QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Kline Industries International Pty Ltd t/as Kline Homes v Nicholls* [2020] QCAT 227
PARTIES:	**KLINE INDUSTRIES INTERNATIONAL PTY LTD T/AS KLINE HOMES** (applicant) **v** **SERENA NICHOLLS** **LYN NICHOLLS** (respondents)
APPLICATION NO/S:	BDL056-16
MATTER TYPE:	Building matters
DELIVERED ON:	17 March 2020
HEARING DATE:	21 March 2019
HEARD AT:	Brisbane
DECISION OF:	Member King-Scott
ORDERS:	**The Tribunal directs by way of interim orders that:** **1. Serena and Lyn Nicholls pay Kline Industries International Pty Ltd the sum of $82,302.59 in respect of its claim;** **2. Kline Industries International Pty Ltd pay Serena and Lyn Nicholls the sum of $6,555.00 in respect of their counter-application;** **3. The order to pay is stayed until further argument in relation to costs, interest and the form of final orders;** **4. I invite the parties to make submissions in relation to interest and costs; and** **5. I direct the parties to file written submissions, if any, as to costs as follows:** **(a) Kline Industries International Pty Ltd by 4.00 pm on 1 April 2020**; **and** **(b) Serena and Lyn Nicholls by 4.00 pm on 15 April 2020**.

CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – GENERAL – domestic building dispute – scope of Contract – where error in contour plan provided by owner – where site much steeper than initially stated – whether owner liable for additional costs – where additional scaffolding costs – where special condition excluding certain works from the Contract to be completed at a later date – whether practical completion reached – where variations not in writing – whether deemed variations – meaning of full landscaping – whether defects and incomplete work *Domestic Building Contracts Act* 2000 (Qld), s 84(4) *Allaro Homes Cairns Pty Ltd v O'Reilly & Anor* [2012] QCA 286 *Better Homes Queensland Pty Limited v O'Reilly & Anor* [2012] QCATA 37 *Clarke v Shire of Gisborne* [1984] VR 971
APPEARANCES & REPRESENTATION:	
Applicant:	S Taylor instructed by Robert Duncan Solicitors
Respondents:	Self-represented by S Nicholls

REASONS FOR DECISION

[1] The Applicant builder, Kline Industries Pty Ltd trading as Kline Homes, commenced proceedings against the Respondents, Lynn Nicholls and her daughter, Serena Nicholls, claiming the balance of monies owing under a contract relating to the construction of a house at 61 Sky Royal Terrace, Burleigh Heads. The amount[1] claimed is as follows:

(a)	Final progress payment stage	$20,017.10
(b)	Reduction in cost between Rev C plans and the Rev J plans due to reduction in size by 38.54 m^2. Gyprock, roof, tiles, waterproofing and windows	$7,711.29
(c)	Increase cost between the Rev C plans and the Rev J plans for framing, redrafting, external cladding & fix-out materials	$13,232.22
(d)	Additional sums incurred in connection with scaffolding arising from Rev J plans	$29,216.00

[1] Exhibit 6.

(e)	Work performed in connection with the window per 'Excluded Works Agreement'	$3,000.00
(f)	Additional sums incurred in connection with provisional sums (footings & crane) re invoices	$25,038.56
(g)	Negative variation for rear stairs	$490.00
(h)	Total	$82,302.59

[2] The Respondents have denied that any amount is owing and have cross claimed for defective work and damages of $237,875.00 to enable completion of the house, losses in not being able to rent the property and solatium. Their claim[2] comprises:

Completion costs		$81,000.00
• Stair case with steel stringers 21 treads	$15,000.00	
• Full landscape backyard	$45,000.00	
• Floor covering throughout building	$10,000.00	
• Repair of building defects	$6,000.00	
• Clean-up and removal of waste	$5,000.00	
Repair of exterior decking and driveway from delaminated paint		$2,000.00
Loss of rental income		$126,100.00
Solatium claim for general inconvenience, distress and discomfort		$10,000.00
Delay in completing the build under Clause 31.1 at $5 per day		$6,775.00
Total		$225,875.00[3]

Background

[3] Lynn and Serena Nicholls ('the Homeowners') lived at 61 Sky Royal Terrace, Burleigh Heads. That house had been constructed by another builder in 2013. They decided to build another house on the same lot and then to strata title the houses.

[4] In 2014 they made a Material Change of Use (MCU) application to the Gold Coast City Council to construct the further house which would adjoin the existing house. It

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2 Exhibit 12.

3 The total of the components is less than the total in Exhibit 12.

was a condition of the approval that was granted, that the Homeowners have separate water and electrical services connected to the second house.

[5] In mid-2014, the Homeowners approached Kline Homes to build the second house. The construction of that house is the subject of these proceedings. Part of the quote requested, was for some work to be performed on the existing house.

[6] On 18 July 2014, the Homeowners provided Kline Homes with plans[4] for the proposed new house, being the plans that had been used as a basis for the MCU application.[5] On 20 July 2014, the Homeowners provided Kline Home with a copy of a Contour Survey Report[6] dated 24 May 2013, prepared by Alan Sullivan & Associates, Consulting Surveyors, hereafter referred to as 'the First Survey Report'.

[7] On 2 July 2014, Kline Homes provided the Homeowners with a quotation[7] of $286,500 inclusive of GST to construct a house of 205 m².

[8] On 29 July 2014, the Homeowners advised Kline Homes that they had preliminary finance approval and they requested a fully executed contract.[8]

[9] By email dated 29 July 2014 Graydon Kline, the sole Director of Kline Homes advised the Homeowners of the potential increase in value of the property once it had been strata titled. He requested to be put in funds for soil tests, to prepare engineering and to draw plans. A preliminary agreement[9] was executed for $6,600 to:

(a) Arrange site inspection of the land;

(b) Prepare building plans;

(c) Prepare specifications;

(d) Supply a soil test; and

(e) Prepare full engineering and footing designs from soil test and existing survey plans.

[10] The Homeowners revised their plans and advised Kline Homes of their plans by email dated 23 August 2014.[10]

[11] Revised plans prepared by Stuart Osman were forwarded by Kline Homes by email dated 4 September 2014.[11] The Homeowners required no changes to the amended plans and expressed their happiness with the design. They requested a fixed contract.[12]

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4 Drawn by Cyber Drafting & Design dated 27 May 2013.
5 Court book, 79 – 84.
6 Court book, 85 – 88.
7 Court book, 89.
8 Court book, 90.
9 Court book, 93.
10 Court book, 94 – 96.
11 Court book, 97 – 98.
12 Court book, 100.

[12] In mid-September 2014 Mr Kline accompanied the Homeowners to floor suppliers, 'Flooring Depot', where they met the flooring consultant, Anthony Halilovich. The Respondents indicated that they did not want the bronze range of flooring[13] being polypropylene carpet for the bedrooms and laminate floors for the living room but, rather, they wanted bamboo flooring throughout.

[13] On 25 September 2014 a scaffolding quote was received by Kline Homes from 'All Round Scaffolding' for scaffolding for the build of $9,039.00 plus GST. The quote was made on the basis of the plans submitted to All Round Scaffolding by Kline Homes, being the Revision C plans dated 4 September 2014.

[14] On 28 September 2014 Kline Homes advised that the construction price had changed 'dramatically' because the original quote was for a house of 205m^2 and the size of the house had grown to 340.5m^2. Further, there was an extra kitchen and a number of upgrades. By way of example, it referred to the increased cost of bamboo flooring over what had been allowed for in the bronze range. It was also noted that it had not allowed for landscaping.

[15] A Formal Tender[14] was prepared for $443,612.00. The modifications to the previous quotation were as follows:

(a) Increase dwelling size;

(b) Include full landscaping;

(c) Include fencing both sides;

(d) Include water tank and pump;

(e) Include retaining walls to existing and new dwelling;

(f) Inside fly screens;

(g) Upgrade floor coverings;

(h) Upgrades, second kitchen and granite bench tops to kitchen and vanities; and

(i) Upgrade timber polished stairs.

[16] On receipt of the formal tender Mr Kline said a conversation took place between the parties wherein Ms Serena Nicholls advised Mr Kline that:

> Serena: The most we can get for the house finance is $400,000.
> Kline: The only way I can reduce the price is if you take out some of the inclusions or you go back to a smaller house.
> Serena: I'd rather have a bigger house. I'll let you know what to take out of the contract.

[17] By email dated 12 October 2014 the Homeowners requested further changes to the contract to reduce the cost. It is relevant to identify the changes requested. The email was as follows:

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13 The described floor coverings apparently fell within the bronze range of inclusions for a house in the price range the Homeowners were interested in.

14 Court book, 102 – 103.

> Can you please take off the quote for the deck extension and the two entertaining platform areas. They weren't actually noted as an inclusion in the original tender, so they may not even realise they are missing. Keep the landscaping and retaining walls for both but also exclude the flooring except for the tiled wet areas.

[18] The reference to 'they' is a reference to the Homeowners' bank.

