explanation.

267 Finally, Mr Mahedy has listed in Appendix C his project management fees.

268 Again without explanation, Mr Mahedy has apportioned these fees as being 60% towards completion works and 40% towards rectification works.

269 Mr Mahedy has not explained by what process of reasoning or analysis he has come to the conclusions stated concerning allocation of the costs incurred by the Owners to completion works on the one hand and rectification of defective works on the other. In some cases, he has simply asserted he has made the allocations based on his knowledge of the building works, including, in the case of Mr Seage, a sweeping statement that Mr Seage spent "significantly more"

time and materials on rectification than completion. In some cases, he has given no reasons at all.

270 It is true that the evidence reveals that Mr Mahedy had a very detailed involvement with the progress of the work, in the course of which he took detailed notes of his regular inspections of the works as they progressed.

271 But, as the Builder submitted, Mr Mahedy has not stated any of the implicit assumptions or material facts relied upon which informed his opinions and the allocations that he made.

272 The Builder did not object to the evidence that Mr Mahedy gave concerning his allocations, nor to Appendix C itself in which the allocations are set out. Mr Mahedy was not challenged in cross-examination about his allocations.

273 The question remains, however, as to what Mr Mahedy's evidence is capable of establishing, beyond the fact that he made the allocations in question.

Principles

274 The manner in which the Owners have sought to establish their loss must be considered in the light of judicial observations concerning the manner in which loss must be proved.

275 The general principle concerning proof of damages is:

> "As much certainty and particularity must be insisted on … in … proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."[21]

276 Mr Horowitz drew my attention to the observations of Dixon J in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)*.[22]

277 In that case, the expert retained on behalf of the party in the position of the Owners prepared a "costs to complete" report in which he apportioned the total costs to complete between "enhancement works", "rectification works" and "completion works".

278 The party in the position of the Builder challenged the expert's allocation.

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[21] Ratcliffe v Evans [1892] 2 QB 524 at 532-3 (Bowen LJ).
[22] [2012] VSC 99.

279 In that regard, his Honour said:

> "[The builder's] first challenge to this process was that it failed to sufficiently identify the costs of particular enhancements and rectification works. [The expert's] allocation of the total costs between rectification, costs to complete, and enhancements could not therefore be checked. A global assessment was impermissible and an item by item assessment of costs was necessary". [23]

280 His Honour then carefully analysed the expert's reasoning process and ultimately rejected the builder's challenge to the evidence, stating:

> "I reject [the builder's] assertion that all defects should have been individually costed, and [the party in the Owners' position] should have used an alternative method of cost management. It is not for the contract breaker to dictate, beyond the terms of the bargain that continue in force, how the innocent party responds to its breach." [24]

281 However, it is clear from his Honour's analysis that the expert report in that case was a good deal more sophisticated than the relevant parts of Mr Mahedy's reports in this case. The expert in *Dura* "excluded from the known total costs the enhancement costs and the assessed costs of completing the works, leaving the balance of the total costs necessarily attributable to rectification" works.[25] The expert also described his methodology as proceeding on "an elemental basis", meaning that he allocated costs to particular elements of the project,[26] which enabled his Honour to conclude that the expert reports were not, as the builder in that case alleged, arbitrary, but rather "applied a methodology in determining percentage allocations".[27] Further, in that case, the builder adduced evidence from its own expert. The builder's expert made a detailed response to the owner's expert report and expressed no reservations about, let alone challenged, the allocations made.[28]

282 Thus, the circumstances in *Dura* were very different to those in this case.

283 Mr Horowitz also referred to the observations of Handley JA[29] in *Houghton v Immer (No 155) Pty Ltd*:[30]

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[23] Ibid at [598].
[24] Ibid at [612].
[25] Ibid at [597].
[26] Ibid at [600].
[27] Ibid at [611].
[28] Ibid at [598].
[29] With whom Mason P and Beazley JA (as her Excellency then was) agreed.
[30] (1997) 44 NSWLR 46; [1997] NSWSC 608.

