District Court

New South Wales

Case Name:	Deane Projects Building Pty Ltd v Kinda Kapers Holdings Pty Ltd
Medium Neutral Citation:	[2020] NSWDC 622
Hearing Date(s):	6-9 October 2020
Date of Orders:	19 October 2020
Decision Date:	19 October 2020
Jurisdiction:	Civil
Before:	Abadee
Decision:	See paragraphs 346-350
Catchwords:	CONTRACTS – building and construction – variation claims – whether provision for variations was itself varied – whether implied term incorporated through prior course of dealing – alleged defective works – whether owner's claim limited in time – whether claimed defects appeared during defects liability period – whether builder liable for "design defects" in commercial contract for construction DAMAGES – claim for rectification costs for defective works – whether owner intended to rectify – whether proposed works reasonable PRACTICE AND PROCEDURE – building disputes – building experts – conflicting evidence about defects and scope of rectification works – desirability of practitioners ensuring building experts confer and jointly produce report prior to hearing
Legislation Cited:	Building and Construction Industry Security of Payment Act 1999 (NSW) Environmental Planning and Assessment Act 1979

	(NSW) Environmental Planning and Assessment Regulation 2000 (NSW) Environmental Planning Regulations 1994 (NSW) Home Building Act 1989 (NSW)
Cases Cited:	Bellgrove v Elridge (1954) 90 CLR 613 Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2009] NSWSC 1302 Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd [2018] NSWCA 213 Cordon Investments Pty Ltd v Lesdor Properties [2012] NSWCA 184 The Owners – Strata Plan No 66375 v King [2018] NSWCA 170 Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221 Repfix Industries Pty Ltd v FBD Group [2020] NSWDC 514 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272 Trimis & Anor v Mina [1999] NSWCA 140; (2000) 16 BCL 288 TSW Analytical Pty Ltd v The University of Western Australia [2017] WASCA 67 Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd (1994) 13 BCL 378 Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd (1990) 20 NSWLR 251 Westpoint Management Ltd v Chocolate Factory Apartments Ltd; Chocolate Factory Apartments v Westpoint Finance & Ors [2007] NSWCA 253 Wheeler & Anor v Ecroplot [2010] NSWCA 61
Texts Cited:	J D Heydon, Heydon on Contract (Lawbook Co, 2019)
Category:	Principal judgment
Parties:	Deane Projects Building Pty Ltd (Plaintiff/Cross-Defendant) Kinda Kapers Holdings Pty Ltd (Defendant/Cross-Claimant)
Representation:	Counsel: Mr M Maconachie for the plaintiff/cross-defendant Mr G Carolan for the defendant/cross-claimant

	Solicitors: Roberts Legal for the plaintiff/cross-defendant Morrissey Law for the defendant/cross-claimant
File Number(s):	2019/121014
Publication Restriction:	Nil

JUDGMENT

INTRODUCTION

1 This case concerns the construction of renovation works undertaken in connection with a child care centre operated by the defendant in Toronto, New South Wales. Simply described, the works concerned two buildings, Block 'A' (at the front) and Block 'B' (at the rear). Both were built with precast concrete exterior walls and had steel framed suspended floors, steel framed roofs and Colorbond treated roof sheeting. Interior walls generally had steel frames lined with plasterboard. Outside the two buildings were three outside play areas.

2 The works were carried out under a standard contract for commercial construction entered into on 5 November 2015. Practical completion of the works was reached in early 2017.

3 The plaintiff ('the Builder') issued 13 progress claims. The first 11 progress claims were paid by the defendant ('the Owner'). Progress claim 12 (which concerned monies retained by the Owner pending rectification of defective works) was issued on 19 September 2017 and was paid, but only belatedly, in January 2018. Progress claim 13, issued on 15 December 2017, was not paid at all. Progress claim 13 comprised a claim in relation to 15 alleged variations. The Builder contends that its entitlement to variations was sourced not only in express terms under the written contract, but by also partly impliedly by a course of prior dealing. It is common ground that the Builder had performed at least some prior construction works for the Owner prior to the works at Toronto.

4 By its statement of claim, the Builder claims the sum of approximately $250,000 from the Owner. Broken down, the Builder's claim is principally made up of progress claim 13 (for a sum of approximately $180,000), interest on the delayed payment of progress claim 12, interest on progress claim 13, a mark-

up on the progress claim 13, a separate mark-up on landscaping and a component for GST. The Builder brings its claim principally in contract. In the alternative, a claim is brought on a *quantum meruit*.

5 The Owner partly accepts progress claim 13, but only to the extent of certain variations (being numbered 2, 5, 9, 10 and 11). Save for those variations, the Owner denies liability for variations. Further, it says that the only basis for variations to be claimed was under the express terms of the contract. These, relevantly, prescribed certain procedures which were not observed and, on that account, the disputed variations were invalid. The Owner nevertheless accepts that where variations are established, the Builder is entitled to interest on the claim and a mark-up on the amount.

6 The Owner also accepts the Builder's entitlement to interest on progress claim 13, to the extent that variations are accepted. It also accepts an entitlement to profit margins on the progress claims and GST. Further, it accepts a profit margin relating to landscaping, which task had been taken away from the Builder. The Owner contests the Builder's entitlement to interest in relation to progress claim 12.

7 Otherwise, the Owner brings its own cross-claim. This is centred upon the Builder's alleged provision of defective works. The defects were extensively set out in the Cross-Claim. The defects were said to be quantified in the sum of $282,000, on the basis of the scope of works set out by Mr Shepherd, the Owner's building expert.

8 I indicated to the parties during the hearing my inclination that issues of quantum, whether relating to the variations (including interest and mark-ups) or the costs of rectifying defects, would be the subject of referral (assuming the parties remained in dispute about them) and that my findings would be directed to the substantive issues of whether there were variations and defects. No contention was made to the contrary.

THE BUILDER'S PROGRESS CLAIM 13

The pleaded variation

9 By its statement of claim, in paragraphs 8 & 9, the Builder alleged that it was a term of the contract that work required by the contract could be varied by a 'mutual understanding' comprising the following features:

> "(a) proposed variations would be notified to the plaintiff by the defendant, or by the defendant's agent, by email as contemplated by BC3 Contract clause 9(c) (see paragraph 11, below, or the equivalent clause for pre-2013 Previous Agreements);
>
> (b) the plaintiff would notify the defendant of its agreement to the variation either by return email, by telephone, or by acting upon the proposed variation;
>
> (c) the costs of variations to works would not need to be notified to the defendant in writing and would be calculated pursuant to BC3 Contract clauses 9(g) and 9(h) for additional work or 9(i) for different work (or the equivalent clauses for pre-2013 Previous Agreements).
>
> (d) the plaintiff would invoice the defendant for all variations at the conclusion of the project."

10 Further, the plaintiff alleged that insofar as unforeseen or latent circumstances arose impeding performance of the works, the works would be resolved by the builder as a pre-requisite to completing the works and be charged as a variation.

The contested variations – general matters

Relevant contractual provisions

11 The subject contract was the standard form for commercial buildings issued by the Master Builders Association.

12 Clause 9 provided for variations. It provided:

> "(a) Works may be varied by:
>
> (i) increases or decreases in or omissions from the works;
>
> (ii) execution of additional work;
>
> (iii) changes in the character or quality of any material or work such as may be caused by latent conditions;
>
> (iv) changes in the levels, lines, positions or dimensions of any part of the works.
>
> (b) The **Builder** is not obliged to vary the works or carry out any extra work unless he consents, which consent is not to be unreasonably withheld.
>
> (c) If the Builder agrees to undertake a variation, the work constituting the variation is to be detailed in writing by the **Owner** to the **Builder**. Writing in this

context can be in the form of any document which of its nature confirms that the builder is to do something different to that previously required by the contract. Emails, new drawings or product samples will evidence this.

If the **Builder** believes an instruction constitutes a variation but the **Owner** refuses to provide written instructions to confirm that position then the matter, issue or instruction giving rise to the respective beliefs of the **Builder** and the **Owner** must be referred to a clause 24 meeting. If that does not resolve the issue then clause 25 procedures are to be followed.

Builder to advise value of variations

(d) The **Builder** within a reasonable time of receipt or instructions to execute a variation, is to notify the **Owner** in writing of the value of the variation.

The **Builder** may require prior to the execution of any variation that the **Owner** produce evidence, satisfactory to the **Builder**, of the **Owner's** capacity to pay for the variation.

Less work due to a variation

(e) Where the works are decreased or omissions from the works are made the cost of the work not now required is to be deducted from the contract price. Costs in this case means the actual expense or about saved by the **Builder** because the work is not required to be done. No other deduction is required by reason of the work or aspect of such work not being required.

Additional work due to a variation

(f) Where the work to be done is increased, the cost of the extra work is to be added to the contract price. The **Builder** can choose when and how often to claim payment for variation work and it is not required to wait until the next progress claim.

(g) Where a price has not been agreed, the Builder may proceed with the variation work and the price to be paid for the variation will be the cost as calculated with **clause (h)** below plus the allowance specified in **Schedule 2 item (g)** or supervision, overheads and profit together with an amount to pay the proper impact of the GST on the variation work. If **Schedule 2 item (g)** is left blank then 20% will be applied.

(h) In calculating the cost of the work which is the variation: -

> (i) the rates for labour provided by the **Builder's** employees are those set out in **Schedule 2 item (h)**. If no rates are shown in the rate published by the Master builders Association of New South Wales current at the time the variations for all art used; and
>
> (ii) the price for materials is the cost of the materials to the **Builder**. Costs here means the amount paid or payable by the **Builder** or materials.
>
> (iii) when the work is executed by a trade contractor, the costs to be paid is the last properly paid or payable trade contractor which will be evidenced by provision of a proper tax invoice from the trade contractor who did the variation work covering the variation work with such resulting amount properly treated for the effect of GST.

Different work due to a variation

> (i) If the variation results in different work being done, then the contract price will be adjusted by deducting the cost of the work not to be done and adding the cost of the work now to be done plus the **Builder's** margin as set out in **Schedule 2 item (g)**. Different work means a change in the character of work as opposed to new work. For example wooden floors changed to tiled floors.
>
> (j) If the **Builder** commenced work prior to receiving or without a written instruction as to the work being a variation or as the price variation, the same will not as of right prevent a claim for payment being allowed. However in the absence of a written instruction the Builder has to substantiate that the work is not part of the original contract works and verify that the amount claimed is reasonable.