[19] Later, on the suggestion of Kline Homes, there were changes to windows, reducing the number and making those retained larger.[15]

[20] Kline Homes emailed the Homeowners on 13 October 2014 with the changes in the tender to meet the Homeowners' requirements. I set out the letter in detail:

> Hi Serena,
> I have reduced the pricing by $43,270.00 this will bring the contract to $400,342.00 as requested.
> I have itemised the excluded items below, the exclusions will be included once you refinance as discussed. These amounts have been either quoted as per your selections or allowances made on the work to be completed, I will keep this agreement between us separate to the contract so it doesn't affect your finance with the bank.
>
> $17,865 for timber flooring.
> $3,000 in reduction to window changes.
> $10,000 deck extension to existing house.
> $6,243 back landings.
> $1,862 water tank and pump.
> $4,300 air conditioning.
>
> Except for the window changes, all other items are installed at the end of the job, I will place the footings for the landings when we do the house footings. I will also provide all the required 20 amp electrical provisions for air-conditioning units.

[21] A formal tender[16] in the sum of $400,342.00 was emailed to the Homeowners on 14 October 2014.

[22] The parties signed a contract on 23 October 2014.

The Contract

[23] The tender was followed by a formal contract[17] being *QCI 2010 Plain Language New Home Construction Contract* published by the Housing Industry Association hereafter referred to as 'the Contract'. The Contract is dated 23 October 2014.

[24] The Contract incorporated:

(a) A Client Confirmation of Building Products;[18] and

(b) An Excluded Works Agreement.[19]

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15 Court book, 106, email dated 13 October 2014.
16 Court book, 109.
17 Court book, 117.
18 Court book, 1224.

[25] Schedule 3 of the Contract dealt with 'Excluded Items' which described any items not listed in the *The Client Confirmation of Building Products* document as being excluded under clause 21 of the Contract.

[26] The Excluded Works Agreement was signed contemporaneously with the Contract and its terms, it is alleged by Kline Homes, were expressly incorporated by way of special condition to the Contract. Under the section Special Conditions[20] contained in the Contract reference is made to:

> 1. To include landscaping and fencing
> 2. The agreement to finish items as per the agreement

[27] The Excluded Works Agreement provided:

> The Builder Kline Industries International Pty Ltd trading as Kline Homes is to complete all work up to and including Practical Completion Stage as per the contract, excluding the agreed works listed below that will be completed once Serena and or Lyn Nicholls refinances there [sic] home and pays to Kline Homes $43,270. The said amount including a breakdown shall be used to complete the following items.
>
> 1. $17,865 for timber flooring.
> 2. $3,000 in reduction to window changes.
> 3. $10,000 deck extension to existing house.
> 4. $6,243 back landings.
> 5. $1,862 water tank and pump.
> 6. $4,300 air conditioning.
>
> The Owner shall indemnify and save harmless the Builder from and against all liabilities, loss, damages, cost and expenses awarded against or paid or suffered or incurred by the Builder arising out of or as a result of or in connection with any breach of duty or negligence, or any act or omission of the Owner, its agents or subcontractors or the Queensland Building and Construction Commission in connection with the incomplete works until payment is made no works can commence.

Events after Contract signed

[28] On 27 October 2014, Revised C plans were delivered by the draftsman, Stuart Osman. The same day Mr Kline wrote to the Homeowners commenting that 'the ground level you provided with the contours must be wrong'. He advised, that he would check it the next day.[21]

[29] A meeting took place on site with Stuart Osman and Mr Kline where it was established that the First Survey Report was wrong. Alan Sullivan & Associates carried out a further inspection and prepared an updated report dated 18 November 2014[22] ('the Second Survey Report'). The inspection found that the gradient of the

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19 Court book, 163.
20 Court book, 124.
21 Court book, 173.
22 Court book, 177.

slope was of a significantly steeper decline than originally shown on the First Survey Report. Consequently, the plans had to be revised.

[30] Work commenced on 5 December 2014. On 3 March 2015, the Homeowners signed an Extension of Time Claim of 35 days because of heavy rainfall during the month of January 2015.

[31] On 20 April 2015 Jason Anderson of All Round Scaffolding attended the site for a routine inspection prior to arranging the delivery of scaffolding to the site. At that time the footings were completed, and posts were standing. It was apparent to Mr Anderson that the site levels were different to the contour plan that he had quoted from and advised that he would need to revise his quote. He advised that additional scaffolding was required and would have to be supported independently. It would have to be carried out in three stages. In addition, because of the unsafe ground conditions the scaffolding would have to be craned in. The new quote was received on 29 May 2015 and was substantially more being $29,215.00.[23]

[32] Mr Kline says he informed the Homeowners of the additional cost of scaffolding at an onsite meeting on 11 May 2015. He says he advised Serena Nicholls, who was the principal decision maker and contact for the Homeowners, [24] that it arose from an error in the First Survey Report. The conversation, not disputed by Ms Nicholls, was as follows:

> Kline: I will have to pass on the cost of extra scaffolding. Because the contour plan you gave me was wrong. The height of the back of the house now is 8 metres taller than the original plans on which I calculated the price.
>
> Serena: I received legal advice and you're not entitled to increase the price.
>
> Kline: So, you won't contribute to the extra cost for scaffolding?
>
> Serena: We won't be covering that additional expense because we have entered into a fixed price contract that allowed for scaffolding.

[33] Mr Kline believed what he had been told by Ms Nicholls and did not raise the issue until much later. He may have suspected that the cost would be significantly higher but, at the time, he had not received the new quote.

[34] Building proceeded and on 30 July 2015, Kline Homes emailed the Homeowners requesting that they organise to have the water connected which was a requirement of the MCU application.

The dispute arises

[35] On 3 August 2015 the Homeowners emailed Kline Homes raising a number of issues, including:

(a) What was the process by which they connected the water?

(b) When would the turf be laid? And

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23 Court book, 254.

24 Transcript 2-25 line 31.

(c) Why were the rear stairs not connected?[25]

[36] Mr Kline replied by email[26]on 3 August 2015 and after explaining the process of connecting the water, said in respect to the other matters:

> To answer your other concerns, I poisoned the weeds and then planted plants … I was the [sic] going to put mulch over the entire yard, (it is more expensive for me) although it will be no maintenance for you. No one can get down to mow on the 25 degree slope. You would never turf an area like that.
>
> The stairs have a limitation of steps before you need to put in landings, your house is so high off the ground that we cannot get stairs in under the Building code. The other issue is, what do you do when you get to the bottom of the stairs, the 25 degree slope makes your yard untraversable. I am putting stairs on the new deck where at least there is some flat area to walk and access some of the yard.
>
> …
>
> Serena have you organised for the bank to come out and refinance for the timber floor, air conditioning and water tanks? I will check with my Certifier to see if there are any issues with providing a final certificate with no flooring. The bank will want a final certificate to pay practical completion (final invoice), until the final invoice is paid you cannot take possession, the delay may come from your bank not me.

[37] Ms Nicholls responded by email on 14 August 2015 that she was waiting to hear back (presumably from the bank) and that she could not refinance until they strata title the property and enquired how to start that process. She also enquired as to the difference between the cost of the stairs.[27]

[38] Mr Kline replied by email dated 15 August 2015 and explained what the process was to strata title the property. He also advised that the only remaining issue was the floor coverings and that his Certifier could not issue a Final Certificate until that was attended to.

[39] Ms Nicholls responded that the bank had advised her that under the current contract the floors already had been paid for.[28] Mr Kline explained that the flooring which he believed to be $17,000 was one of the separate items to be attended to later.[29] I should interpolate here that the bank had not received a copy of the Excluded Works Agreement.

[40] From this point on the relationship deteriorated rapidly descending into the litigation the parties now find themselves in. It is relevant to set out the email communications in full to fully appreciate how the dispute arose.

[41] Mr Kline attached the final invoices and then went on to outline the timetable for completion of the contract and the time that various trades would be attending the

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25 Court book, 221.
26 Court book, 220.
27 Court book, 1288.
28 Court book, 1286.
29 Court book, 1285.

house in the following week. He advised that unless the invoices were paid in full the dwelling would remain locked.

[42] Mr Kline responded questioning why the Homeowners would put in $9,000 worth of flooring only to pull it out and then put in $17,000 bamboo flooring when refinancing came through. Ms Nicholls continued to maintain that the bank had told her she had paid for the floor.[30]

[43] Mr Kline responded by email the same day.[31] He said:

> Hi Serena, don't play games with me!
>
> The provisions attached were for the upgrades that you requested, so you could put timber flooring in all rooms and upgrade from laminate to bamboo and include the flooring in all rooms
>
> Have a look at the documents attached. You know exactly what's going on and that's why the attached documents formed part of the contract, so you could get your initial funding over the line because your bank wouldn't lend you the full amount at the beginning.
>
> Serena, I have also attached the final invoices. Serena so you know exactly what is required and what is actually going to happen, please note the following:
>
> (Mr Kline then set out a timetable for completion of the works)

[44] Ms Nicholls responded by email[32] within minutes:

> I am confused and don't appreciate the aggression. My understanding was that you were laying floors and then we were then upgrading to timber under the second contract. As you told me that I can't strata title until the floors go in, we decided with you to lay the floors but upgrade to timber floors later on. And that's what you put in your quote. So, I am baffled now as to the aggression and refusal to put the floors in. May be this is something that the bank will have to resolve cause you have just taken a very aggressive stance with me and are unwilling to explain why now you won't be putting any flooring in and in fact have just responded quite nasty [sic] without any justification.