> "In my judgment the Court should assess the compensation in a robust manner, relying on the presumption against wrongdoers, the onus of proof, and resolving doubtful questions against the party 'whose actions have made an accurate determination so problematic'."[31]

284 Similarly, in *McCartney & Ors v Orica Investments Pty Ltd & Ors*,[32] it was said:

> "Where within the proved case there is a range … the wrongdoer can hardly complain if the loss is found at the upper end of the range."[33]

285 In *Heavy Plant Leasing Pty Ltd (In Liquidation) v McConnell Dowell Constructors (Aust) Pty Ltd (No 2)*,[34] albeit in the context of a dispute as to the reasonable costs of completing works, I referred to the observations of the New Zealand Supreme Court in *Fulton v Dornwell*:[35]

> "Now when a contractor gets into difficulties … and the employer is in consequence put to the extreme inconvenience and annoyance of having himself to complete the work I think *the employer should be allowed a large discretion in the way in which he completes it*, and that the contractor, in the absence of fraud or extreme negligence, *cannot complain if the work be carried out in an uneconomical manner*."[36] (Emphasis added.)

286 *Fulton v Dornwell* appears only to have been cited three other times in Australia and not in a superior court,[37] but appears to be accepted in the United Kingdom and in New Zealand and has also been cited with approval in Hudson's Building and Engineering Contracts.[38]

287 However, to repeat, those observations were made in the context of a dispute about the reasonable costs of completing works, whereas the question in this case is the extent to which the costs admittedly incurred by the Owners should be attributed to rectification of defects, rather than completion of the work. That is a vital distinction in relation to the Owners' claim against Mr Kazzi under s 37 of the DBP Act.

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[31] Ibid at [59], referring to LJP Investments Pty Ltd & Anor v Howard Chia Investments Pty Ltd (1990) 24 NSWLR 499 at 508 (Hodgson J).
[32] [2011] NSWCA 337.
[33] Ibid at [158] (Giles JA, with whom Macfarlan and Young JJA agreed).
[34] [2022] NSWSC 1775.
[35] (1885) 4 NZLR 207.
[36] Heavy Plant Leasing Pty Ltd (In Liquidation) v McConnell Dowell Constructors (Aust) Pty Ltd (No 2) (supra) at [456], citing Fulton v Dornwell (supra) at 210 (Williams J).
[37] It has been cited with approval in three Victorian Civil and Administrative Tribunal decisions: Avonwood Homes Pty Ltd v Jaffer [2003] VCAT 443 at [7.26] (R Young, Senior Member), Serong v Dependable Developments Pty Ltd [2009] VCAT 760 at [311]-[313] (M F Macnamara, Deputy President) and Clark v Boehm [2015] VCAT 1879 at [24]-[25] (E Riegler, Senior Member).
[38] N Dennys and R Clay, Hudson's Building and Engineering Contracts (14th ed, 2020, Sweet & Maxwell).

288 I accept that the Owners' methodology adopted to prove their loss in this case should be seen in light of those authorities.

289 I am prepared to accept Mr Mahedy's evidence as providing a basis for which to come to a conclusion on the *total* cost of completing and rectifying the work.

290 Thus, I am satisfied that the Owners, using Mr Mahedy's methodology, have established that the amount they have expended, as set out in Appendix C, should be accepted as representing the total of the reasonable costs of completing the works *and* rectifying the defective work.

291 I am not, however, persuaded that the evidence enables me to come to any conclusion as to what proportion of that total amount in Appendix C should be attributed to the cost of rectifying defective work, as opposed to completing the works. Mr Mahedy has not exposed his reasoning process on that question and, as the Builder submitted, were I simply to accept his conclusions, I too would come to an unreasoned conclusion.

292 As I set out below, this has serious implications for the Owners' claim against Mr Kazzi under the DBP Act.

293 On behalf of the Builder, a separate point was made that, for the most part, the Owners did not seek competing quotations for the work performed following termination of the Contract. However, I see no basis to conclude that the quotations sought and accepted were not reasonable. My attention was not directed to any evidence suggesting that was so. Nor can I see any basis for the Builder's complaint that Mr Mahedy charged project management fees that the Owners now seek to recover from the Builder. The Owners' engagement of Mr Mahedy as project manager appears to me to have been reasonable, especially in circumstances where the Builder engaged an employed project manager, Ms Dodd, who played an active part in the construction process.

The Court proceedings

294 Because of the encroachment onto Mr Kazzi's property to the south, it was necessary for the Owners to commence proceedings in this Court seeking an easement over Mr Kazzi's property to cure the encroachment. Those proceedings were settled upon the basis of Mr Kazzi agreeing to grant the

Owners an easement over his property in return for a payment of $15,000. The easement was registered on 15 July 2020. In addition to the $15,000 paid to Mr Kazzi, the Owners incurred costs and disbursements of $48,563. This was in circumstances where the encroachment of the Building onto Mr Kazzi's land was a direct result of the Builder having constructed the Building in that location.