13 Clause 14 generally provides for a warranty by the Owner that the site will support the works. Sub-clause 14(b) more specifically provides that:

> "if the conditions below the surface of the site are shown on the drawings or described in the specifications and in fact differ from what is so shown or described, then the **Builder** upon discovering this must notify the **Owner** in writing of the conditions encountered and obtain his written instructions before proceeding."

14 Sub-clause 14(c) makes similar provision for notice to the Owner where the Builder discovers that assumptions about conditions below the surface of a site are not realized. The balance of clause 14 then sets out a further regime for costing any variations required because of the conditions encountered at the site.

15 I will address the general evidence of the witnesses concerning variations first, before considering specific variations.

Mr Deane's Evidence

16 Mr Deane is the director of the Builder. He put on two affidavits, one on 20 January 2020 and the other (an affidavit in reply) on 11 June 2020.

17 Mr Deane deposed to earlier works supplied to the Owner, in the period from 2004 through to May 2016, which were regulated (relevantly) by a written form of contract. His point was that a course of dealing had emerged through these earlier dealings, by which variations were more informally agreed. His evidence in this respect was admitted over objection. The pattern, he said, comprised a proposal sent to the Owner (or their design consultants), express acceptance of a proposal (by return email, telephone, or the act of commencing the construction), an absence of pricing prior to the commencement of the work, a retrospective pricing based on actual cost or the fair value of work calculated

from established labour rates and material costs, and an invoice to the Owner at the conclusion of the work. Such of what I will call 'informal' variations arose because of unforeseen or latent site conditions which prevented the progress of work. He deposed to his usual practice of invoicing the Owner for such works at the end of a project. Mr Deane deposed that variations might be handled for this subject work in accordance with this earlier practice.

18 In relation to the subject contract for the works at Toronto, the work commenced in January 2016. Relevantly, progress claim 12 was in the sum of $94,868.29. Progress claim 13, for the sum of $222,907.30, was issued on 15 December 2017, although this was later amended and re-issued in June 2018.

19 In cross-examination, Mr Deane was generally asked about his experience and understanding of cl 9 of the standard form (BC3) commercial contract for construction providing a regime for variations. He accepted that he used such contracts up to twice a year, but considered that variations could be agreed by email or verbally and that although there was a written requirement to notify the Owner of the anticipated cost of a variation, that requirement could not apply if the cost was unknown. In re-examination, he explained that his thinking on these matters was shaped by his past experience of emails and verbal confirmation from the Owner in relation to prior projects.

20 He accepted that in multiple respects, it was not before December 2017 (well after practical completion) that he provided to the Owner the costs of certain variations. It was also put to him that at the respective dates when progress claims were made, he had provided statutory declarations which were each to the effect that no variation was sought or anticipated. Mr Deane's position was that no variations were attached to each of the progress claims until progress claim 13 was issued.

21 Mr Deane attended a meeting with Mr Peden and Ms Peden on 22 January 2018. In cross-examination, he recalled Ms Peden's rejection of any payment to the civil contractor, but indication that she would consider the other variations. In response to this, Mr Deane recalled remonstrating with Ms Peden that the civil contractor had completed all the work which was not in the contract. He also recalled Ms Peden indicating that she would discuss the

variations with Mr Peden, but wanted Mr Deane to get back to them regarding gas costs. He further recalled some discussion about the non-payment, to that point, of the 19 September 2017 progress claim 12. Mr Deane threatened to proceed under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the SOP Act'). On 25 January 2018, payment for the progress claim 12 was made. Mr Deane also deposed that he had all invoices available with him and went through each of the variations with Mr Peden and Ms Peden to confirm the invoice amounts. He recalled having all of the invoices attached to each of the variations, as well as a full set of construction drawings. He also deposed that all defects have been rectified at the time of the meeting on 22 January 2018; with the exception of the fencing around the walkways. In relation to that he relied upon his earlier evidence in which he claimed to have satisfied Mr Peterson that the height of fencing complied with the National Construction Code.

Ms Peden's evidence

22 Ms Peden is the sole director of the defendant. She owns the business of the defendant and runs it with the assistance of Ryan Peden, the general manager.

23 In her affidavit (sworn 13 March 2020), Ms Peden deposed to having engaged the plaintiff on previous projects. One of those was a project at Tighes Hill, which she opined was relevantly similar in scale and scope to the project the subject of dispute in Toronto. She deposed that Ryan Peden was the main contact person for this project, although she was regularly informed of status of work on the project. Ryan was also the primary point of contact on the Toronto project.

24 Ms Peden denied that the defendant (or any associated entity) had ever dealt with the plaintiff on the basis that variations could be priced retrospectively after the work had commenced or been completed. She denied that the plaintiff could resolve to undertake work arising from unforeseen or latent site conditions without consultation. She denied that the plaintiff could proceed with works arising from unforeseen or latent site conditions and charge later for a variation.

25 In cross-examination, Ms Peden was referred to prior progress claims in relation to the Adamstown project in 2004. Each of those referred individually to variations. The last (of four) progress claims added a large number of variations, from variations 10 to 32 inclusive. The last of the progress claims followed completion of the work. It was put to Ms Peden that the issue of progress claims in this way – and the defendant's payment of the preponderant part of what was claimed in the aggregate – was consistent with what happened in relation to the subject project at Toronto, whereby a series of individual progress claims were issued, followed by a last progress claim containing many additional variations. Ms Peden rejected the comparison.

26 In relation to these progress claims of 2004, it was also put to Ms Peden that she had gone out of her way in her affidavit to emphasise that they were made against her in her 'personal capacity' notwithstanding a range of indications (not least the addressee of the progress claims) in a self-conscious attempt to distance the defendant from proof of past arrangements that supported the plaintiff's case on prior dealings when it came to the disputed works. Ms Peden said that in 2004 she had a poor, or at least limited, understanding of "the legalities"; i.e. the distinction between work performed for her (as ultimate owner) and work performed for the defendant; an understanding which, she explained, only developed years later when she received professional advice.

27 After receiving progress claim 13 on 15 December 2017, Ms Peden deposed to attending a meeting with Mr Deane (attended also by Mr Peden) at the defendant's premises on 22 January 2018 and having a conversation substantially to the effect that Mr Deane required her help and was "out $400K on this job" and implored the defendant to "At least meet me half-way". To these entreaties, she answered him negatively: the defendant was "not a bank. We've paid you what we owe you." She also recalled that during this meeting they discussed several defects, including: the height of the fences to the walkways, gaps under the fences, water damage to the ceilings in Building A, and significant water accumulating underneath Building A.

28 Further, she deposed that during the meeting, she indicated her disagreement that there were valid variations. She indicated that so far as she was

concerned, changes were claimed that had not been requested, and she observed that this was the first time that the plaintiff had made claims for variations for works done up to 18 months ago. To this, she deposed that Mr Deane reiterated that the build had cost him $400,000 more than the contract; and that the variations claimed were not all of the extra cost. She deposed to his seeking the release of the retention monies (relating to progress claim 12) and his promising to correct remaining defects. She recalled inviting Mr Deane to provide all documents and invoices to consider the claimed variations and Mr Deane indicating that he would do so.

29 She expected to receive further information. But, she deposed, she never did receive it, aside from an email sent in and around 17 April 2018, which related to gas credits.

30 After her discussion at the January 2018 meeting, she and Mr Peden agreed to release the money the subject of the progress claim 12.

Mr Peden's evidence

31 At the relevant times, Mr Peden was the general manager of the defendant. He swore two affidavits, dated 18 March 2020 and 19 August 2020 (the latter which simply attached certain documents).

32 In his principal affidavit, Mr Peden referred to the practice that each time a progress claim was submitted to the Owner, Mr Deane would provide a statutory declaration, relevantly, that any variations known to date and potential claims had been notified. Mr Peden considered that at the point when the progress claim 11 was submitted (on or around 8 February 2017) practical completion had been reached.

33 In relation to the earlier construction works supplied by the builder, Mr Peden deposed that his approach was, in relation to minor maintenance works, to discuss each issue directly with Mr Deane and agree to an approach. He rejected Mr Deane's account as to how variations and unforeseen site conditions were dealt with.

34 He regarded the Tighes Hill project as being the only earlier work that was comparable in scale or scope to the subject works at Toronto. In relation to that

earlier project, he deposed that the Owner followed the procedure outlined in the written standard form contracts with respect to variations. In paraphrase, this meant discussing requested variations; the provision by email of a written quote for a variation and, if an exact figure was not possible, a rate or similar was quoted or at least a very detailed explanation of the works was provided; the builder's variation quotes were typically marked "works will not start until approval of variations received"; he would confirm that the Owner had approved the variation to the quoted price by sending an email, including confirming a request to proceed in the email; and no variation was commenced prior to the Builder and the Owner agreeing on a detailed scope of additional works, and estimates provided (if not a specific quote) and a request to proceed been given. In relation to the Tighes Hill project, 11 variations were given: two of them related to provision sums and one was a credit. Eight of the variations were dealt with in the manner so described.

35 Mr Peden was referred to the Builder's tax invoice dated 9 April 2014 in relation to the Tighes Hill project in cross-examination. It was put to Mr Peden that the timing of the issue of the invoice – 2 or 3 months after completion of the works – was indicative of a prior course of dealing whereby variations could be claimed after completion of a project by the Builder. Mr Peden rejected that as a general proposition, though he accepted that certain variations had been claimed after completion of works for Tighes Hill and the subject works at Toronto.

36 In relation to unforeseen site conditions in connection with the Tighes Hill project, Mr Peden deposed that at no stage did he agree that the Builder could undertake additional works and then charge the Owner for a variation without the latter's prior approval. I infer from this that Mr Peden was referring to the Builder undertaking additional works unilaterally, without prior consultation or instruction. The process for the project involved the Builder property contacting him or Ms Peden, and one or both of them would meet with Mr Deane to agree to an approach to dealing with the issue. The Builder was required to provide a quote for the variation writing and the Owner would respond to confirm its approval and instruction to proceed.

37 Mr Peden deposed that when progress claim 13 was received on or around 15 December 2017, this took him by surprise as the works had, from his point of view, been completed in January 2017. He deposed to a telephone conversation with Mr Deane on or around 18 December 2017 in which he expressed his disagreement that many of the items listed were variations; asserted that many of the items had not been fairly priced; declared that it was Mr Deane's job to manage the pricing of the items to ensure that the pricing was fair; and indicated that he could not accept the invoice. Mr Peden indicated that Ms Peden was away on holidays and indicated that there should be some discussion early in the New Year. He sent an email at 9:04am on 18 December 2017 confirming that the Owner did not accept the invoice variations and requesting a meeting on 10 January 2018.