[45] Mr Kline responded by email[33] immediately:

> I was not being aggressive or nasty, you're playing games and want everything for nothing, like the scaffold I paid for you and its [sic] not my house. I was merely stating the facts why would you put in $9,000 worth of flooring i.e. the original quote for carpet to the bedrooms and the laminate floors in the living areas, only to rip it out and then put in bamboo flooring everywhere for $17,000.

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30 Court book, 1284.
31 Court book, 1283.
32 Court book, 1282.
33 Court book, 1281.

> Why would you spend $26,000 on flooring? And then waste $9,000 that would go to the tip. The agreement clearly states the flooring is going in after you refinance, there was never any flooring being laid in the contract.
>
> The tender was done for you so you could get your finance for the initial stage. Serena stop lying, I just told you now that you can't get you [sic] strata title until the floors go in. I have never previously mentioned this. I thought you were going to refinance first, you don't have to have a strata title either, although it does help to have it finished to get the best valuation.

[46] Ms Nicholls responded by email[34] the same day:

> I am without words. I ask you not to be aggressive and then you accuse me of lying, knowing that to be false. You been trying to save costs and cut corners ever since you realised that you underestimated the scaffold costs. Which you tried to falsely get me to cover, knowing that that was your legal duty. You have made decisions without my approval in order to further save costs. We had on the plan the stairs out the back and you had the surveying report before providing my quote. This past week, when you realised it was going to be expensive to include them, you chose to put four steps off a bedroom which provides minimal access to the backyard if any. You know that decision alone I found out after you have put the rail on the deck blocking the original stair access and ordered the four alternate stairs. I expressed my concerns and you were dismissive. There is a significant cost difference between the two, yet you are refusing to either reimburse me or put the stairs where they were originally designed as per the plans.
>
> You have tried cut [sic] similar costs elsewhere without consulting me. Now, you're refusing to even lay the floors. This is another attempt to save costs and not meet your contract. Yes, we did discuss that it will be more expensive for me to put flooring down and then take it up at later date that but as I noted, we didn't know how long strata titling would take or how long it would take for me to be able to refinance. So, flooring down in the temporary [sic] is what we agreed. You know that was the case, which is why you included it in the quote. I'm actually really upset you're trying this on me and trying to manipulate and bully me. It must be because I'm young disabled woman, as you would not refuse to meet your obligations with a male client, attempt to cut costs or try to manipulate them out of services/goods that they have already paid for. As I said, ask you not to be aggressive and yet again you are. You're trying to manipulate and bully me out of what I have already paid for and I don't know how you could engage in such unconscionable behaviour.

[47] The same day Mr Kline responded by email[35], the relevant parts are as follows:

> I have never cut any corners, I added a cupboard in your kitchen that wasn't there and there was an extra $580. The external painter had to paint four coats of paint on the walls just to get coverage, it clearly says in my document a white base of paint, you used a blue base which cost an extra $100 per drum, over and made their own internal painters come back and recoat the ceilings were [sic] more paint because I wasn't satisfied. The list goes on with the amount of extras I've done for you [sic] and your email below is only an excuse, because you want more than you're entitled to.

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34 Court book, 1281.

35 Court book, 1280.

> The scaffold was only an administration error, if it was in the contract you would have had to pay for it. It's only because it wasn't there you don't.
>
> When I provide you with a price I went off the old plans, when we received the new survey I only sent the new plans to the frame people to amend the posts and because we were in such a hurry I forgot to send it to the scaffold company. The stairs don't meet compliance and cannot be made, I am unsure why you can't understand this.
>
> Serena, look at your Client Confirmation of Building Products, there is nothing there about temporary flooring, I don't even have a price for the carpet and laminate because you never wanted it from the beginning.
>
> …

[48] In a further email[36] communication Ms Nicholls continued to accuse Mr Kline of manipulating and bullying her and said, *inter alia*:

> In terms of your reference to temporary flooring not being in the contract, of course it doesn't [sic]. Instead, it just notes flooring. And as we discussed, we didn't know how long it would take me to get refinanced or for strata title and therefore, we didn't know how temporary that would be. I had hopes that it might only take a year or so but we hadn't discussed that aspect of.

[49] The parties then decided they would put the matter into the hands of their respective lawyers.

[50] On 15 August 2015 Kline Homes submitted the Final Claim for $45,055.66.

[51] In response to a phone call from Mr Kline on 14 September 2015, Ms Nicholls responded by email 14 September 2015 stating that she would only communicate with him by email. She observed that she had seen a truck load of mulch being delivered to the house that day and advised that she had paid for full landscaping of both backyards and advised that any court in Queensland would interpret that as including lawn. She advised, that she would not pay for it. She also asked to be advised when the flooring would be laid. She identified some further items that required attention before she would make a final payment. She accused Kline Homes and Mr Kline of fraudulent and deceptive conduct and foreshadowed a claim for damages for loss of rent.

[52] She concluded the email dated 14 September 2015[37]as follows:

> I need to know the details of your "blind Freddie" lawyer (although I am aware you are yet to gain legal advice, as this case is quite clear-cut and you would be well advised to fulfil the terms of the contract). If you do not intend on fulfilling the contract, I need your lawyers [sic] contact details in order to communicate with them and you can start paying them some exorbitant legal fees. Please note that I will be self-represented, as I am a lawyer and you are free to Google my credentials to confirm this. I have been admitted as both a solicitor and barrister in Queensland. I teach law at the University and, in fact, contract law was one of my courses until recently. So, I am well-prepared and knowledgeable on the topic. I am confident in my position and my claim for

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36 Court book, 1279.
37 Court book, 789 – 780.

> damages if you choose not to fulfil the terms of the contract. On this occasion, you have truly underestimated who you are dealing with and whether you can make [sic] manipulate them out of their legal entitlements. I'm willing to pursue this until I receive justice, which will include the damages that I will accrue weekly. Alternatively, you can just concede, recognise the time and money you will waste defending my claims, and fulfil the terms of the contract. I will need to know your decision immediately, as I will need to look at lodging my claim for breach of contract with the Magistrates Court and claim to the QBCC for you engaging in fraudulent and deceptive conduct. Please advise me this week regarding how you wish to proceed and provide me with your lawyers [sic] contact details if that is the direction you choose to take the case, as I will start drafting my statement of claim to be lodged with the Magistrates Court.

[53] Although, Ms Nicholls claimed to be admitted as a barrister in Queensland, in fact, she was not called to the Bar until 11 April 2016.[38]

[54] Kline Homes engaged lawyers on 15 September 2015. On that day Kline Homes issued a tax invoice for Practical Completion.

[55] On 22 September 2015 Kline Homes issued a Certificate of Practical completion.

[56] The Homeowners responded by email on 28 September 2015 setting out a number of matters that they required to be attended to 'at a minimum'. It included flooring, stairs from the back deck and the laying of turf.[39] Further intimidating comments were made by Ms Nicholls in an email[40] in reply:

> Our contract is clear and these terms were included in our contract. You are required to complete the house by 19 June and you are still yet to do so. If we go to court, I will be pursuing damages for breach of contract and awarded estimated rental weekly value of the house which week that passes. To date, that equates to over $8,000 and it will accrue until the judgement date. It is undeniable that we have a contract for you to complete the house by a certain date. Not only did you fail to do so but you failed to fulfil the terms of the contract. This is an easy case for me. By the time a judgement is reached, I will be awarded over $20,000 in damages (minimum) and you will be required to fill [sic] the terms of contract, in addition to any legal fees that you accrue.
>
> I have made my position clear and I have no intention of negotiating …

[57] Ms Nicholls in the above email continued to threaten Mr Kline and made it very clear that she was not prepared to negotiate.

[58] By letter dated 1 October 2015, Kline Homes set out in detail its position in relation to the various issues in dispute as well as addressing some minor omissions/defects.[41] Mr Kline in the letter noted that the plans for the stairs from the back deck allowed two tread stair whereas the revised contour plans meant that a 16 tread stair would be required, but the actual site level at the point was below the average contour and would mean an 18 tread staircase would be required with an

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38 Court book, 786.
39 Court book, 225.
40 Court book, 225.
41 Court book, 217.

intermediate landing. He offered a negative variation of $490 or would undertake the additional work for $7,635.00. If not advised the letter stated that it would be assumed that the Homeowners elected for the negative variation. In relation to the complaint about the retaining walls Mr Kline pointed out that, if there were defects, which was denied then they were not defects that affected the occupation of the house and, therefore, were not required for Practical Completion to be reached.