295 The Owners claim these amounts from the Builder.

296 In closing written submissions, it was put on behalf of the Builder:

> "The [Owners'] entitlement to damages in respect of the easement granted to Mr Kazzi turns on who was responsible for the encroachment onto [Mr Kazzi's property]. The costs claimed are the entirety of the solicitor-client costs. That they were paid or payable does not establish that they were reasonable."

297 However, in closing oral submissions, that position was abandoned and senior counsel for the Builder said, in terms, "I don't wish to make any submissions about that". I took this to mean that the Builder accepts liability for these amounts.

Claim for interest

298 The Owners claim, as *Hungerfords v Walker*[39] damages, the interest they have had to pay as a result of the building works not being completed by 4 July 2017, being the date for practical completion under the Contract.

299 That claim is made on the basis that:

(a) the Owners took out various loans to fund the building works;

(b) the Owners sold a number of apartments in the building off the plan but could not settle the sale of those apartments until the defects in the building had been rectified and the Owners had obtained easements in relation to the encroachments on neighbouring land; and

(c) as a result, the Owners were unable to repay the loans until August and September 2020, rather than in July 2017.

300 The loans taken out by the Owners were from Messrs Eswaran and Sharma themselves, from the NAB and from Mr Sharma's father. The amount claimed by the Owner for interest is some $500,000, and thus comprises a significant part of the Owner's total claim. The precise calculation is set out in a document

[39] (1989) 171 CLR 125; [1989] HCA 8.

that I marked "MFI 6". Interest is calculated at a fixed rate of 4.5%. I understand that there is no dispute about the calculation of interest, as such.

301 The Builder submitted that "there is no occasion to consider this claim" because:

(1) the parties abandoned the initial date for practical completion and never fixed another;

(2) the Builder suspended the operation of the Contract on 20 March 2018.

302 However, as I have found, the fact that the date for practical completion came and went without the project in fact being completed was because of the manner in which the Builder wrongly constructed the foyer and stairway, leading to the s 96 application; which did not proceed because of the Builder's wrongful purported suspension of the works in March 2018.

303 These are all matters the responsibility for which lies with the Builder and are not matters which can, themselves, operate to deny the Owners an entitlement to common law interest.

304 An issue that divided the parties was whether any entitlement to *Hungerfords* interest was necessarily excluded by reason of cl 30 of the Contract, that provided:

> "30.1 If the building works do not reach practical completion by the end of the contract period the owner is entitled to liquidated damages in the sum specified in Item 13 of Schedule 1 for each working day after the end of the contract period to and including the earlier of;
>
> a. the date of practical completion;
>
> b. the date this contract is ended; or
>
> c. the date the owner takes possession of the site or any part of the site."

305 The sum specified at Item 13 of Sch 1 was "$200 per working day calculated on a daily basis".

306 The Builder submitted that the effect of this clause was to confine the Owners' claim for delay damages to the amount of $200 per working day and ending on the earlier of the three dates specified in the clause.

307 However, as the Owners pointed out, there is a "familiar principle of construction that clear words are needed to rebut the presumption that a

contracting party does not intend to abandon any remedies for breach of the contract arising by operation of law".[40]

308 It has thus been said:

> "So when one is concerned with a building contract, one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law … To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract."[41]

309 The Builder did not engage with this point.

310 I see no such "clear unequivocal words" in cl 30.

311 Indeed, cl 30 provides that the Owners are "entitled" to liquidated damages, suggesting that the parties intended that such entitlement be in addition to, and not in substitution for, such other rights as the Owners might have, including for *Hungerfords* interest.

312 For that reason, I do not accept the Builder's contention that, in effect, cl 30 has the effect of precluding the Owners' claim for *Hungerfords* interest.

313 I should add that the Owners did not suggest that they should be awarded *Hungerfords* interest *as well as* delay damages under cl 30. The Owners' claim, as developed in closing submissions, was for *Hungerfords* interest alone.

314 There is no suggestion in the evidence that, as at the date of the Contract, the Builder was aware that the Owners were borrowing funds to finance the development.