38 Mr Peden deposed that on 22 January 2018, at a meeting with Mr Deane, to his understanding, in which: Mr Deane would provide documents and invoices in respect of the claimed variations; following the supply of those documents and invoices, he and Mr Deane would further discuss the claim for variations and defective works which had been previously notified to Mr Deane but which had not been rectified; and Mr Deane was not requiring the Owner to make any payments in respect to progress claim 13 until supporting documents and invoices have been supplied and discussed.

39 In cross-examination, Mr Peden was challenged on his evidence that there was agreement that Mr Deane would provide supporting documents and invoices at a future time. Mr Peden said that Mr Deane may have brought documents, but he did not have answers to the questions that were raised.

40 He deposed that although there remain defects on the site, he arranged for the release of the 2.5% retention, being payment for progress claim 12; in response to Mr Deane's request that the monies be released due to financial difficulties.

41 On 17 April 2018, Mr Deane sent a further email showing a breakup of the 'gas credits'. The Owner considered that the gas credits should have been in the sum of $17,743 compared to the credit of $8,282 that had been provided; but awaited further documentation from Mr Deane.

42 On 16 July 2018, the Owner received a further, or perhaps revised, progress claim 13, which had changed certain amounts for variations 1, 14 and 15, respectively. On 24 July 2018, Mr Peden emailed Mr Deane a payment schedule rejecting the claim. That was in response to the plaintiff's claim under the SOP Act.

Mr Deane's affidavit evidence in reply

43 In his second affidavit, Mr Deane disputed Mr Peden's account of what was said in the telephone call on 18 December 2017: Mr Peden did not categorically rule out the variations the subject of the recently issued progress claim 13. He only indicated that he could not approve the claim whilst Ms Peden was away on holidays and indicated that she would decide on whether or not to approve the variations.

44 Mr Deane replied to Ms Peden's account of a meeting on 20 January 2018 with Mr Deane (attended also by Mr Peden). He showed her emails received from Mr Gary Poole regarding the height of the fences. He said he told Ms Peden that the walkways complied with the National Construction Code. He also said that he informed Ms Peden that the landscaping was low and that a timber sleeper should be put in under the fence to cover a 20mm gap. An acoustic engineer subsequently came out and certified that what was done was correct.

45 Mr Deane replied also to Mr Peden's account of the same meeting. He reiterated that he showed Mr Peden and Ms Peden his invoices and went through each variation. He denied that there was any discussion about his providing further documentation or receiving any indication that he would not require payment by the Owner until he furnished further documentation.

46 Mr Deane deposed that he had provided the gas credits to the Owner in the total sum of $17,843. He added that it was only the documents relating to the gas credits which Mr Peden and Ms Peden requested of him during the January 2018 meeting.

47 Mr Deane rejected Mr Peden's explanation as to prior practice of variations in relation to earlier projects. In particular, he noted that (along with the Buxton Street project) for the Tighes Hill project, variations were paid at the end of the project; and, for the remaining 8 variations for that project, they were a mix of

'quoted' and 'non-quoted' variations. He took issue, in particular, with Mr Peden's proposition that work would stop until a variation had been approved, and maintained that he had received verbal confirmations to proceed with variations in addition to written ones.

48 In respect to unforeseen site conditions, at the Tighes Hill site, the variation relating to removal of unsuitable material was not the subject of prior quote and the supply and placement of a concrete cap over a large underground was not quoted.

Contested variations – specific issues

49 During closing addresses, the Builder abandoned his claims in relation to variations numbered 4, 12 & 15 in progress claim 13.

Variation 1

Mr Deane's evidence

50 Mr Deane explained the variations comprising progress claim 13 as follows. In each case, he deposed that the Builder had paid the costs associated with what he regarded as additional works. The documents Mr Deane relied upon to substantiate progress claim 13 were comprised in Exhibit B. This bundle of documents had been compiled, initially, to support a claim under the SOP Act, which was made in July 2018.

51 Variation 1 was said to have arisen from circumstances occurring on or about 15 February 2016. Mr Deane deposed that during early excavation works, difficulties were encountered with significant amounts of rock. He gave evidence at the hearing that he had contacted Ryan Peden on the phone and informed Mr Peden that the original design had not worked.

52 A site meeting was organised in February 2016. It was attended by himself, Mr Peden, Ms Peden and Scott Watson, the engineer of the consulting engineering firm Lindsay Dynan. Mr Deane said that he opened the discussion by stating that a solution was required in relation to the rock. Mr Watson had said that the base of the retaining wall would have to be constructed. The design had provided for bore holes, but this could not be undertaken because of the rock.

53 Mr Deane deposed to explaining to Ms Peden, for the Owner, that the rock meant that the only option was to build a conventional core filled blockwork wall over a poured footing stepped back at a metre high, with a second retaining at a metre high. He indicated that this would be more expensive than the one quoted. He deposed to the engineer, Mr Watson, expressing his agreement with Mr Deane. Ms Peden then pressed for an estimate of costs and indicated her apprehension with the level of work. Mr Deane told her that until a revised design was received and whilst it remained uncertain how hard the rock was, it was difficult to quantify the anticipated cost. The engineer said that he would need to design the retaining wall with a toe in the rock along the length of the retaining wall to stop any lateral movement. He said he expected a revised drawing to be reissued in the next day or two.

54 When he gave evidence at trial, Mr Deane stated that Ms Peden instructed him to get the revised drawings to keep the project going.

55 On 21 March 2016 and 11 April 2016, Mr Deane received emails attaching revised designs for the footings and retaining walls. These were received from Mr Watson. He explained that the revised designs required further excavation in rock to accommodate a toe beam to prevent lateral movement, as well as excavation of trenches through the rock for stormwater lines and pits, as well as the removal of 250mm of rock, between ‘Block B’ and the retaining wall, to the level of the underside of the concrete slab payment. He explained that it was also necessary to excavate the pad footings of ‘Block B’ to reduced levels.

56 In cross-examination, Mr Deane was challenged as to whether any change in the construction was ever sent to Mr Peden and Ms Peden. Mr Deane understood that the engineer had sent this information to the Owner.

57 The rock excavation and retaining wall variations were performed by subcontractors. A trade breakup, identifying 82 items in relation to this particular work, for this variation put into evidence (Exhibit B, pp 17-19).

58 Mr Deane was cross-examined on some of these items. At item 74, reference was made to the excavation of rock and removal in the period from 18 February 2016 to 8 March 2016 for a cost of $65,332.50. It was pointed out that no claim had been advanced in December 2017 for a cost in relation to

that sum, but Mr Deane explained that this was an item for variation 16 but was subsequently brought into variation 1. It was put to Mr Deane that, at any rate, there was no documentary trail to substantiate a claim of that size. As I understood him, Mr Deane explained that this claim had to be considered, partly, against documentation provided by the civil contractor, Mr Ian Rich. Mr Deane also stated that credits had been provided to the Owner in relation to the original proposed retaining wall. As to item 78, Mr Deane said that this accommodated provision for boring holes and concrete. As to item 80, he explained that this accommodated the cost of supporting steel poles; and also the crane hire. It was suggested that the trade breakup was inadequate in providing necessary detail to the Owner, but Mr Deane stated that the Owner had a copy of his workings.

Ms Peden's evidence

59 Ms Peden did not recall having any scheduled meeting with Mr Deane in the middle of February 2016; although she did recall discussing the works on site with Mr Peden at the time. She recalled observing Mr Deane talking with Mr Watson. She further deposed that once Mr Watson had left, she had a conversation with Mr Deane in which she queried if there was a problem. She recalled that Mr Deane answered that he was trying to figure out a better way to do the wall, in terms of cost-saving. She disputed being informed about the change in the way the retaining wall would be constructed would result in any variation. She only became aware of a claimed variation in relation to the excavation work on 15 December 2017.

60 It was put to Ms Peden that the Owner who had engaged the engineer. She accepted this. It was also put that she never told the engineer, Mr Scott Watson, that he could take instructions directly from Mr Deane. She accepted this. But she was referred to a document (Exhibit B, p 11) which indicated that Mr Watson had prepared a retaining wall sketch. She said that she had not provided the instruction for him to do so and, so far as she was aware, Mr Peden had not provided such instruction either. She could not account for Mr Watson performing this work, and believed that he had done so without authority. She maintained that she had no conversation with Mr Deane in February 2016 regarding the discovery of a significant amount of rock. It was

also put that her account of the conversation with Mr Deane in mid-February 2016, in which she portrayed Mr Deane as indicating only that he was trying to find cost-savings in relation to the wall, never happened. She maintained that it had.

Mr Peden's evidence

61 Mr Peden deposed to receiving a telephone call from Mr Deane in early February 2016, in which Mr Deane referred to the discovery of "some rock". A few days after this telephone call, he and Ms Peden attended the site where Mr Deane indicated that there was rock and they had a conversation with Mr Deane in which he said that the material could be removed by a normal excavator that conveyed the impression that there would not be any significant problem. Mr Peden, questioned whether it was more like a really hard clay. Mr Peden deposed that Mr Deane had not indicated that any variation would be required.

62 Mr Peden deposed that around mid-February 2016, he (and Ms Peden) attended the site in order to inspect the progress of the works. He recalled seeing Mr Deane and Mr Watson, the engineer, on the site. He also recalled that there was no scheduled meeting on the occasion. But he did observe Mr Deane and Mr Watson having a discussion after which Mr Watson left the site. Once that had occurred, Mr Peden deposed to further conversation with Mr Deane in which Ms Peden queried whether there was a problem and Mr Deane responded that he and Mr Watson had been discussing a different way to do all which would be cheaper. Mr Peden deposed that at no stage during this discussion did Mr Deane state any different way of doing the works or that they would be any additional cost. To the contrary, his recollection was that Mr Deane said that it would be cheaper. Further, Mr Peden said that at no stage had Mr Deane supplied any notification, verbal or in writing, that there would be a variation to deal with rock or any additional associated cost. He also deposed that he had not seen Mr Watson's email of 21 March 2016, attaching the retaining wall sketch.

63 In cross-examination, Mr Peden accepted that he had (personally) not provided any authority to the engineer, Mr Watson, to take instruction directly from Mr

Deane. He was referred to Mr Watson's email attaching a retaining wall sketch, dated 21 March 2016. Mr Peden indicated that this was work which he did not instruct Mr Watson to undertake.

64 In re-examination, Mr Peden said that when it came to slight, or minor changes, of a practical nature, to works, it was possible that the engineer might take instruction from the Builder, in terms of the engineer's authority, but no such authority was conferred in relation to major matters involving a re-design of something like a retaining wall.