[59] On 26 October 2015 Mr Kline emailed Ms Nicholls advising, that other than for some minor matters, the works were completed and enquired as to when she would like to inspect them. He also indicated that his plumber could not complete his work until a water metre was installed. He enquired as to when that would occur.

[60] On 30 November 2015, Kline Homes served a Notice to Remedy Breach[42] for their failure to pay the final claim.

Who is liable for errors in the First Survey Report?

[61] Clause 13 of the General terms[43] of Contract provided:

> 13.1 The owner warrants the accuracy of the contract documents supplied by the owner and the suitability of the design, materials and methods of working each specified therein.
>
> 13.2 If either party becomes aware of any error, ambiguity or inconsistency in or between the contract documents, that party must within 5 working days of becoming aware, give the other party written notice detailing the problem.
>
> 13.3 The owner must within 5 working days of becoming aware of such problem, give to the builder such written instructions as are necessary to enable the builder to proceed with the works.
>
> 13.4 If the owner does not give written instruction as required by subclause 13.3, the owner is deemed to have instructed that the builder carry out the works using the order of precedence.
>
> 13.4 If:
>
> (a) compliance with the owner's instructions involves more or less cost than a reasonable builder would have anticipated on signing of this contract; and
>
> (b) the problem is not solely caused by documents provided by the builder.
>
> The owner is deemed to have asked for a variation for the builder to comply with those instructions.

[62] Mr Kline engaged Stuart Osman to draw plans. Mr Kline frequently used Mr Osman as a draftsman. However, he was engaged as an independent contractor. He did not deal with the Homeowners.[44]

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42 Court book, 1270.
43 Court book, 1096.
44 Transcript 2-17 line 15.

[63] The Contract was signed on 23 October 2014. Mr Kline says that the day after the Contract was signed he commenced preparations and reviewed the plans being Revision C prepared by Stuart Osman.

[64] On 27 October 2014 Kline Homes wrote to the Homeowners advising that there might be an error in the First Survey Report.[45] The Second Survey Report is dated 18 November 2014[46] and confirmed that the gradient of the slope was steeper than originally depicted in the First Survey Report. That necessitated the plans to be redrawn by Stuart Osman.

[65] The error in the contour plans also caused problems with the placement of the house. That was because the First Survey Report indicated that the front boundary and the land was larger than it was. It was necessary in redesigning the house to make it narrower to fit on the smaller area. The Homeowners were advised of this problem in around mid-November 2014. Kline Homes recommended the Homeowners make an application for a relaxation from the local authorities for moving position of the works. This they did and the relaxation was approved.

[66] Ms Nicholls submitted that Mr Kline conceded that he had considered the extra costs associated with the new survey plans. Mr Kline does not recall any such concession. In any event it would not affect the additional costs incurred in amending the plans.

[67] Under the Contract the Homeowners were responsible for the errors of the First Survey Report and warranted the accuracy of the documents. The Homeowners by paying for the revised plans by implication accepted the error as theirs.[47]

[68] It is alleged that Mr Kline should have inspected land prior to the signing of the Contract and had he done so he would have been aware of the discrepancy in the First Survey Report. Mr Dyer thought Mr Kline should have checked the site, whereas, Mr Sim considered the builder had no reason to doubt the accuracy of the plan. He also testified that a site inspection may not necessarily have revealed the inaccuracy of the First Survey Report.[48]

[69] I should interpolate here that I did not find Mr Dyer to be an impressive witness. During cross-examination his answers, frequently, were not responsive to the questions being asked and he often volunteered answers that were not responsive but advanced the Homeowners' case. Essentially, he was an advocate for the Homeowners. For these reasons, his evidence has to be approached with caution. I am hesitant to accept his opinion unless corroborated by other evidence. Where his opinion disagrees with Mr Sim, I prefer Mr Sim's evidence.

Practical Completion

[70] Clause 24 provides for Practical Completion. Clause 24.2 provides that on reaching practical completion the builder must give the owner:

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45 Court book, 173.
46 Court book, 177.
47 Court book, 748 paragraph 3.
48 Transcript 3-56 line 20.

(a) A notice of practical completion stating the builder's opinion of the date of practical completion; and

(b) The final claim.

[71] On 22 September 2015, Kline Homes issued a final claim in the amount of $45,055.66[49] and a Notice of Practical Completion.[50] On 7 March 2017 a Form 21 Final Certificate was issued by the Certifier. The amount of $40,055.66 was made up of the Practical completion stage payment and what was described as an approved variation of $25,038.56. That, in fact, was not a variation as such but a provisional sum for the footings and crane over and above the sum allowed in Schedule 4.

Entitlement to provisional sums

[72] Additional footing and crane costs were incurred as a consequence of the errors in the First Survey Report. They are referred to in the Contract as prime cost items but were better described as provisional sum items. Schedule 4 allowed $4,290 for footings and $2,600 for crane.

[73] Clause 20 of the Contract provides for provisional sums. Clause 20.10 provides where the provisional sum relates to footings the builder is only entitled to claim the excess of the allowance where the need for the additional amount could not be established from the foundation data available to the builder at the time of contract. That information was not contained in the First Survey Report and, therefore, could not be established. Exhibit 6 sets out the respective amounts with accompanying invoices. The additional amount less the provisional sum is $25,038.56. It is submitted by Kline Homes that the Homeowners never disputed the extra costs throughout the proceedings.

[74] When Exhibit 6 was tendered Ms Nicholls did dispute the debt but it seems on the basis that Kline Homes knew that they were on a fixed budget of $400,000[51] and Kline Homes had exceeded that sum. This seems to be the real core of the complaint that Ms Nicholls had with Kline Homes. The Homeowners seem to ignore the fact that there are a number of provisions in the contract where the Contract sum can be adjusted up or down. There is a warning to the owner that this may occur. See Item 5 of Schedule 1 of the Contract.

[75] Mr Glen Murrant was engaged by Kline Homes as a certifier. Because the owners had not had power and water connected the final plumbing and drainage certificate could not be issued, and consequently the Form 21 Certificate could not be issued. He observed that the lack of floor covering did not preclude the issuing of a final certificate. However, on reconsideration, Mr Murrant determined that if a Form 16 Certificate could be issued by the electrician, he would issue a Form 21 Certificate. The Certificate was issued on 7 March 2017.

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49 Court book, 1184.
50 Court book, 1185.
51 Transcript 2-11 line 25 and 45.

[76] Mr Murrant stated that the final certification of the house had not occurred as the owners had not installed a water meter and the Gold Coast City Council had not conducted a site inspection or issued the final Plumbing and Drainage Certificate. The latter two requirements depended upon satisfaction of the first.

[77] In his opinion, the only reason why the house was not suitable for occupation is that there is no power or water connected.

[78] Mr Sim believed the failure of the owners to connect power and water released the builder from the obligation of obtaining the final certificate. There were some minor Category 2 defects but they did not preclude practical completion. Mr Dyer believed that loose electrical wires not connected to the main power supply would be expected to be completed before Practical Completion. I note that a Form 16 was issued by the electrician who was, presumably, satisfied with the wiring of the house. It should be borne in mind that Mr Dyer had not inspected the inside of the dwelling.

[79] Mr Dyer believed the non-installation of skirting boards around the dwelling including robe doors made the dwelling unsuitable for occupation. The skirting boards had not been installed as Kline Homes were waiting to install the bamboo flooring at a later date. The skirting boards were stored on site.

[80] Subject to which party is saddled with the consequences for the errors in the First Survey Report and the issue of floor coverings I am of the opinion that practical completion had been reached by Kline Homes.

[81] The Certificate of Practical Completion was issued on 22 September 2015. Although, the Homeowners responded to the certificate by email dated 2 September 2015 the response raised matters that were subject of a contractual dispute being floor coverings, landscaping and the staircase. The response also raised the issue of fly screens and doors to be hung. Kline Homes had indicated that the fly screens were susceptible to damage and would be hung after payment. The doors were stored on site and would be hung when the floors had been laid. It was denied that there were any defects in the retaining walls.

Is the Contract still on foot?

[82] There has been no formal attempt to terminate the Contract by either party. On 30 November 2015, Kline Homes served a Notice to Remedy Breach[52] for their failure to pay the final claim. Neither party had alleged repudiation of the Contract.

[83] The Homeowners say that the Contract is still on foot and Kline Homes are responsible for its upkeep. Kline Homes say that the Contract has been completed (subject to the Excluded Works). A Form 21 Certificate has issued. The Homeowners have indicated that they do not want Kline Homes to undertake any further work. The Homeowners have refused to make payment of the final stage, they have failed to connect electricity and water which has prevented completion of some items. They have failed to proceed with the excluded works. Indeed, they have made no application to the bank for finance to proceed with the excluded works.

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[52] Court book, 1270.

However, the institution of these proceedings and the manner in which they have been prosecuted is sufficient to my mind for a finding that the Contract is at an end.

Expert Conclave Report

[84] Bevan Sim, Architect was retained by Kline Homes to provide an expert report. He provided a report dated 19 July 2015 and a statement dated 3 April 2017. He inspected the site on 13 July 2016.