315 Indeed, the Contract stated, in terms, that the "contract price" was being "funded by" the Owners.[42]

316 However, very shortly after the date of the Contract the Builder became aware that the Owners had borrowed funds to finance the development; and well

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[40] Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574 at 585 (Lord Goff) and Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689 at 717 (Lord Diplock); cited with approval in Concut Pty Ltd v Worrell [2000] HCA 64 at [23] (Gleeson CJ, Gaudron and Gummow JJ); and see generally P Herzfeld and T Prince, Interpretation (supra) at [29.430].

[41] Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd (supra) at 718 (Lord Diplock).

[42] Item 7 in Sch 1.

before becoming in breach of the Contract by performing the works defectively, purporting to suspend the works, and failing to complete the work.

317 I do not see the fact that the Builder did not know of the Owners' borrowings at the date of Contract is, itself, a reason to deny to the Owners an award of *Hungerfords* interest. That is because an award of interest at common law arises because "it is a foreseeable loss, necessarily within the contemplation of the parties, which is directly related to the defendant's breach of contract or tort".[43] It is thus an award of damages under the first limb referred to in *Hadley v Baxendale*:[44] loss arising naturally and in the usual course of things from the breach of contract in question, rather than under the second limb in *Hadley v Baxendale*, namely loss which might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract.[45]

318 As was stated in *Pooraka Holdings Pty Ltd v Participation Nominees Pty Ltd & Ors*:[46]

> "It is obvious that non-payment of amounts due under the contract of sale would deprive the respondent of the opportunity of putting those amounts to profitable use. If the respondent in fact suffered loss in consequence of being deprived of that opportunity, such loss would have to be regarded as within the reasonable contemplation of the parties. The onus was on the respondent to prove that such loss was sustained and the extent of any such loss".[47]

319 The Builder did not dispute that the Owners incurred the interest expense the subject of their claim for *Hungerfords* interest.

320 Nor did the Builder dispute that, assuming its contention that cl 30 of the Contract precluded the Owners from claiming *Hungerfords* interest was not accepted, it was open to award such interest.

321 The Owners claim *Hungerfords* interest referable to their borrowings to fund construction costs from July 2017, when practical completion was due to take place, to July or August 2020 (depending on the date on which they were able to repay the particular loan in question). This was on the basis that it was only in July and August 2020 that they were able to negotiate an easement over Mr

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[43] Hungerfords v Walker (supra) at [40] (Mason CJ and Wilson J).
[44] (1854) 9 Ex 341; 156 ER 145.
[45] See Minister for Industrial Affairs v Civil Tech Pty Ltd [2003] SASC 393 at [37]-[40] (Perry J).
[46] (1991) 58 SASR 184.
[47] Ibid at 196 (King CJ, with whom Jacobs, White, Matheson and Prior JJ agreed).

Kazzi's property, procure the issue of an occupation certificate and the registration of the strata plan; thus enabling completion of the sales of the six apartments in the Building.

322 Leaving aside the cl 30 question, the matter that divided the parties was the date from which interest should start to run. The Builder disputed that interest should run from July 2017, and contended that any interest should only run from, at the earliest, March 2019 when, after Mr Portelli's quantity surveyor report was finally to hand, the Owners demanded that the Builder return to the site and complete the work.

323 As I have set out above, it appears that there was no substantial progress of the works from around January 2017, when the need for a s 96 certificate was first raised, until the Builder's purported suspension of the works in March 2018, and, again, from then until the report of the Owners' quantity surveyor, Mr Portelli, was delivered in March 2019.

324 It was only then, on 20 March 2019, that the Owners demanded that the Builder resume work.[48]

325 Although, in a general sense, and as I have set out, the delay in prosecution of the project from January 2017 was caused by the Builder's defaults relating to the design of the foyer and lift shaft, the Owners do seem to have let the matter drift, particularly from the date of the Builder's purported suspension of the works in March 2018 until their final decision a year later to demand that the Builder return to the site and complete the work.

326 In all the circumstances, I have concluded that the correct exercise of discretion here is to allow the Owners *Hungerfords* interest from the date they demanded the Builder to resume work: 20 March 2019.

The Owners' Claim against Mr Kazzi under the DBP Act

327 Section 37(1) of the DBP Act provides:

> "(1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects—
>
> (a) in or related to a building for which the work is done, and

[48] As I have set out above, the Owners made an earlier such demand on 22 May 2018, but did not press that demand.

(b) arising from the construction work."

328 Section 36 of the DBP Act defines "construction work" as including "building work" and "supervising, coordinating, project managing or otherwise having substantive control over the carrying out of", amongst other things, "building work".