65 It was put to Mr Peden that when Mr Deane rang him in early February 2016 and referred to the discovery of rock, the purpose of the discussion was to arrange a meeting to deal with a significant issue. It was not clear to Mr Peden that it was a significant issue and he denied that the purpose of the telephone discussion was to set up a meeting. He disputed that the conversation with Mr Deane, also involving Ms Peden, about rock, was the result of a pre-arranged meeting. He also rejected the proposition that Mr Deane had informed them both that there was a need for the rock to be excavated and a retaining wall redesigned, and that Ms Peden had given an instruction to draw up design: Mr Peden said he heard no such instruction.

66 Further, where, in his affidavit (at paragraphs 50-55), he referred to a discussion about rock at the site with Mr Deane (in the absence of Mr Watson), Mr Peden said in cross-examination that this conversation with Mr Deane occurred on a different date to the account (at paragraphs 48-49) of the conversation he had with Mr Deane in which the latter had indicated the presence of the rock.

Mr Deane's evidence in reply

67 Mr Deane affirmed that a meeting was arranged for February 2016 to discuss the discovery of rock. He also annexed an email from Mr Peden to Mr Watson dated 23 May 2016, in which reference was made to the redesign of the retaining walls and beams due to the rock onsite. Mr Peden expressed the Owner's intention to pay for that additional cost.

Variation 3

Mr Deane's evidence

68 Mr Deane deposed that in the original tender, a quotation for joinery was incorporated. The quote had been received from CR Joinery. But on 15 September 2015, Mr Deane deposed to receiving a quotation which was different in some respects. Mr Deane inferred that the supply of the quote from the Owner amounted to an instruction which constituted a variation.

69 He explained that the difference in the scheduled joinery in a trade breakup, which appeared in Exhibit B, pp 28-29.

70 In cross-examination, it was put to Mr Deane that in undertaking the joinery works, he proceeded on the basis of a quote from 13 October 2015. Mr Deane denied this. He stated that he proceeded on a version of the quote dated 22 June 2016. He was not able to articulate, however, what was different about the joinery works to that which was indicated in the October 2015 quote.

Mr Peden's evidence

71 On 15 September 2015, Mr Peden sent an email to the joiner, providing commentary on the interior design and attaching a joinery schedule. He deposed that he had not received from Mr Deane any informational quote to indicate any additional costs associated with the joinery finishes detail to that which was referred to in the 15 September 2015 email, either before, or indeed after, the contract had been entered into with the Builder.

72 In cross-examination, Mr Peden accepted that he had emailed to the joiner a revised quote of 22 June 2016 and that it was obvious that there may be some additional cost for the joinery.

Mr Deane's evidence in reply

73 Mr Deane deposed that it was the revised quote of 13 October 2015, which itself was further revised on 22 June 2016, which formed the basis for the joinery work.

Variation 6

Mr Deane's evidence

74 Mr Deane deposed to receiving revised plans for Blocks A and B on 5 April 2016 and 11 May 2016, respectively. Further revised plans were received on 17 May 2016. He deposed that these required additional plastering work to that which had been included in the contract sum. He interpreted the additional works as amounting to a requested variation.

75 This was also summarized in a trade breakup (Exhibit B, p 102).

76 On 7 March 2016, Mr Deane received an email from a draftsperson (Mr Ljolicjic) in relation to the structural steel workshop drawings. Some of the walls were built with pre-fabricated concrete. The email referred to fire ties that needed to be put on panels over 2.5m high. Fire ties were brackets fitted to panels which fell out in the event of fire. They were always expected for this project.

77 In cross-examination, Mr Deane accepted that there was no written variation to incorporate fire ties, but the variation related to fire ties in certain (boxed) areas of gyprock. This, Mr Deane argued, was a legitimate variation since the drawings did not make it clear the heights for the ceilings. Mr Deane stated that he spoke with Mr Peden or Ms Peden and indicated a need for bulkheads to go in. He accepted that he made no reference to a change of ceiling heights in his affidavit.

Mr Peden's evidence

78 On 5 April 2016, Mr Peden emailed to Mr Deane 'section 96' drawings for the subject project. On 11 May 2016, Mr Deane was sent a further email attaching revised drawings, with the direction of the doors changed and revised entry for Block B. By then, gyprocking had not commenced. On 17 May 2016, he forwarded an email to City Plan requesting the issue of a new construction certificate.

79 Mr Peden deposed that at no time prior to the issue of progress claim 13 did he receive any notice from Mr Deane that changes identified in his emails would result in additional plastering work to that which had already been provided for in the works. He was unable to divine from tax invoices rendered by Mr Deane

on 8 December 2016, 17 November 2016 or 22 September 2016 whether they included any plastering work or gyprocking that was part of the works or otherwise.

80 As to the trade breakup (Exhibit B, p 102), item 9 provided for skylights. However, a variation for skylights had previously been claimed as variation 11.

Mr Deane's evidence in reply

81 Mr Deane deposed that in October 2016, he showed Mr Peden where bulkheads had been installed to hide the fire ties and where the ceiling butted into the bulkheads.

82 He also deposed that the item 9 on the trade breakup for this variation, with its reference to skylight, was a reference to gyprock work performed to form skylight shafts. This was distinct from the item in variation 11, which concerned the supply and installation of skylights on the roof.

Variation 7

Mr Deane's evidence

83 Mr Deane's position in relation to this item was relevantly similar to his position in relation to variation 6. He interpreted the emails and drawings he received on the same dates as amounting to a requested variation of tiling work.

84 In her affidavit, Ms Peden deposed that she did not ask Mr Deane to change the flooring material from vinyl to tiles.

85 In his second affidavit, Mr Deane elaborated that the original drawings did not comply with egress regulations, as the doors swung into the building. The drawings were changed to allow the doors to swing out to comply with the regulations. A new stepped-in entry to Block B was required after the concrete wall panels had been installed and the Builder pulled out existing ply flooring and replaced it with compressed AC sheeting to take ceramic tiles.

Ms Peden's evidence

86 Ms Peden deposed to not asking Mr Deane to change the flooring material from vinyl to tiles. It was put to Ms Peden that there could have not been vinyl in the outdoor area. She indicated that she was unaware that it was outdoor.

87 It was put to, and denied by, Ms Peden that Ms Peden instructed Mr Deane to tile the walls in the staff toilet. Ms Peden accepted that there was vinyl in the external part to the entrance area.

Mr Peden's evidence

88 On 11 May 2016, Mr Peden emailed to Mr Deane revised drawings with the direction of the doors changed and revised entry for Block B. This included a request to epoxy grout the splashbacks. Mr Peden deposed that at no time did he receive notice from Mr Deane that any additional tiling was required to the walls of the staff toilet which, prior to the revised drawing, had been the laundry area; or for changing the four material from vinyl to tiles to the floor material for the entry of Block B.

Mr Deane's evidence in reply

89 Mr Deane contended that the revised architectural drawing sent to him on 11 May 2016 did not provide for tiles for the staff toilet. On a date he cannot recall, he deposed that Ms Peden and he had a conversation in which he asked her what colour she wanted the walls to be painted; and, in response to this question, she asked whether he could tile the full height of the toilet walls, instead of the painted walls. He responded that the drawings only showed floor and skirt tiles.

Variation 8

Mr Deane's evidence

90 On 5 April 2016 and 24 June 2016, Mr Deane received emails confirming changes to the designs of the laundry. Since he understood them to amount to design amendments constituting additional works, he took the request to amount to a variation.

91 Mr Deane's trade breakup in relation to this item appeared at Exhibit B, p 124. In cross-examination, he was asked about substantiation of item 1, being the supply and installation of Louvre windows to the laundry. Mr Deane clarified that the invoice at p 125 substantiated that item.

Mr Peden's evidence

92 On 5 April 2016 and 24 June 2016, Mr Peden supplied Mr Deane with copies of plans and a door and window schedule, noting changes to Block A. They

included an additional door and two aluminium glass doors following the relocation of a laundry.

93 He deposed that prior to submitting progress claim 13, Mr Deane had not supplied any costs estimate for those changes.

Variation 13

Mr Deane's evidence

94 Mr Deane deposed to being notified by Ms Peden of a roof leak in Block A of the play area. He deposed to inspecting the area and finding a significant build-up of condensation. He deposed to a conversation with Ms Peden in or about early June 2017 in which he explained what he regarded as a design oversight producing the result of excessive condensation in the ceiling space. He said to her that the best option was to install electric controlled whirlybirds, so as to create air flow through the ceiling space. He deposed to Ms Peden informing him to "Go ahead" and install the whirlybirds as there was mould appearing on the ceiling in rooms that were being used by children.

Ms Peden's evidence

95 In her affidavit, Ms Peden deposed to recalling that in late January 2017, the lights at the site would cut out in the two top rooms of Block A. She rang Mr Deane and after pointing out the problem with the lights, she deposed to Mr Deane indicating that it was an electrical issue. She recalled being at the site on 31 January 2017 and observed a subcontractor electrician. She deposed to speaking with the subcontractor in which the latter referred to a very high amount of moisture in the ceiling cavity causing the issue with the light circuits. He was said to also have referred to damage to the ceiling gyprock from moisture in the top north west room of Block A from water. He identified possible condensation.

96 On the basis of this information, Ms Peden deposed to making multiple calls to Mr Deane in February 2017 and on one such occasion, asking him whether he thought condensation was causing the problem with the light circuit. Mr Deane answered that it was the air conditioner. Later in February, when on site, Ms Peden deposed to receiving further opinion from the subcontractor to the effect

that it was the moisture in the ceiling cavity which was causing the issue with the light circuits.

97 Then, on or around 7 March 2017, Ms Peden deposed to Mr Deane inspecting the issue with the lights cutting out and Mr Deane not being able to explain the presence of moisture in the cavity. She suggested to him, on that occasion, that there was also excessive water underneath the building. During this month, she deposed to Mr Deane using pumps and barrel fans to dry out the underneath area of Block A.

98 Ms Peden deposed to observing mould growing in the ceiling in the area where the moisture was. She complained of mould to Mr Deane in May 2017. She deposed to inquiring of Mr Deane in July 2017 when he was going to fix the moisture issue and that, as he had in May 2017, Mr Deane promised to fix it.