[85] Mr Dyer was a building consultant who trades under the name BCA Group (Qld). He inspected the site on 20 September 2017 and filed an affidavit[53] in the proceedings on 10 October 2017. The inspection on 20 September 2017 was an external inspection only.

[86] The experts met on 21 November 2017 and an Expert Conclave report dated 21 November 2017 was filed in the Tribunal.

[87] The experts agreed on the following issues:

(a) The first contour survey plan was different to the second plan;

(b) The Contract does not specifically define landscaping;

(c) The following items were defective or incomplete:

(i) Blue exterior paint streaking, with white undercoat visible;

(ii) Exterior wood paint starting to peel, including decking and driveway;

(iii) Trip hazard on front entry deck to driveway ramp;

(iv) Instances of concrete doming around steel columns within subfloor area; and

(v) The bottom tread of the staircase built off the front yard was inconsistent in height with the ground and therefore non-compliant with the *National Construction Code* and *Building Code of Australia*;

and

(d) The experts agreed that these were minor items that can be undertaken up to and after Practical Completion.

[88] Issues not agreed on by the experts were:

(a) Whether Practical Completion had been reached?

(i) Mr Sim believed the failure of the owners to connect power and water released the builder from the obligation of obtaining the final certificate.

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53 Court book, 653.

(ii) He believed the lack of skirting boards was a minor omission and these were stored on site in the garage.

(iii) Mr Sim believed the ceiling cornice removed from the kitchen was a category 2 defect and did not preclude Practical Completion.

(iv) Mr Dyer believed that loose electrical wires not connected to the main power supply would be expected to be completed before Practical Completion.

(v) Mr Dyer believed the non-installation of skirting boards around the dwelling including robe doors made the dwelling unsuitable for occupation.

(b) Was it reasonable for the builder to rely upon the First Survey Plan?

(i) Mr Sim considered the builder had no reason to doubt the accuracy of the plan.

(ii) Mr Dyer thought the builder should have checked the site.

(c) Did the difference in the two contour plans increase the costs of construction?

(i) Mr Sim believes the first plan was incorrect to the extent that it would have been impossible to build the building in accordance with those plans.

(ii) He believes the building has been completed generally in accordance with the as-constructed plans.

(iii) Mr Sim believes the site boundaries from the first plan are different from the second plan.

(iv) Mr Sim believes the rear steps off the family room are approximately 450 mm from the ground in the Contract plans, while the as-constructed plans show the stairs as approximately 4800 mm from the ground (or 10 times the height).

(v) Mr Sim also believes the plans do not show an extra deck and set of stairs at the front that gives much safer access to the exterior than the stairs shown on the as-structured plans.

(vi) Mr Sim believes the contract plans show virtually zero structure below the lower floor level, whereas the as-constructed plans show a multitude of steel stanchions to the undercroft area.

(vii) Mr Sim believes the as-constructed plans show a significant number of horizontal beams and cross braces built for lateral stability and wind bracing. He says the cost of this work is extra to that in the Contract plans.

(viii) Mr Dyer believes the builder should have specified any increase costs as a variation.

(d) Are the scaffold and other costs associated with the slope of the land?

(i) Mr Sim believes that the amount claimed for scaffolding of $29,215 plus GST is reasonable.

(ii) He believes that the cost of scaffolding and access to the rear and undercroft would have been higher than if the works have been constructed in accordance with the Contract plans.

(iii) He also believes the works provided at least double the height of the scaffolding to gain safe access to the upper works and roof, and a safe working platform would have been required to install the cross beams and braces of the undercroft area.

(iv) He also believes the Contract plans suggest the site could allow reasonable ambulatory access to the rear of building, after cutting and filling.

(v) He believes the 1 in 2.5 slope preclude safe walking on the site, both during the construction and now.

(vi) He believes different more expensive and slower earthmoving equipment (i.e. track mounted in little wheels) would have been required to excavate for footings and drainage.

(vii) Mr Dyer believes the builder underestimated the costs of scaffolding and should have specified any increase in costs as a variation.

(e) Are structures described by the owners as retaining walls in fact structural walls or merely landscaping components?

(i) Mr Sim believes the sleeper wall does not contribute structurally to the works, does not retain any structure in anyway, and is not shown on any plans as being structurally required.

(ii) He believes the sleeper wall is not a structural retaining wall because it does not comply with Gold Coast City Council conditions:

A. none of the sleeper walls have a surcharge loading and are only holding back mulch, soil and plants;

B. no sleeper walls located within 1.5 m of a building; and

C. the sleeper walls are built up to 1200 mm high but only retain less than 1 m.

(iii) Mr Sim believes if the wall was structurally required, it would need to be part of the Contract plans and he has been instructed that the engineer did not require the wall to be built.

(iv) Mr Dyer believes the wall has been constructed to retain the terrace part of the yard.

(f) Are the retaining walls fit for purpose and free of defects and do they provide backyard space for the owners?

(i) Mr Sim believes the timber sleeper walls are not defective. He believes the sleepers not being precisely level or the uprights not being precisely plumb is natural and inevitable with the passing of time, rather than defective construction. This is because timber is an ongoing material subject to differential movement volume change, particularly in exposed locations like this site.

(ii) Mr Dyer believes the retaining walls failed to meet a reasonable standard of construction and finish and have these defects:

A. the top sleeper comes away from the post due to insufficient fixing;

B. to be usable the lower level would require another retaining wall to tier the yard; and

C. because the height above ground was over 1 m, the Building Code of Australia requires them to be designed and approved by an engineer.

(g) Was it appropriate and does it comply with the Contract for Kline Homes to install areas of mulch instead of turf because of the steep gradient of the land?

(i) Mr Sim believes the builder provided 'landscaping' as defined in the Contract. He believes the works comply with a requirement of the Contract because it does not provide details or specifications of what constitutes 'landscaping'. In his opinion, the provision of turf, mulch, plants and sleeper walls as provided is sufficient. He also believes if the turf was applied to ground slope of up to 1 in 2.5, particularly over hard subsoil, it would not survive due to the top soil erosion and would be impossible to mow and maintain.

(ii) Mr Dyer believes the landscaping is incomplete because the site is overgrown with weeds and has not been serviced or maintained. He believes the builder laid mulch instead of turf, to save time and money. He also believes the builder could have transported turf over the site after machinery completed clearing and levelling of the site.

(h) Did the builder fulfil the contract in not constructing a staircase off the bottom back deck onto the back yard, with the non-installation of the staircase as per the approved plans?

(i) Mr Sim believed the builder did fulfil the Contract by building an equivalent set of stairs in a different place because it was impossible for them to be built in the location provided by the Contract plans.

(ii) Mr Dyer believed the builder was responsible to construct the stairs to suit the site and comply with the National Construction Code and Building Code of Australia. He believed the builder has not constructed the stairs as required by the contract plans:

A. as the builder quoted to provide plans and specifications, including redesign of the home to suit the contours of the land, it was responsible for ensuring all relevant information was correct for building approval and to advise that stairs could not be provided if site contours were incorrect; and

B. as the builder provided the drawings for construction and redesign to suit the contours, it was responsible to check all levels for compliance and construction to ensure the external staircase was designed to suit site conditions.

(i) Does the alternative two tread staircase built by the builder off the front deck provide the owners with appropriate access to the rear yard?

(i) Mr Sim believes it does.

(ii) Mr Dyer believes the construction to be a contractual defect, as the built stairs were not on the approved plans, are non-compliant and inconsistent with the riser, adversely affecting safety:

A. the certified plans dated 19 December 2014 show no staircase drawn off the bedroom 2 and no variation to include a staircase has been provided; and

B. the stairs serve no purpose and provide no access to the rear yard as this require traversing through the cross-bracing and under the metal frame down the slope, presenting a safety concern.

(j) Did the builder install flooring throughout the residence as per the building Contract and final tender sent to the bank?

(i) Mr Sim did not consider the Contract required the builder to install flooring.

(ii) Mr Dyer believes the non-installation of carpet and timber flooring as per contract specification is incomplete work as the work has not been paid for.

(iii) He believes the non-installation of the bamboo flooring is contractual that was not purchased or installed by the builder.

(iv) He believes the builder has failed to meet a reasonable standard of construction or finish. He says the builder did not sand the particle board flooring as required by section 12 of AS1960.2.

(k) Any other defects not referred to?

(i) Mr Dyer believed there was further defective and incomplete work:

A. scratches and swirl marks in the external face of stained timber entry door; and

B. no downstairs ducting to satisfy the National Construction Code.

[89] Mr Sim believed the ducting was not required as windows are provided in accordance with Part 3.8 of the Building Code of Australia.

The Claim by Kline Homes

Final Progress claim

[90] In my opinion, Kline Homes is entitled to recover this $20,017.10. It has completed all works under the Contract save for the works under the Excluded Works Agreement.

Provisional sums

[91] The sum of $25,038.56 is claimed under his head of claim. As I have stated above the Homeowners do not really dispute this claim. I find that it is recoverable.