329 Mr Kazzi is the sole director and shareholder of the Builder.

330 He said in his first affidavit that:

> "I attended the Property on a weekly basis (about two to three times a week) to *oversee* the construction of the Building." (Emphasis added.)

331 He was thus a person who supervised, and had substantive control over, the building work at the site in that he was able to control how the work was carried out.[49]

332 The Builder offered the formal submission that Mr Kazzi was not a "person" for the purpose of s 37 of the DBP Act because, it was submitted, s 37 of the DBP Act "does not extend to employees etc of a person who as principal carries out construction work and thus owes that statutory duty to exercise reasonable care in its performance". The Builder accepted that submission was inconsistent with my conclusion in *Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2)*.[50] Assuming my decision is correct,[51] it follows from the matters I have set out above that Mr Kazzi is a "person" for the purpose of s 37 of the DBP Act.

333 The Owners pleaded their case against Mr Kazzi under s 37 of the DBP Act as follows:

> "As the nominated supervisor for [the Builder], [Mr] Kazzi was responsible for:
>
> (i) carrying out all relevant work for the Contract; and
>
> (ii) ensuring that [the Builder] complied with all relevant codes of practice, laws and regulations.
>
> [Mr] Kazzi carried out all relevant work for the Contract on [the Builder's] behalf.
>
> Accordingly, [Mr] Kazzi owed the Owners a duty to exercise reasonable care to avoid economic loss caused by defects:

[49] See my observations in The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659 at [26].
[50] [2022] NSWSC 1368.
[51] There is an appeal pending.

(i) in or related to the Building; and

(ii) arising from the Building Works.

Particulars

The duty arises both at common law and pursuant to s 37 of the [DBP Act]."[52] (Bold emphasis in original; underlined emphasis added.)

334 The pleading continued:

"[Mr] Kazzi breached his duty of care to the Owners by failing to:

(i) carry out the Building Works, and/or ensure that the Building Works were carried out, with due care and skill and in accordance with the plans and specifications set out in the Contract;

(ii) supply materials, and/or ensure that materials were supplied, that were good and suitable for the purpose for which they were used;

(iii) carry out the Building Works, and/or ensure that the Building Works were carried out, in accordance with, and in compliance with, the *Home Building Act 1989* and the *Environmental Planning and Assessment Act 1979*;

(iv) ensure that the Building Works resulted, to the extent of the Building Works conducted, in a dwelling that was reasonably fit for occupation as a dwelling; and

(v) ensure that the Building Works and materials used in doing the Building Works were reasonably fit for the specified purpose or result, being the construction of an apartment building in accordance with the Development Consent.

Particulars

The Building Works contained the defects listed in Annexure C hereto."[53] (Bold and italicised emphasis in original; underlined emphasis added.)

335 In reply submissions, the Builder submitted:

"In this case there was no pleading of want of 'reasonable care'. What was pleaded was a failure to 'ensure'."

336 The Builder drew attention to the observations of Gummow J in *Roads and Traffic Authority of NSW v Dederer*[54] that:

"… whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden."[55]

[52] Statement of Cross Claim at [35]-[37].
[53] Statement of Cross Claim at [41].
[54] (2007) 234 CLR 330; [2007] HCA 42.
[55] Ibid at [43].

337 It is unfortunate that the pleader has chosen to use the words "ensuring" and "ensure that" in this pleading because s 37 of the DBP Act does not impose an obligation on any "person" to "ensure" anything. The obligation is to exercise reasonable care.

338 However, I think a fair reading of the pleading is that what was in substance being alleged was Mr Kazzi acted in breach of a duty to exercise reasonable care.

339 The particulars given in support of the allegation that Mr Kazzi acted in breach of his duty of care is said to be the fact that:

> "The Building Works contained the defects listed in Annexure C hereto."

340 In *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)*,[56] I referred to the observations of Meagher JA in *Garzo v Liverpool / Campbelltown Christian School*,[57] and of Ward CJ in Eq (as the President then was) in *Sergienko v AXL Financial Pty Ltd*,[58] and concluded:

> "These authorities establish that a plaintiff alleging a breach of duty of care by a builder, and this must include a breach of the Statutory Duty of Care, must identify the specific risks that the builder was required to manage, and the precautions that should have been taken to manage those risks.
>
> It is not sufficient simply to assert a defect and allege that the builder was required to take whatever precautions were needed to ensure that the defect not be present."[59]

341 The Owners pointed out that my decision in *Loulach Developments* was delivered a year after the date of the filing of the Owners' Cross Claim. However, my decision did not state new law, but applied existing authority to the statutory duty of care created by s 37 of the DBP Act.