99 During these conversations, Ms Peden deposed that Mr Deane did not explain what he was proposing to do to try to fix the moisture issue or that the proposed works he had in mind would result in a variation and increased costs. She deposed to providing no instruction for him to install vents and whirlybirds. Nevertheless, she observed the vents and whirlybirds in and around September 2017. She deposed that in answer to her complaint that she would not have approved these, Mr Deane indicated that he had asked an expert and the whirlybirds and vents were the solution he had come up with. She deposed that at no time had she instructed him to install vents and whirlybirds and was unaware that these works were being claimed as a variation until she had received progress claim 13.

100 In cross-examination, it was suggested that save for one issue, all issues concerning ‘defects’ had been rectified. Ms Peden regarded them as being resolved by October 2017. The exception was the moisture in the ceiling. As to this, Ms Peden maintained that the issue had been raised (and resolved) earlier than September 2017. It was put to, but denied by, Ms Peden that she had authorised whirlybirds in July 2017. She had authorised these in relation to the Tighes Hill project. In that regard, she was referred to an invoice in relation to Tighes Hill (dated 9 April 2014) indicating the installation of whirlybirds to the roof of the premises as a variation. But Ms Peden maintained that she did not

regard the installation of whirlybirds as being the solution in relation to the subject disputed works and denied that she had given Mr Deane the go ahead to install them on 25 July 2017.

101 It put to Ms Peden that there was no reference to water under the building in her account of what was said in September 2017. Ms Peden considered that there was. Ms Peden was also referred to the account of her meeting with Mr Deane in January 2018. It was suggested that she had made no mention of water under Block A and, moreover, she had never raised the matter at all before Mr Shepherd, the defendant's building expert, had referred to it. She did not dispute this. It was also suggested that the only notice of defects that the defendant had ever provided was on 17 March 2017, when Mr Peden sent an email to Mr Deane. She accepted that this may have been the only *written* notice; although she referred to multiple phone calls in which complaints had been made.

Mr Deane's evidence in reply

102 In his second affidavit, Mr Deane denied Ms Peden's evidence of conversations on the subject between January and May 2017. He affirmed the evidence in his first affidavit, whilst adding that he provided, as an option, cutting in eave vents to determine if that worked. These were installed in late June 2017 and he deposed to receiving Ms Peden's permission to install them. A short time later, he deposed, Ms Peden indicated that the moisture in the roof was getting worse. This prompted Mr Deane to arrange for a ventilation contractor to attend the site. Subsequently, Mr Deane met with Mr Watson, the engineer to discuss the issue. Then, on or about 20 July 2017, Mr Deane spoke with Ms Peden and indicated his proposal to place ventilation fans under the floor on timers and his advice that the Owner would need sub floor ventilation, otherwise the area would remain wet. The whirlybirds were installed on 27 July 2017.

103 However, on 8 August 2017, Mr Deane deposed to receiving a phone call from Ms Peden complaining about the mould getting worse.

104 In cross-examination, Mr Deane said that the building had been constructed in accordance with the drawing, but acknowledged there was no ventilation

inside. He reiterated that it was after the suggested installation of the eave vents, and after Ms Peden indicated that the situation with moisture, that he had advised her of the potential solution of whirlybirds. He maintained that she had directed him to proceed to install them. It was put that there was no reason why he could not have provided a quote and that no price was provided until December 2017. Mr Deane said that the work was urgent.

105 The installation of the whirlybirds was not within the contractual scope, so Mr Deane took the direction to amount to a variation. He later subcontracted Impact Roofing to supply and install the whirlybird ventilators and Godbee Electrical to connect them.

Variation 14

Mr Deane's evidence

106 On 25 October 2016, Mr Peden emailed Mr Deane correspondence which the Owner received from Lake Macquarie City Council concerning planning conditions for the new commercial grade driveway. He took the email to amount to a request for works to accommodate the conditions required by the planning consent.

Mr Peden's evidence

107 On 25 October 2016, Mr Peden emailed to Mr Deane a letter received from Lake Macquarie City Council, which concerned the installation of the driveway at the project site.

108 Mr Peden deposed that at no stage prior to the issue of progress claim 13 did Mr Deane provide notice that the contents of the Council's letter would result in the need for any additional work or additional costs.

109 It was put to, but denied by, Mr Peden that Mr Deane told him that Lindsay Dynan would have to design and construct a driveway, in order to obtain Council approval. In that regard, the Council's letter of 20 October 2016 (Exhibit B, p 177) was shown to Mr Peden. Mr Peden accepted that the Builder had been charged by Lindsay Dynan for the driveway and drainage works in an invoice dated 1 December 2016.

Mr Deane's evidence in reply

110 Mr Deane deposed that on or about 25 October 2016, after receiving Mr Peden's email, he rang Mr Peden and discussed points 3 – 5 (inclusive) in the Council's letter and thereafter explained that Lindsay Dynan would need to do the design and send it to the Council for approval.

PARTIES' CONTENTIONS ON VARIATIONS – GENERAL

The Builder's submissions

111 The Builder contends that cl 9 was itself either: (a) varied by a procedure set out in its pleading; or alternatively, if it was not varied, (b) that procedure was incorporated into the contract by a course of dealing. A further alternative (c) was that the requirement to notify the cost of a variation occurred only at the completion of the work. The Owner relied upon observations of McColl JA in *Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd* [2018] NSWCA 213 at [234]-[235] as authority for the proposition that a term can be incorporated into a contract where there is a lengthy and consistent course of dealing and a failure of the party who opposes the propounded term to object to it.

112 It referred to the projects at Adamstown and Tighes Hill as supportive of this course of dealing. It was emphasised that Tighes Hill project (another child care centre) was the closest proxy to the subject project at Toronto. It was submitted that the documents indicated that variations were only notified, and were to a significant extent paid by the Owner, only after completion of that project.

113 Alternatively, if the contract count fails, the Builder relies upon a *quantum meruit*, citing *TSW Analytical Pty Ltd v The University of Western Australia* [2017] WASCA 67 at [96]-[105].

The Owner's submissions

114 The Owner commenced by submitting that the onus fell upon the Builder to establish a regime for variations that differed from clause 9 (and, by extension, also cl 14). The Owner contends that there could be no 'variation' to the regime for variations in circumstances where what was substituted contradicted the express written term. The notion that there was any 'variation' to a variations regime, or incorporation by course of dealing was, it was submitted,

inconceivable for a written lump sum contract in the order of $3 million. It notes that no claim has been brought for rectification. It might be added, further, that there was no reliance by the Builder on promissory estoppel (or pleaded invocation of cl 9(j)).

115 The Owner then submits that the evidence was too weak to admit of any such 'mutual understanding' in any event. To the contrary, what occurred on the Tighes Hill project – when a report was first commissioned from Douglas Partners and, thereafter, approval was sought from the Owner to proceed on the basis of it, was consistent with the regime in place for this project. Similarly, in relation to the Adamstown project, what had occurred in that case was, generally, variations being notified at a point broadly contemporaneously with the issue of progress claims. This was consistent with what was required by cl 9 in the subject contract.

116 The Owner pointed to other circumstances telling against any such understanding. There was the delayed nature of the claim – 11 months after the issue of an interim occupation certificate. There was also the succession of statutory declarations accompanying progress claims in which no reference was made to current or anticipated variations.

117 Given the failure of the Builder to demonstrate the 'variation' to the regime for variations, or the incorporation of a different procedure by prior course of dealing, effect should be given to cl 9 by its terms. That being so, for the disputed variations, the Builder did not give notice of claims and without approval of them in advance, the purported variations are invalid[1]. Further, the work the subject of the purported variations was actually contemplated by the contract, which was a lump sum contract[2].

118 Further, as a matter of principle, the claim on the *quantum meruit* must fail where it is founded on circumstances inconsistent with the terms of a subsisting contract, unless the work falls outside of the contract[3] .

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[1] Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd (1990) 20 NSWLR 251 per Priestley JA (Samuels JA agreeing) at 274-275.
[2] Trimis & Anor v Mina [1999] NSWCA 140; (2000) 16 BCL 288 per Mason P (Priestley JA and Handley JA agreeing) at [60].
[3] Trimis at [54]-[63]. See also Update Constructions per Priestley JA (Samuels JA agreeing) at 275.

PARTIES' CONTENTIONS ON THE CONTESTED VARIATIONS – THE INDIVIDUAL VARIATIONS

Variation 1

Builder's submissions

119 The Builder submitted that although there was conflict in the evidence between Mr Deane and Mr and Ms Peden in relation to what was said about the need for rock excavation and the need for a retaining wall, the Court could infer notification by the Builder of the requirement for this variation from the documents and the circumstances. This included documents showing Mr Rich's breakdown showing that excavation began (on 18 February 2016) and was to be performed in close proximity to the site meeting, and Mr Watson's drawings (21 March 2016).

120 The Builder referred to Mr Peden's evidence, in re-examination, where the witness said that the engineer had authority to deal with the Builder (and in so doing, bind the Owner) in relation to minor works. The work in respect to this item did not fall into this category, but the engineer had every incentive to inform the Owner so that it could receive payment. The engineer was the Builder's agent.

121 The sequence of events suggested that prior approval had been granted for the work, if not any quote being supplied as to cost. There was discussion (if not a meeting) of at least some kind on 15 February 2016 and Mr Deane should be accepted when he said he immediately rang Mr Peden. The Owner had in its possession Mr Rich's break down, showing excavation work commencing on 18 February 2016. Mr Watson's drawings were then emailed to the Builder on 21 March 2016.

122 The Builder conceded, however, that no evidence of value was given until the claim for the variation was made. It must, perforce, rely upon its argument about variation, or prior course of dealing to succeed with its claim for this variation on the contractual basis.

Owner's submissions

123 The Owner referred to the conflict in the evidence between the Builder and the Owner about a site meeting in mid-February 2016. However even if Mr

Deane's account was preferred over the Pedens' respective accounts, cl 14(d) of the contract was not complied with and the Owner was deprived of its right to determine whether a variation was really necessary and to discuss the position with the Builder. This meant that the Builder could, at best, rely upon cl 9, but it could not do so since it did not give any written notice of a proposed variation or provide any costing in relation to it. Here, clause 14 was ousted on the Builder's construction of events, with the result that the Owner was expected to sign a blank cheque without consultation.

124 This inherently surprising result was magnified in the context where conditions about the site material were the subject of geotechnical assessment undertaken in 2009. It would have been expected, it was argued, that if the discovery of the rock was as significant as the Builder portrayed it to be, that it would have been picked up in the earlier geotechnical assessment. Further, detail about the discovery would have been supplied to the Owner much earlier than it was.

125 As it was, the breakup of Mr Rich's work was, on its face, ambiguous, since it was unclear whether the works related to constructing a retaining wall exclusively, or was for excavation which would need to have been carried out under the contract in any event.