Increased cost between Rev C and Rev J plans

[92] The amount claimed is $13,232.22. Kline Homes allowed a negative adjustment of $7,711.29 for changes between the plans that resulted in savings to the Homeowner. The claim is supported by invoices.[54] The changes to the works clearly would have required a variation. There was no variation in writing signed by the parties as required under the Contract or in accordance with the now repealed *Domestic Building Contracts Act* 2000 (Qld) ('DBCA').

[93] Mr Kline said he never renegotiated the price of the Contract with the Homeowners. It appears to be agreed between the parties that the house size had to be reduced to accommodate the new survey plans, otherwise it would not fit on the block.[55] That required the plans to be sent back to the suppliers to requote. Consequently, some items decreased and other items increased.

[94] There is no doubt that there was much discussion between them as the parties worked through the various editions of the plans from Rev C to J.[56]

[95] The issue is whether this amount is recoverable. If it is not recoverable the adjustment of $7,711.29 also should not be made.

[96] In cross-examination Ms Nicholls contradicted her affidavit evidence that she was aware that there would be an increase in building costs as a consequence of modifying the plans to comply with the council requirements and the budget.[57] Under cross-examination she said that all she was aware of was that Mr Kline needed to redesign the house to accommodate the extra expense. In fact, the Homeowners had pleaded in Attachment A as part of their Response and Counter-application that Kline Homes has provided the Homeowners with the revised house plans identifying that the price had increased because he had to account for the newly commissioned survey report, which increased the post heights and engineering costs.[58] Reference was made to an email from Mr Kline to Serena Nicholls dated 15 December 2014:

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54 Exhibit 6.
55 Transcript 1-15 lines 15-35 and 1-16 line 15-40.
56 Transcript 1-35 lines 5-10.
57 Court book, 274 and Transcript 2-75 line 30.
58 Court book, 512.

> … the price increased by more than $12,000 with the new survey plan because of the post height and engineering increased the price, so I had to reduce your house firstly to comply with Council to fit on site and secondly to keep you on budget.

[97] I am satisfied that the Homeowners were aware that there would be increased costs as a result of the change in plans and, although, reference was made to post height and engineering, I am also satisfied that the increase cost went beyond merely those items but included other expenses associated with the increased height of the house. Mr Sim gave evidence of the additional work arising from the error in the First Survey Report.

[98] Pursuant to Clause 13 of the Contract I am of the opinion that the need to change the plans resulted from an error in the Contract documents supplied by the Homeowners and that Kline Homes gave appropriate notice detailing the problem. I am unaware of any response, in writing, to the email but the parties continued to 'tweak the plans' through to Rev J.[59] I find that the sum is recoverable as a deemed variation under Clause 13.5 of the Contract. I also take account of the negative variation, for savings, caused by the amended plans.

Window per Excluded Works Agreement

[99] This was included in the Excluded Works Agreement but there is a handwritten notation in Serena Nicholls' handwriting that it would be taken off the Contract price afterwards. Mr Kline emailed Ms Nicholls on 13 October 2014 detailing the excluded items and stating at the end of the email that:

> Except for the window changes all other items are installed at the end of the job.

[100] The amount is recoverable.

Negative variation for rear stairs

[101] The plans in Rev C had the rear steps only of two treads to ground level. When the errors of the First Survey Report were discovered the Second Survey Report was commissioned and provided and the plans revised. That resulted in amended drawings described as Rev J with a differently designed stair case of 16 treads. Subsequently, Kline Homes established that to comply with the Building Code an 18 tread stair case was required with an intermediate landing. Kline Homes, in its letter of 1 October 2015, offered two options, either a variation to build the stairs in accordance to the amended design at a cost of $7,635.00 or to remove the stairs from the Contract and provide a negative variation of $490.00. It advised that if no option was selected it would assume the negative variation.

[102] The Homeowners submit that the issue should have been raised much earlier than when it was, and that may be the case, but that does not change the fact that if they wanted stairs constructed as per the revised plans it would have required a variation and an additional cost to the Homeowners.

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[59] Transcript 1-35 line 10.

[103] Mr Marshall was a neighbour, and also a registered builder, who had a house built in the same street by Kline Homes at about the same time as the Homeowners' house. He gave evidence of comments made by Mr Kline to him to the effect that 'Serena is disabled and has no use for stairs to the backyard or a backyard at all so why would I bother to build them'. Despite not being able to recall such comments I have no doubt Mr Kline made some comment along those lines.[60] I suspect that the comments were made out of frustration at Ms Nicholls' conduct rather than as an explanation as to why he did not build the stairs.

[104] I should interpolate here that though there were several references to Ms Nicholls being disabled and although she appeared at the hearing, apparently disabled, no evidence was led as to the nature and extent of her disability. Having said that I do not doubt that she has a disability of some kind.

[105] It is surprising that though Mr Marshall was aware of a dispute between the parties, his understanding was that it was because the house was unfinished. He claims that he was not aware that the Homeowners had not paid the monies owed under the Contract. In any event, the evidence though showing a lack of empathy by Mr Kline has little relevance to the liability of Kline Homes to install the stairs.

[106] Mr Sim believed Kline Homes fulfilled the Contract by building an equivalent set of stairs in a different place because it was impossible for them to be built in the location provided by the contract plans. The alternative two tread staircase built by Kline Homes off the front deck provided the Homeowners with appropriate access to the rear yard. I accept his opinion on the issue.

[107] It is clear from what I have said above that the stairs were not included in the original contract price and could only have been included with a variation. Kline Homes has no liability in respect of the stairs.

Additional scaffolding costs

[108] On 20 April 2015 when Mr Jason Anderson, the scaffolder, attended the site he noted the steep gradient of the block. He had quoted off the First Survey Report and did not attend the site when preparing his quote. Kline Homes received the quote from All Round Scaffolding on 29 May 2015. The scaffolding plans were revised. Ms Nicholls says she was not advised of the scaffolding issue until 11 May 2015. Mr Kline believes he advised her at an earlier date.

[109] I have referred to the email wherein Ms Nicholls advised Mr Kline that she had legal advice that she was not required to pay the additional scaffolding costs because she had entered into a fixed price contract. That advice was wrong in that the error arose from the erroneous First Survey Report which had been warranted by the Homeowners as correct. However, Mr Kline was bluffed by Ms Nicholls' assertion and accepted it, presumably, because he felt he should have picked it up after the error in the First Survey Plan was discovered. Be that as it may, the Homeowners are responsible for the initial error as they provided the First Survey Report and warranted its correctness.

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60 Transcript 1- 63 line 30.

[110] Had the error been identified early in the build the Homeowners would have been liable for the additional scaffolding costs. Kline Homes should have issued a variation which the Homeowners, had they wished to continue with the build, would have had to agree with.

[111] There is no reason why their position is any different now, merely because Mr Kline erroneously thought that he was responsible for it, as an administrative error.

[112] Counsel for Kline Homes submits that there are a number of alternative bases by which Kline Homes can legitimately claim the costs of scaffolding. He prefaces his remarks by distinguishing scaffolding from being part of the scope of works which, if changed, in certain circumstances, would require a variation to which both parties would have to agree. He contends that it is an increase in the cost of performing the scope of works, which could not have been reasonably anticipated, at the time of entering into the Contract. He claims that:

(a) It could be a claim for damages for breach of the warranty given under Clause 13.1 of the Contract;

(b) It could be a claim under Clause 13.5 of the Contract for extra work arising from an error in the documentation being a deemed variation;

(c) Under Clause 19.6 of the Contract the urgency of the situation required Kline Homes to erect the scaffolding urgently to continue with the build and to comply with the workplace safety and health requirements. He submits that the Homeowners were never in a position to reject the additional work and only the cost of the scaffolding was in dispute. Clause 19.7 of the Contract addressed that issue being the reasonable price plus builder's margin;

(d) Under the legislative pathway pursuant to s 84(4) of the DBCA the variation was a necessary variation and the builder may apply to the Tribunal for recovery of the amount. Kline Homes' application made pursuant to s 84 of the DBCA was directed to be determined at the hearing.[61]

[113] The claims under Clause 13 have merit. The claim under Clause 19.6 required Kline Homes to submit a variation document which it has never done. In all the circumstances I prefer to proceed under s 84(4) of the DBCA. That sub-section provides:

> The tribunal may approve the recovery of an amount by a building contractor for a variation only if the tribunal is satisfied that—
>
> (a) either of the following applies—
>
> (i) there are exceptional circumstances to warrant the conferring of an entitlement on the building contractor for recovery of an amount for the variation;
>
> (ii) the building contractor would suffer unreasonable hardship by the operation of subsection (2)(a) or (3)(a); and

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[61] Directions 27 April 2017.

> (b) it would not be unfair to the building owner for the building contractor to recover an amount.