342 However, as the Owners pointed out, in his initial iteration of Appendix A, Mr Mahedy had a column headed "Scope of Completing Works and Actions" which set out the work that Mr Mahedy contended was needed to rectify the defects I have found to exist.

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[56] [2021] NSWSC 1068.
[57] [2012] NSWCA 151 at [22].
[58] [2019] NSWSC 1610 at [46].
[59] At [42]-[43].

343 I did not allow that column as evidence of the fact that such work was necessary. Nonetheless it served to put the Builder on notice of the nature of the Owners' case.

344 As the Owners pointed out, many of the defects in the work that I have identified were the consequence of the Builder's failure to carry out the building works in accordance with the construction certificate plans and specifications. The Builder accepted that it had acted in breach of its duty of care in relation to the boundary encroachments defect[60] and the concrete strength issue.[61]

345 As the Owners also pointed out, the defence offered by the Builder in relation to many of the other defects was that the work was incomplete, rather than completed defectively, or that the Builder had approval to build otherwise than in accordance with the construction certificate plans and specifications. I have dealt with those matters above.

346 Precisely how these matters bespoke a breach of duty by Mr Kazzi personally was not clearly developed in the Owners' submissions.

347 There is, however, a wider problem for the Owners. That is, that it follows from my conclusion as to Mr Mahedy's evidence that the Owners have not proved what component of the expenses they have incurred relates to the cost of rectifying the Builder's defective work, as opposed to completing the work that the Builder failed to complete.

348 In that regard, the Owners submitted:

> "There is no utility in breaking down the rectification costs defect by defect, unless it is found that Mr Kazzi is not responsible for any particular defect – in which case the parties ought to be given the opportunity to make submissions as to what the rectification costs for that particular defect were (based on the invoices and timesheets in evidence)."

349 The Owners also pointed out that the Builder accepted that "the elements of negligence" had been proved in relation to the concrete strength and boundary encroachment issues to which I have referred.[62]

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[60] See [46]-[50].
[61] See [77]-[78].
[62] See [47]-[51] and [78]-[79].

350 But, assuming that the Owners' case against Mr Kazzi for breach of duty under s 37 of the DBP Act was otherwise established in relation to all the defects complained of, the Owners were required to prove what costs they had incurred to rectify that defective work; as opposed to the costs of completing the work.

351 Because of the manner in which Mr Mahedy's evidence was adduced, my conclusion is, for the reasons I have set out earlier, the Owners have not established what those total rectification costs were, subject, perhaps to the three invoices to which I referred at [262] above.

352 For that reason alone, subject to that caveat, the Owners' claim against Mr Kazzi fails.

The Builder's claim for payment of its invoices

353 Finally, I turn to the Builder's claim for payment of its invoices.

Invoice 685 – 1 July 2017 – $75,000

354 This invoice is not payable for the reasons set forth at [180] to [191] above.

Invoice 686 – 1 July 2017 – $63,750

355 This invoice is also not payable for the reasons set out at [180] to [191] above.

Invoice 6880 – 3 November 2017 – $17,784

356 This invoice is not payable for the reasons set out at [163] to [169] above.

Invoice 690 – 28 February 2018 – $82,210

357 This invoice is not payable for the reasons set forth at [170] to [174] above.

Invoice 6916 – 19 March 2019 – $11,793.06

358 This invoice related to lift storage fees allegedly incurred by the Builder. For the reasons I have explained, the Builder was responsible for the fact that, ultimately, no lift was installed in the Building. It must follow that any lift storage fees are for its own account.

Invoices not pressed

359 As I have set out above,[63] the Builder does not press its claim for payment of invoices 691, 6915 and 6917.

Conclusion

360 The parties should confer and endeavour to agree on whether any other matters in dispute require resolution and the orders that should be made to give effect to these reasons.

361 I will list the matter for directions at a time convenient to the parties.

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Appendix A - Schedule of Incomplete Building Works (1806717, pdf)http://www.caselaw.nsw.gov.au/asset/1874ff3e662e8980b8f2f39e.pdf

Appendix C (480312, pdf)http://www.caselaw.nsw.gov.au/asset/1874ff4e6857df950d4a638f.pdf

[63] At [28].