126 The email from Mr Watson dated 21 March 2016 attaching sketch drawings for a retaining wall did not advance the Builder's position since the Owner was not copied in to it. Given other instances of conduct, it could equally be inferred that the Builder had engaged Mr Watson to engage in that work. No warranty was given as to any authority that the Owner had conferred upon Mr Watson to undertake works on the Owner's behalf. Further, there was no evidence that the Builder sought the Owner's consent to the construction of the retaining wall.

127 The variation claim was flawed for its lack of detail on such matters as the volume of material excavated and what accounted for the difference in price. The Owner submitted that no credit was given to it on a range of matters arising from the original design. It was submitted that the Builder could not articulate how the cost of the excavation was really excavated. For these

reasons, the Builder did not discharge its onus of establishing a variation and that the price was reasonable.

Variation 3

128 The Owner partially concedes this claim, in relation to items 1, 2, 5, 6, 8, 9, 10 & 22 for a net price of $5,580, but not otherwise. The rest represented price increases between the time of the contract and the time when the builder attempted to order the joinery package.

129 The Builder submits that Mr Peden arranged for the alterations to the joinery himself (Exhibit B, p 31) and the final quote was directed to Mr Peden. He must be taken to have known about the price difference.

Variation 6

130 The Owner partially accepts this claim for variation, in relation to component (a), concerning a change in the location of the laundry. It disputes the quantum of this aspect and submits that Mr Shepherd's valuation ($7,423.46) is to be preferred to the Builder's claim of $17,720. The Builder submits that in relation to this component of the variation, the Builder should not be left to bear the cost of the works because of a vague suggestion that they appeared expensive.

131 The Builder otherwise had assumed that the balance of this variation had been agreed to during the course of the hearing. The Owner indicated that this was not so.

132 As to component (b), which concerned the cost of framing and lining bulkheads to conceal fire ties, this was the product of discussions between the Builder and its panel designer as contemplated by existing works; and was not subject to any direction by the Owner.

133 As to component (c), concerning the lining of two skylight shafts, the Owner acknowledges that this was the subject of a direction, but says that this is the subject matter of variation 11. Further, the Owner did not direct or authorise a variation for the installation of gyprock lining to the skylight shafts.

Variation 7

134 Neither party made submissions specifically in relation to this variation.

Variation 8

135 The Owner accepted component (a) to this variation. It continues to dispute any entitlement to component (b), relating to the supply of aluminium glass doors, which was not the subject of any direction.

136 The Builder made no submission directed to this variation.

Variation 13

137 The Owner submits that Ms Peden's evidence denying the giving of any instruction to install whirlybird fans should be preferred to Mr Deane's evidence and that the latter took a unilateral decision to install them in an attempt to resolve the defect which became apparent; of excess moisture in the ceiling cavity.

138 The Builder submitted that it was reasonable for the Builder to have installed the electric whirlybird fans. It was submitted that Mr Shepherd's evidence to the effect that dampness from the sub-floor permeated up to the ceiling was 'preposterous'.

Variation 14

139 The Owner concedes an instruction to vary the works in relation to the driveway but disputes the value of the claim. It says it should be valued at $3,118.20. The Builder made no specific submission as to why it should be more.

140 This, however, is a matter which should be settled by a referee should the parties not agree in the meantime.

CONSIDERATION

Credit

141 Generally, I considered that Mr Deane tried to give his evidence honestly. He made certain concessions during his evidence. But there were occasions where I considered that his answers were not responsive to the particular questions raised. Sometime he was prone to engage in advocacy. This conduct demonstrated a consciousness of the import of his answers and a tendency to give evidence in a way that would further his interests, and in this he impaired his reliability. On the central issue affecting the plaintiff's claim, I

considered that he downplayed his awareness or appreciation of the standard term relating to contractual variations.

142 I am reserved about accepting his evidence on contentious matters in the absence of corroboration or where his evidence is inconsistent with the inherent probabilities and objectively proven facts.

143 I found Ms Peden also gave her evidence honestly. I formed the impression, however, that she took very entrenched views which were not altogether plausible in light of other evidence. On occasion, she gave evidence so adamantly as to amount to speech-making. Moreover, I perceived some disjunction between the impression conveyed in her affidavit that she was willing to let Mr Peden take most of the running with managing the project, and the impression conveyed in her evidence that she was very hands on, or was herself something of a micro-manager. I treat her evidence with some caution.

144 I found Mr Peden also tried to give evidence honestly. However, similar to Ms Peden, I found that Mr Peden was somewhat entrenched with a view that appeared incongruous or implausible set against the prevailing circumstances. Thus, I regarded his denial that a point of Mr Deane's call to him in February 2017 was to set up a meeting and that the discussion which eventually occurred on the subject of rock was inadvertent. I treat his evidence cautiously as well.

145 Overall, I do not ascribe any definitive general preference to the accounts of Mr and Ms Peden over Mr Deane, or vice versa.

Allowances for admitted variations for Progress Claim 13

146 I have noted the Owner's concessions that variations 2, 5, 9, 10 & 11 in progress claim 13 were valid; and also its concession in relation to the profit margin on the landscaping. That means that allowances should be made for each of those variations.

147 The parties should have opportunity to confer on the quantum of the interest calculations on the variations for progress claim 13 as determined in these reasons, together with the calculations for mark-up.

Findings on disputed variations for Progress Claim 13

General observations

148 I do not accept that cl 9 was itself 'varied' by some (subsequent) 'mutual understanding'. Variations of that kind conventionally require the furnishing of new consideration by the party said to benefit from the variation and none was identified here.

149 In support of its two alternative contentions of post-contractual variation or pre-contractual incorporation of terms by previous dealing, as indicated the Builder relied upon the following passage from the judgment of McColl JA (Macfarlan JA and Leeming JA agreeing) in *Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd* [2018] NSWCA 213 (citations omitted):

> "232. Contractual variation requires a mutual intention to vary the existing contractual terms and consideration. Consideration can be found in the mutual abandonment of existing rights, the conferment of new benefits by each party on the other, or the incurring of liability to an increased detriment.
>
> 233. When the parties to an existing contract enter into a further contract by which they vary the original contract, they have made two contracts. In some cases, it may be material to determine whether the effect of the second contract is to bring an end to the first contract and replace it with the second, or whether the effect is to leave the first contract standing, subject to the alteration. In this case, nothing turned on the characterisation of the agreement made on and from 1 October 2008 if it had been varied as Cellarit contended.
>
> 234. In the ordinary course the silent acceptance of an offer is generally insufficient to create any contract. Nevertheless, as I have indicated in considering the question of whether the variation case was run at trial, the silence of an offeree in conjunction with the other circumstances of the case may indicate assent to an offer. The "ultimate issue is whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted.
>
> 234. In this context, it is accepted that a lengthy and consistent course of dealing, together with a failure to object to a contractual term in issue, can be relied upon to imply assent to the incorporation of a term."

150 However, *Cellarit* is distinguishable on the facts. *Cellarit* concerned an alleged variation to an oral contract. Further, the 'course of dealing' referred to by McColl JA concerned what had occurred *after* a contract had been formed to support an argument for variation of the oral contract. In this case, the Builder is asking the Court to find that a course of dealing derived from earlier transactions was implicitly incorporated in a detailed lump sum written contract. I accept the Owner's submission that it would be extraordinary if parties who

have stated their rights and obligations exhaustively in a detailed written lump sum contract (a circumstance which, paradoxically, the Builder relies upon in support of its defence to the cross-claim concerning the defects) could be taken to have intended that their rights or obligations would be affected by antecedent understandings not expressed in the contract. Questions about the implied incorporation of terms by prior course of dealing usually arise where parties enter transactions informally and one of them is presented with a condition of which they are unaware – illustrated by the 'ticket' cases. That is a far cry from the situation here.

151 I am not persuaded, at any rate, that there was a mutual understanding in the terms pleaded by the Builder. On this matter, the views of Mr Deane and Mr and Ms Peden, respectively, are of course diametrically opposed. I am unable to ascribe any clear preference to the views of these witnesses, expressed retrospectively and through the self-interested prism of hindsight. It is by no means inherently probable that a reasonable bystander ascribe any common intention that the mutual understanding arose in substitution for cl 9: it would mark a serious reduction in or derogation of the rights and protections of an Owner as to its responsibility for variations. I consider it more reliable to consider the parties' conduct in an objective fashion.

152 A term or terms may be incorporated by a course of dealing, but not unless the party propounding it or them establishes a course of dealing that was consistent, frequent or regular[4]. Although it was accepted that the Tighes Hill project was comparable to the subject project even in respect to that particular project, the putative 'mutual understanding', to the extent that it absolved the Builder from the requirement to receive prior approval, was not applicable when, for example, a problem emerged with the suitability of the carpark subgrade. Further, I accept the submission that in the Adamstown project, it was manifestly not the case that variations could be claimed only at the very end, after completion of the works; rather than, say, claimed with or foreshadowed with progress claims issued prior to completion.

[4] J D Heydon, Heydon on Contract (Lawbook Co 2019) [7.170], p 231.

153 Nor do I accept the more refined alternative to the Builder's incorporation argument, to the effect that the prior course of dealing involved the claim for variations at the end of the works. I repeat what I have said in relation to the Adamstown project.

154 I find, therefore, that it is clause 9 and clause 14 (respectively) which exclusively govern the parties' rights and obligations in relation to variations and unforeseen site conditions.

155 That being so, the Builder confronts the general problem that, subject to a qualification, clause 9 sets out requirements for written approval of works to be varied and the requirement for something like a quote to be provided to the Owner, or at least something what would indicate to the Owner an estimated value of the varied work.

156 A qualification to this is sub-clause 9(j). By its terms, that addresses a situation where an indication has been supplied to the Builder that the Owner approves work as a variation, but withholds the supply of a written instruction. It seemed to me that a provision like this bore the hallmarks, or perhaps achieved the same effect, as the general doctrine of promissory estoppel, although it is unnecessary to further analyse that possibility in the circumstances. Counsel for the Owner submitted that in this case the Owner has accepted certain variations even if not all the circumstances in cl 9 generally were strictly adhered to. Implicit in this was the contention that where variations remained contested, it would be up to the Builder to establish that cl 9(j) had work to do. In respect of the contested variations, the Builder did not do so.

157 Subject to sub-clause 9(j), however, once it is accepted, as I so find, that there are notice requirements in cl 9(c) and 9(d), then the law posits that they must be observed. The Builder did not suggest that the authority of *Update Constructions* relied upon by the Owner was no longer good law. I must apply it.