[114] That phrase was considered by North J (with whom the other members of the Court agreed) in *Allaro Homes Cairns Pty Ltd v O'Reilly & Anor*.[62] At paragraph [15] His Honour said:

> The phrase "exceptional circumstances" is not defined. It is found in an act whose purpose or object is to achieve a reasonable balance between the interests of building contractors and building owners and to maintain appropriate standards of conduct in the industry. It may be vague but the matters that might be considered relevant to such an inquiry will be indicated by the particular way in which the Act was not complied with and the circumstances particular to the dispute. In this Act, it directs attention to those circumstances which are exceptional and warrant conferring upon the building contractor an entitlement to recovery for the variation which its conduct, by failing to meet the obligations imposed by the statute, deprived it. It would therefore suggest, in the context of this dispute, attention might be directed to the circumstances that applied that prevented compliance or explained non-compliance with s 80(2)(e), which required the building contractor to state the change of the contract price because of the variation or how the change in price might be worked out. Circumstances such as an unanticipated event requiring work to be done urgently might, for example, afford an explanation and constitute an "exceptional circumstance". But this comment should not be regarded as exhaustive, the term is broad and it is not desirable to attempt an exhaustive statement of what might be in any given dispute an exceptional circumstance.
>
> (Citations omitted)

[115] It is pertinent to note that the following facts in relation to the scaffolding costs:

(a) If the build was to continue scaffolding was necessary: there was no alternative;

(b) Despite the error in the First Survey Report the Homeowners instructed Kline Homes to amend the plans and continue with the build;

(c) The increased costs arose from the inaccuracy of the First Survey Report, a report provided by the Homeowners;

(d) The cost of the scaffolding was paid by Kline Homes to a third party, All Round Scaffolding and Kline Homes did not profit from the additional cost;

(e) Ms Nicholls erroneously advised Mr Kline that she had legal advice that it was not recoverable;

(f) Kline Homes did not become aware of the full amount of the increased cost until 29 May 2015; and

(g) The costs of the scaffolding were reasonable in all the circumstances.

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62 [2012] QCA 286.

[116] The circumstances referred to above, in my opinion, together, are exceptional. In particular, the error of the First Survey Report can be considered an unanticipated event of the kind described by North J.

[117] The decision of *Better Homes Queensland Pty Limited v O'Reilly & Anor*[63] was the subject of the appeal in *Allaro Homes Cairns Pty Ltd v O'Reilly & Anor*.[64] In speaking of 'hardship', being the second alternative limb of s 84(4) of the DBCA, Kingham DCJ said at [28] and [29] (in the former):

> The Appeal Tribunal concurs in his Honour's view that the fact that a builder incurred, and cannot recover, the costs of a non-compliant variation could not, alone, constitute unreasonable hardship. That outcome is consistent with the evident purpose of providing an effective incentive to comply with the requirements of the Act.
>
> The test of unreasonable hardship requires an assessment of the impact of that sanction on the builder in the circumstances in which the non-compliance occurred. That is both a subjective and an objective enquiry: subjective, in that evidence must be led to demonstrate hardship to the builder; and objective, in that the nature and extent of the hardship must be unreasonable in the circumstances in which it occurs.

[118] Mr Kline deposed in his affidavit sworn 15 November 2017[65]to his company Kline Homes as being a very small company with no employees other than himself. Ms Nicholls cross-examined Mr Kline on this issue and, although making several assertions that Mr Kline was effectively concealing his net worth there was no evidence led to that effect.[66] I am satisfied that Mr Kline was a sole operator but I am not convinced that his business is not significantly profitable. The financial returns of the business and other businesses show a substantial operating profit for the last financial years. No explanation or clarification was provided for the significant distributions from the Kline Property Trust to the Kline Family Trust, Graydon Kline, Big Brand Shoes Pty Ltd or to Natral International Pty Ltd. In all the circumstances, I am not satisfied that hardship has been established.

[119] Having found exceptional circumstances, it is necessary, that the Tribunal be satisfied that it would not be unfair to the building owner for the building contractor to recover the amount. In the circumstances I have outlined above, it is my opinion, that the fairness test has been established and Kline Homes is entitled to recover the additional costs of the scaffolding being the difference between what, initially, was allowed for in the contract and the revised cost. That amounts to $29,216.00.

Resolution of Kline Homes' claim

[120] I am satisfied that Kline Homes is entitled to the full amount of its claim of $82,302.59.

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63 [2012] QCATA 37.
64 [2012] QCA 286.
65 Court book, 755.
66 Transcript 1-96 to 1-99.

Counter-application by the Homeowners

Staircase with steel stringers and 21 treads

[121] I have dealt with this issue above under Kline Homes' claim. I do not think there is any liability for Kline Homes to construct the stairs.

Landscaping

[122] The claim is for $45,000.00 to include the turfing of the whole yard and repairing the buckled retaining walls.

[123] The Contract provides under Special Conditions 'To include landscape and fencing'. No further details were provided. The words are of plain meaning, the terms are not ambiguous. There is no dispute about the fencing. I should interpolate here that landscaping involved both yards, that is the existing home as well as the new dwelling. There is no evidence that any discussion took place prior to the signing of the Contract that the yards were to be turfed. It is obvious that the Homeowners believed that was what they had contracted for, but there is no justification for that belief when the overall budget of $400,000 is considered.

[124] The homeowner alleges that landscaping meant turfing of the yard. Kline Homes says that the steepness of the block made it difficult, if not impossible, to turf the yard and he intended to mulch the yard. Mr Kline says the allowance for landscaping was $6,000 for plants, turf and mulch and $3,500 for fencing.[67] Turf was included at the top of the property. As Mr Kline rightly pointed out where there was a limited budget landscaping was not a priority.[68] Mr Kline indicated that turfing was actually cheaper than mulch, but the preparation was expensive, that is, moving in soil etc. As Mr Kline said, under the Contract the Homeowners left it to his discretion.

[125] Ms Nicholls in her submissions referred to evidence by her mother of conversations with Mr Kline to the effect that she was looking forward to being able to utilise the back yard to play with her grandchildren. In cross-examination Mrs Nicholls testified that no specific mention was made of turfing the yard, she assumed it would be, and the conversation took place after the Contract was signed.[69] She also assumed that there would have been earthworks but had no idea how much earthworks cost.[70]

[126] Mr Sim believed the builder provided 'landscaping' in accordance with the Contract. The Contract does not provide details or specifications of what constitutes 'landscaping'. In his opinion, the provision of turf, mulch, plants and sleeper walls as provided was sufficient. He also believed that if turf was applied to the ground slope of up to 1 in 2.5, particularly over hard subsoil, it would not survive due to the top soil erosion and it would be impossible to mow and maintain.

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67 Transcript 1-67 line 5.
68 Transcript 1-67 line 35.
69 Transcript 2-38 lines 1-13.
70 Transcript 2-39 line 17.

[127] As stated earlier Mr Mathew Marshall lived in the same street as the Homeowners and his house had been built by Kline Homes at about the same time as the construction of the Homeowners' dwelling. Mr Marshall relied on his expertise as a builder to request a more specific scope of works from Kline Homes, particularly, in respect of landscaping. He had his front and back yard turfed, but at a cost of $17,985.27 which was considerably more than the $8,000.00 initially allowed for as the landscaping package in his contract.[71] It involved the use of a bulldozer to push top soil down from a higher level and Mr Marshall testified that Mr Kline favoured mulch rather than turf and had intended to mulch his property creating a level platform by placement of fill. The changes took place towards the end of the build as a variation.[72] The difference between what the Homeowners wanted, and what Mr Marshall achieved, is that Mr Marshall was prepared to pay extra for his landscaping.

[128] It is relevant to note that, prior to contracting with Kline Homes, Mr Marshall had inspected other houses in the street that Kline Homes had built and had formed the opinion that he did not want landscaping 'like any of those'.[73] I infer from his comments that mulching of the yards was the norm.

[129] In my opinion the landscaping provided complies with the terms of the Contract. I disallow this of $45,000.00 and observe that the claim is made in the context of a Contract whereby the Homeowners wanted to keep the cost of the Contract at $400,000.00!

Floor coverings

[130] Ms Nicholls alleges she had a conversation with Mr Kline to the effect that the bronze range of floors were included. Such an allegation is inconsistent with her email of 12 October 2014 where she requested the exclusion of the timber flooring. I do not accept her evidence in her affidavit of the conversations she allegedly had with Mr Kline that she required floor coverings. The conversations are inconsistent with the contemporaneous documentation.

[131] It is also inconsistent with the Excluded Works Agreement and with the evidence of Mr Halilovich.

[132] Mr Halilovich was a flooring consultant who saw the Homeowners at his show room. He testified that the Homeowners were only interested in bamboo flooring and not in any other coverings.