Specific findings

Variation 1

158 This claimed variation is distinct from the other variations. As Counsel for the Owner submitted, the relevant contractual provision dealt with here was cl 14; not cl 9. Counsel for the Builder did not contend for the contrary.

159 I accept the Owner's submission that the purpose of cl 14 is to give an Owner a right to be consulted as to whether and to what extent variation should be given. I also accept that this has particular salience in the specific context where the subject matter – the discovery of a rock – appears as though it had been the subject of prior assessment; in this case, a geotechnical assessment. For a Builder to proceed without written instructions and without any consultation as to the extent of a work and the additional costs associated with the additional work would deprive the Owner of the opportunity to contest whether the variation was truly necessary.

160 Given that I have found that the putative 'mutual understanding' has no contractual basis, cl 14 is to operate in accordance with its terms and it is unnecessary to resolve the conflict between Mr Deane and Mr and Ms Peden as to what was verbally indicated by them in mid-February 2016.

161 This claim for variation is rejected.

Variation 3

162 I agree with the submission for the Builder that it is inappropriate for the Builder to bear the cost of the price increase as a result of this variation. The Builder is entitled to full allowance for this variation.

Variation 6

163 As to component (a), the dispute as to the value should be part of the referral to a referee.

164 As to component (b), in my view, the absence of written direction indicates that the requirements in cl 9 have not been observed. That is fatal to this aspect of the claim. Further, even if that was not so, the omission of the Builder to provide a quote, or estimated value of the work, was also contrary to cl 9 and, on that account invalid.

165 As to component (c), the Builder did not answer the Owner's complaint of duplication with another variation. I am not persuaded that this component should be allowed.

Variation 7

166 As noted, the testimonial evidence on this subject was sharply divergent. This variation is a good demonstration of why the procedures in cl 9 of the contract are as they are. I reiterate the same points made in connection with alleged variation 6, regarding the absence of written direction and the Builder's omission to provide a quote. I am not persuaded that they have been followed. Accordingly, if this particular claim was not already abandoned as a result of no submission being received on the Builder's behalf about it, I reject this claimed variation.

Variation 8

167 I accept the Owner's submission that insofar as the disputed component (a) for this claim is concerned (relating to aluminium doors), the absence of written direction means that this part of the claim should be rejected.

Variation 13

168 The dispute in relation to this issue is another demonstration of why clauses like cl 9 are in the terms that they appear. There is no suggestion that there is an absence of a written direction: it is solely the dispute about whether an oral instruction was given. In my view, cl 9 operates in accordance with its terms with the result that this particular claim fails.

Variation 14

169 The only dispute in this respect concerns valuation of the item. This should be determined by the referee.

CLAIM IN RESTITUION

170 The Builder's Counsel did not, in his oral address, augment his written submission that a claim in respect of the disputed variations is available on a *quantum meruit* should the Court reject the contractual basis for the claim.

171 I do not accept the Builder's submission that the Western Australian Court of Appeal's decision, or rather Mitchell JA's concurrence in that judgment, in *TSW*

Analytical Pty Ltd v The University of Western Australia [2017] WASCA 67 at [96]-[105] supports the Builder's claim. As a matter of status, the appeal in that decision concerned an appeal from an interlocutory decision; which is not a promising basis for the weight of the decision as precedent. As a matter of substance however, the decision appeared to be based upon a situation where a contract was determined to be unenforceable – being the second category identified by Deane J in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221. I do not understand Mitchell JA's observations in *TSW* as dealing with the situation where a party fails on a claim under a subsisting enforceable contract.

172 I reject the alternative claim on a *quantum meruit*.

LANDSCAPING

173 The Owner accepts that in circumstances where this work was performed by another builder, that the Builder is entitled to a mark-up.

174 That profit margin should be allowed.

INTEREST ON PROGRESS CLAIM 12

175 Progress claim 12 was issued on 19 September 2017 for the sum of $94,868.29. Following payment of that claim, the Builder claims interest for the sum of $3,462.04.

176 The Owner's defence was that although it paid the claim, it did so for commercial or perhaps other motives, but it remained of the view that it was not obliged to do so since at least one or more of the items referred to in the Defects List of 17 March 2017 had not as yet been rectified. That being so, the Builder was not entitled to interest notwithstanding that the principal amount on the claim was paid.

177 In my view, viewed objectively, payment of the amount of the progress claim denotes acceptance of liability in respect to the claim. There is no implicit 'reservation of rights' on the aspect of liability for interest on account of the subjective beliefs or motivations of the party that bears the liability.

178 The Owner is liable for interest on progress claim 12.

OWNER's CLAIM FOR DEFECTIVE WORKS

Relevant contractual provisions

179 Clause 4(d) of the Contract provided that the works would be deemed to comply with the requirements of the authority issuing the certificate of completion. There appears to be little doubt that this was a reference to the consent authority – in this case Lake Macquarie City Council. However the Builder contends that by reason of a delegation under the legislation[5], the principal certifying authority was also an 'Authority'.

180 By clause 21(a), any defect or fault "which may appear" was required to be notified to the Builder in writing within a period of 26 weeks after the date of practical completion, the so-called 'contract maintenance period'. If the defect or fault was due, in effect, to the Builder, then it would l be made good by the Builder at its own cost.

181 By clause 21(b), the Owner is not entitled to engage an alternative builder to do work in relation to clause 21(a) or recover the cost of having done the wok by an alternative builder unless the Builder has been advised in writing of all matters which the Owner requires to be rectified and afforded the Builder a reasonable time to attend to such matters. If the Owner fails to do this, then costs or expenses incurred by the Owner in having the work carried out by another builder will solely be at the Owner's liability.

182 Clause 21(c) sets out certain exceptions to the Builder's liability to carry out rectification work within the defects liability period, including among others, where there was a design related matter which was not the Builder's responsibility, and circumstances beyond the Builder's control.

183 'Practical completion' was defined in cl 18 to be the occasion when the works were reasonably fit for proposed use. The parties are in dispute about what that date is, but in my view, in the circumstances, nothing turns on the determination of that date: it was accepted that it had occurred by the early part of 2017.

[5] Environmental Planning and Assessment Act 1979 (NSW), s 109D(c).

Lay evidence

Ms Peden's evidence

184 It was put to Ms Peden that she was not serious about the claim for defects. Not only had the Owner not allowed the builder to rectify them (notwithstanding the Owner's release of retention monies) but the cross-claim was brought 6 months after the Builder's claim and the child care centre had been operational since January 2017 without any indication made to rectify anything. It was suggested that the cross-claim was simply reactive to the principal claim. Ms Peden maintained that the cross-claim was genuinely prosecuted.

Mr Peden's evidence

185 Mr Peden deposed that on or around 8 March 2017, he attended a site meeting with Mr Deane, in the presence of Ms Peden, during which Mr Deane promised to rectify the defects. The defects were itemised in an email which Mr Peden sent to Mr Deane on 17 March 2017. That email itemised 10 defects.

186 In cross-examination, Mr Peden accepted that save for item 10 of that list, the defects identified in the 17 March 2017 email were relatively minor. He also accepted that, save for items 9 & 10 of that list, all had been rectified by September 2017.

187 Mr Peden was referred in cross-examination to the evidence in his affidavit (paragraphs 34 & 41) where he had indicated that the retention monies (or some part of them) were released to pay progress payment 12, notwithstanding the Owner's view that defects remained. It was pointed out that in those affidavit references, no particulars of defects had been identified. There was also only a general reference to defects in the Owner's payment schedule dated 24 July 2018. Mr Peden asserted that there had been verbal discussions with Mr Deane about defects from early 2018.

188 The Owner's records indicated that the last time that the Builder attended the site was on 12 October 2017.

189 On 18 September 2018, Mr Peden sent a letter to Mr Deane regarding the defects. Mr Deane sent a response, through his solicitors, on 29 October 2018.

190 Between 1 November 2018 and 30 November 2018, correspondence was exchanged on the subject of the Builder or his subcontractors attending the site to rectify the alleged defective works. On 8 March 2019, Mr Deane's solicitor sent a letter containing an offer to repair certain defects and, to that end, requesting access for his subcontractors to enter the site on 16 and 30 March 2019. However, the Owner formed the view that there were more significant defects, which had not been addressed, and the Owner sought a more comprehensive scope of works. The Owner expressed its position in an email sent by Ms Peden on 11 March 2019. Further correspondence was exchanged a few days later, however, Mr Peden deposes that there are numerous defects in the works at the site which had not been rectified by Mr Deane.

191 Mr Peden was referred to some correspondence that passed between the parties' lawyers on the subject of defects, from October 2018, but it was suggested that this was well after the project had been completed.

192 One of the defects, Mr Peden asserts, was a gap under the fence to the south east boundary of the site. The owner referred to an acoustic report, dated 15 August 2014, requiring the acoustic fence to be constructed so as to have a gap of not more than 20mm beneath the fence. The owner was concerned that, as it was a childcare centre erected on the site, there was a potential for children to dig a small about an escape under the fence. On 15 March 2017, Mr Peter took a photograph of the fences with the timber boards installed which depicted a gap.

193 It was suggested to Mr Peden in cross-examination that it was absurd to think that small children might be able to dig their way through compacted gravel to make their way under the gap. Mr Peden maintained that it was possible for young children to find a way.

194 In and around April 2019, he had arranged for Stu Adams Gardenscapes to install time boards under the fences where there was a gap, at a cost of $924. In cross-examination, Mr Peden said that the gap had now been addressed.

Mr Deane's evidence

195 Mr Deane deposed that the gap between the Colorbond fence and treated pine base board met the RCA Acoustics report requirements. The gap was not

relevant to the sign off, in the form of the issue of the certificate of compliance on 6 January 2017.

Expert evidence

196 The Owner relied upon expert opinion evidence from Mr Peter Shepherd, a building consultant, in a report dated 20 March 2020. The Builder relied upon expert opinion evidence from Mr John Lewer. No point was taken about the qualifications and expertise of these experts.

197 The two building experts did not confer until the hearing commenced. This was procedurally unsatisfactory in a case of this kind. Whatever was the position about compliance with pre-hearing directions, for building disputes, it is important that practitioners ensure that building experts retained for their clients meaningfully engage with each other on disputed defects (including also the scope of suggested rectification works) well in advance of the hearing and reduce to writing areas of agreement and continuing dispute. In this way, not only will the Court be adequately informed as to the scope of what is truly in dispute, but the Court's time in adjudicating the issues will be reduced. Further, the parties themselves, and their representatives, may also be apprised of the real issues; and that might spur further prospects for settlement discussions. Leaving the experts to confer only during the hearing does not illuminate the issues truly in dispute in a timely fashion but, as it did in this case, is likely to prompt disruption to the parties and their lawyers and, as here, an adjournment to ensure that a process has occurred which at least tries to limit or narrow disputed issues. That naturally is apt to take away from the timely and expeditious flow of the hearing.