[133] Ms Nicholls' assertion is also inconsistent with the Client Confirmation of Building Products where it is recorded that the timber flooring is to be 'placed in after final'. The Homeowners had a limited budget, it seems inconsistent that they would waste their budget on putting in a temporary floor at cost of $9,000.00. Ms Nicholls' evidence that the bank advised her that she was entitled to floor coverings was disingenuous considering the fact that she had kept the information about work excluded from the Contract from the bank. In cross-examination she was evasive on

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71 Exhibit 11.
72 Transcript 4-18 lines 40 – 45.
73 Transcript 4-16 line 10.

the issue as to whether the bank had the information when clearly the intent was that they should not be aware of the Excluded Works Agreement.[74]

[134] I do not accept Mrs Nicholls' affidavit evidence on the issue either. As she agreed in cross-examination some of her memory was reconstructed from looking at documents. She recalls settling for the bamboo flooring if they could afford it and she recalled Serena rejecting the bronze range of flooring.[75]

[135] The issue of floor covering is a contractual matter and not an issue where either Mr Sim's or Mr Dyer's expert evidence would be of assistance. I note Mr Dyer's comments about the particle board not being sanded as required by section 12 of AS1960.2 and that the builder has failed to meet a reasonable standard of construction or finish. It was not determined whether the issue related to the joins or whether the whole of the particle board required sanding. Mr Sim had inspected the flooring and considered it satisfactory. He considered the particle board satisfactory for habitation.[76]

[136] I find that flooring was not, and never was, intended to be included in the Contract but was to be installed under the Excluded Works Agreement.

Defective work

[137] The Homeowners claim for defective work. I set the claim out at the commencement of these reasons. I will deal with those items *in seriatim*.

Retaining walls

[138] These were constructed as part of the landscaping. An issue arose as to whether the walls were retaining walls or whether they were a landscape feature only. They were constructed of sleepers and the walls measured 1.2 m in height. The walls would have to be designed by an engineer if they were retaining walls. Mr Dyer believed it was constructed to retain the terrace part of the yard. Mr Sim did not think it was structural as it was only holding back mulch, soil and plants. He described the wall as a glorified garden edge. It was not located within 1.5 m of a building and was not part of the Contract plans.

[139] Mr Dyer believes the retaining walls failed to meet a reasonable standard of construction and finish and had defects in that the top sleeper was coming away from the post due to insufficient fixing, to be usable the lower level would require another retaining wall to tier the yard and because the height above ground was over 1m, the Building Code of Australia required them to be designed and approved by an engineer.

[140] Mr Sim believed the timber sleeper walls were not defective. He believed the fact that the sleepers were not precisely level and the uprights were not precisely plumb was inevitable with the passing of time and was not defective construction. He said that sleepers shrink dry and curl after time which was natural in exposed locations.[77]

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74 Transcript 2-93 to 2-94.
75 Transcript 2-29 line 45 and 2-30 line 35.
76 Transcript 3.59 line 40.
77 Transcript 3-65 line 7 and 3-67 line 5.

[141] I also note that the garden has been neglected and not maintained which may have contributed to the appearance of the walls.

[142] I do not allow any claim in respect of these walls.

Repair of building defects

[143] This claim is not particularised. However, there are a number of agreed defects referred to in the Experts Conclave report. I set them out as they appear in the Report as defective or incomplete items:

(a) Blue exterior paint streaking, with white undercoat visible;

(b) Exterior wood paint starting to peel, including decking and driveway;

(c) Trip hazard on front entry deck to driveway ramp;

(d) Instances of concrete doming around steel columns within subfloor area; and

(e) The bottom tread of the staircase built off the front yard was inconsistent in height with the ground and therefore non-compliant with the *National Construction Code* and *Building Code of Australia*.

[144] Unfortunately, the cost of rectifying each of these items has not been particularised nor separately quantified. It is not entirely clear whether the defect to the exterior wood is a result of weathering, poor maintenance or poor preparation.[78] There was a tripping hazard noted by Mr Dyer being a difference in height between the front timber deck and the driveway, that required attention as did the bottom tread of the staircase.

[145] Kline Homes has offered to rectify these items at no cost but I consider that in view of the finding that the Contract is at an end that I award a sum to cover the cost of rectifying these items. I allow the amount claimed of $6,000.00.

Clean-up and removal of waste

[146] Again, this is not quantified and would depend upon what rectification works were required to be carried out. In the light of my findings I make no allowance under this head.

Loss of rental income

[147] The claim is based on a rental rate of $650 per week. The claim of $126,100.00 is calculated from 30 June 2015 to date. For the reasons already given, I am of the opinion that Kline Homes is not in breach of the Contract. The Homeowners had not paid the Contract price and under Clause 25 of the Contract were not entitled to possession of the property.

[148] The house has remained locked up for over four years. During that time, it and the gardens have deteriorated as they have not been maintained. Particularly, the back yard has become overgrown and mulch has been blown and washed away.

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78 Transcript 3-36 line 7.

[149] In re-examination Mrs Nicholls gave evidence that, in the month before the hearing of this matter, she had sought to inspect the property by texting Mr Kline but received no response. There was no follow up.

[150] Ms Nicholls has not, at any stage, sought access to the house. Ms Nicholls says that she did not realise she could seek access.[79] That is a surprising assertion considering the fact that she was a lawyer and the stance she took in the various emails that she wrote to Mr Kline threatening him with legal action. It is submitted by Kline Homes that they have never prevented the Homeowners from having access to the house.

[151] I note that Mrs Nicholls in her evidence admitted that they had made efforts to keep the yard under control but that it was very difficult to get down to the yard.[80] I note that when Mr Dyer inspected the property he walked down and moved around the side of the hill.[81]

[152] It is surprising that the Homeowners have made no attempt to mitigate their damages. Mrs Nicholls under cross-examination conceded that the reason why they had stopped attending to the maintenance issues was that they were not sure that it was their issue.[82]

[153] Ms Nicholls stated in evidence that she had had an opportunity to try and resolve thing because of the aggressive nature of Mr Kline.[83] Ms Nicholls in her correspondence with Mr Kline indicated that she had no intention of negotiating with Mr Kline. It is usual in proceedings of this kind before the Tribunal that there are opportunities such as compulsory conferences as well as many other opportunities at direction hearings (of which there were many in this case) where there is an opportunity to negotiate and resolve issues. I am not convinced that the Homeowners did not have an opportunity to raise this issue on the contrary I believe they decided not to do so. I find that they have not attempted to mitigate their damages.

[154] The principal reason why the property is not habitable is that power and water have not been connected to the property. There has been no attempt by the Homeowners to do so, and no sensible explanation for not doing so. The Homeowners have failed to mitigate their loss.

[155] The claim for lost rent is disallowed.

Solatium claim for general inconvenience, distress and discomfort

[156] There no evidence from the Homeowners on this issue. Putting aside the fact that the delay in completing the works was due to the conduct of the Homeowners, as I have found, there is no medical or psychological evidence to support the claim. Undoubtedly, in every case where there is litigation by a home owner against a builder the owner would be disappointed with the outcome. Litigation is nearly

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79 Transcript 2- 107 line 30.
80 Transcript 2-44 lines 15 and 20.
81 Transcript 3 -23 line 20.
82 Transcript 2-45 line 24.
83 Transcript 2 -108 line 47.

always stressful to those involved. For a claim to be compensable it should be outside of the realm of what most litigants would experience from litigation.

[157] Mere inconvenience will not suffice; nor will the inconvenience of having to litigate an action.[84] If coupled with physical inconvenience leading to an adverse psychological reaction such as stress or nervous condition then damages may be recoverable in tort or under the *Hadley v Baxendale*[85] principles. There is no evidence here to justify such a claim.

Late Completion Damages

[158] Clause 31 provides that:

> If the works do not reach practical completion by the end of the building period the owner is entitled to liquidated damages in the sum specified in item 11 for each day after the end of the building period to and including the earlier of:
>
> (a) the date of practical completion;
>
> (b) the date this contract is ended; and
>
> (c) the date that the owner takes control of, possession of, or use of the site or any part of the site.

[159] Item 10 provides that the works must reach practical completion within 145 days after commencement subject to Clause 16. Item 11 sets the rate at $5 a day.

[160] There was an Extension of Time Claim of 35 days because of heavy rainfall during the month of January 2015. Work commenced 5 December 2014. The time work should have been completed by was 3 June 2015.

[161] Kline Homes issued a Certificate of Practical Completion on 22 September 2015. The delay in completion would be 111 days at $5 a day. That amounts to $555.00.

Resolution of the Homeowners' cross-application

[162] I find that the Homeowners succeed on the defects issue to the extent of $6,000.00 and the late completion damages claim of $555.00, a total of $6,555.00.

[163] In conclusion I make the following orders by way of interim order:

(a) Serena and Lyn Nicholls pay Kline Industries International Pty Ltd the sum of $82,302.59 in respect of its claim;

(b) Kline Industries International Pty Ltd pay Serena and Lyn Nicholls the sum of $6,555.00 in respect of their counter-application;

(c) The order to pay is stayed until further argument in relation to costs, interest and the form of final orders;

(d) I invite the parties to make submissions in relation to interest and costs; and

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84 *Clarke v Shire of Gisborne* [1984] VR 971.

85 (1854) 156 ER 145.

(e) I direct the parties to file written submissions, if any, as to costs as follows:

(f) Kline Industries International Pty Ltd by 4.00 pm on 1 April 2020**;** and

(g) Serena and Lyn Nicholls by 4.00 pm on 15 April 2020**.**