198 Eventually, the results of the building experts' conference were reduced to writing (Exhibit G), which they adopted; however, in two instances, Mr Lewer baulked at the suggestion that agreement had been reached on certain matters despite the document indicating that it had. It was apparent, though, as Counsel for the Owner questioned the experts when they gave their evidence concurrently that, save for the two instances I referred to, the experts adopted the correctness of the document.

Agreed defects

199 Counsel for the Builder raised a preliminary point that was applicable to all defects. He raised with Mr Shepherd the circumstance that all construction works had been signed off by the principal certifying authority ('PCA'); as the precondition for the issue of a construction certificate. The same PCA was empowered to determine whether parts of works should be demolished. In this case, however, that power had not been exercised in relation to any of the defective works which Mr Shepherd identified. Mr Shepherd agreed with all this, whilst adding that, in his opinion, the works should not have been signed off in this way.

200 Taking Mr Shepherd's numerical itemisation of the alleged defective works (from his report dated 20 March 2020) the experts agreed that items were defective. In some instances, they completely agreed. In other instances, they only partly agreed or disagreed. I will address, initially, the areas where they were fully agreed upon.

Item 2 (stairs)

201 The experts agree that the external stairs, and the nosing of the internal stairs do not comply with BCA requirements.

202 They agree that the internal handrails are loose.

Item 3.2 (subfloor space - rubble & debris)

203 The experts agreed that some rubble and debris had been left in place by the Builder. (Timber cuts and other things remained on the subfloor).

Item 3.4.1 (subfloor space - paths)

204 The experts identified movement in the paths on the eastern side. Water running down those paths contributed to the source of water entry.

Item 3.4.2 (pipe penetrations)

205 They agreed that there is a defect with the pipe penetrations.

Item 4.2 (subfloor framing - rusty wall brackets)

206 They agreed that a certain quantity of wall brackets were also rusty.

Item 9 (Roof A cappings and flashings)

207 The experts agreed that the flashings on the roof of Block A are crimped and damaged.

208 They further agreed that the caps to flashings are not correctly fastened and sealed.

209 They further agreed that the correct number of sheet fixings has not been provided.

210 Mr Lewer agreed also with Mr Shepherd's view that nylon anchors were used to secure the barge capping to the wall and were found to be rusting.

Item 11 (insulation)

211 The experts agree that insulation is not in place as required. It was falling out of the western side of the walls and leaning against concrete wall panels in Block A.

Item 12 (Awning roof)

212 The experts agreed that roof sheets on the awning roof were damaged, apparently from persons accessing the roof area where the air conditioner was installed and screws and debris remained on the roof.

Item 13 (External walls – penetrations)

213 The experts agree that penetrations in the external walls (to both Blocks A and B) were not sealed.

Item 17 (Window restrictions)

214 The experts agree that opening restriction devices were not fitted to windows.

Item 18.1 (air conditioning)

215 The experts agree that the air conditioning was defective in relation to its mounting.

Item 19 (Stormwater pit)

216 The experts agree that there was a defect with the stormwater pit.

Other agreed items

217 The experts affirmed their earlier agreement with items set out in Mr Shepherd's report of August 2020 (Exhibit 6, CB page 687). These items were (with reference to Mr Shepherd's original numbering):

(a) Item 20.1 (block roller door guides);
(b) Item 20.2 (leaking pipe penetrations);
(c) Item 20.3 (corroded fasteners);
(d) Item 20.4 (articulation joints);
(e) Item 20.5 (path wall interface);
(f) Item 20.6 (block awning trim); and
(g) Item 20.7 (Block B fence).

Contentious defects

218 I will now address the contentious defects; also adopting the itemisation in Mr Shepherd's report.

Item 1

219 As to item 1 (access ramps), the experts agreed that they do not comply with the requirements of the BCA and Australian Standard, and rectification is required; although this was qualified. Mr Lewer agreed that there was a lack of crack control joints.

220 The experts diverged, however, on the question of liability. Mr Lewer considered that the front ramp was a design defect, stemming from masonry supporting the concrete path.

Item 1.2 (rails)

221 The experts agreed that the rails do not comply with BCA requirements. Mr Shepherd considered that the balustrade rail impeded the 50mm space requirement for the lower handrail. This was required by the Australian Standard requirements for handrails and, in multiple instances, the distance was less than the prescribed 50mm.

222 Mr Lewer considered the issue practically: the point of the AS requirement was to assist disabled persons and prevent them getting tangled in the balustrade. He considered that Mr Shepherd's view was "pedantic".

Item 2 (internal stairs)

223 In relation to the internal stairs, these were the ones in the hallway of Block A. Mr Shepherd considered that they were not compliant with requirements since (a) the material was not of suitable density; and (b) the storage cupboard constructed underneath the stairs was not fire-rated.

224 Mr Lewer argued that there was no requirement for the stairs to be fire compliant. There were fire exits for the top of Block A (opening doors to the playing area) and from the bottom level of the block. There was no BCA requirement to subject the internal stairs to fire regulation. Similarly, in relation to the storage issue raised by Mr Shepherd, there was no such requirement. Mr Shepherd disagreed with this reasoning. People were being directed onto the stairs and there was a provision (D 2.3 and D 2.8, Ex 5, CB p 418) requiring compliance with the BCA.

Item 3.1 (Subfloor space - profiling)

225 Mr Shepherd considered that the subfloor had not properly been profiled.

226 Mr Lewer disagreed. He regarded the presence of water on the sub-floor (which he argued was not apparent at the time of construction) as the result of natural causes. He identified the presence of an aquifer which he considered was the source of water. He was challenged on this: it was suggested that this had not been previously identified by him in his reports; and he had not thoroughly investigated the issue.

227 Mr Shepherd distinguished between the profiling of the ground and the source of the water. He referred to and relied upon provision F.1.12(a)(iv) of the BCA and photographs which depicted areas which were damp and surface water. In response to this, it was suggested to him that the provision which Mr Shepherd relied upon dealt only with surface water; not subterranean water.

Items 3.3, 3.4 & 3.5 (subfloor space – mould, water entry, paths, pipe penetrations & ventilation)

228 Items 3.3, 3.4 &3.5 (inclusive) were addressed together.

229 Mr Lewer accepted that some softwood in Block A could be degraded. He said he was unable to opine on whether the Builder had an obligation to provide ventilation on the sub-floor when it was suggested that there was a BCA

requirement and relevant engineering documents (SO9) required the BCA prescription to be given effect to. He accepted, however, that the Builder had not provided ventilation for the subfloor space without wanting to classify whether that was a major or minor breach of the BCA condition.

Item 4.1 (subfloor framing – column bases & rust)

230 There was substantial agreement in relation to this item. Mr Shepherd identified that there were 10 column bases that were rusty. Mr Lewer accepted that there was some damage, and found 3 instances of rust in Block A. But he considered that the problem was partly attributable to corrosion due to the aquifer and some water leaching through penetrations.

Item 4.3 (subfloor framing – support for beam)

231 Mr Shepherd identified that the beam running under the centre of the playground in Block A landed on a footing. Mr Lewer agreed that there was 'an issue', but he disagreed that it was too close to the edge and did not regard it as a defect.

Item 4.4 (subfloor framing – floor joist blocking)

232 Mr Lewer was not prepared to accept that Mr Shepherd had supplied calculations to substantiate this item.

Item 5 (termite protection)

233 There was a measure of agreement in respect to this item. They agreed that a barrier was not installed. Mr Lewer disputed that such barrier was required. Mr Shepherd explained that because of the timber plywood and framing, it was appropriate to install barrier around the perimeter of the buildings. The purpose was to illuminate where termites were building tunnels.

234 Mr Lewer considered that there was no construction requirement to have a barrier; as distinct from the provision for spray or traps. Visual inspections were appropriate.

235 Mr Shepherd disagreed on the latter point; citing AS 3660.1, which provided a range of potential barriers. The barrier could be in the form of a chemical product; but a physical barrier could also be utilised.

Item 6 (External door openings – glass blocks)

236 The experts agreed that there was efflorescence, arising from water getting into the cement. However, Mr Lewer regarded this as a mere maintenance issue: no matter what was done, the entry of water onto the cement meant that the problem would reoccur.

Item 6 (External door openings – door openings)

237 Mr Shepherd observed that there was no flashing under the doors in the external walls to prevent water entry. There should be a drain, of sorts, to re-direct water outside.

238 Mr Lewer did not accept this. He considered that the design was for a flat entry and there was no opportunity for the Builder to insert flashings. There was, however, a membrane which could act as a barrier. It was the architect who was responsible for the position.

239 Mr Shepherd argued that there was no reason why flashings could not be installed. He did not know what membrane that Mr Lewer was referring to. He cited some photographs in his report (Exhibit 5, CB p 464, photos 78-79) as indicating water entry attributable to the absence of flashing and opined that if there was any membrane in place, that it was ineffective.

Item 7 (Block A Suspended Playground)

240 Mr Shepherd opined that the juncture of 2 surfaces in Block A was not sealed, so that water was allowed downward.

241 Mr Lewer did not accept how water entry could occur. His view was that without Mr Shepherd identifying the area in question, he could not comment. Mr Lewer did not consider that the sub-floor to the Block A building needed to be dry at all.

242 In response to this, Mr Shepherd said that the problem was not only a damp sub-floor, but that water was getting onto the formwork and structural steel work. In response to this challenge, Mr Shepherd said that it was at the southern playground of Block A, against the side-wall outside the babies' room. Mr Lewer maintained that, still, he did not see water staining. But he thought that periodical maintenance was sufficient to deal with the problem.

Item 8 (roof A penetrations)

243 Mr Shepherd identified 6 penetrations through the roof which required back flashings. These blocked the flow of water.

244 Mr Lewer disagreed that there was a need for back flashings. There was only a single penetration which needed replacement.

Item 10 (the roof to Block A Box gutter)

245 Mr Shepherd considered that the box gutter did not adequately provide for fall and so could not deal with the volume of water. It was put to Mr Shepherd that his criticism was one of technical non-compliance with the BCA, which Mr Shepherd acknowledged. Nevertheless, he adhered to his written opinion that, amongst other things, the gutter was not provided with a sump and had less than the minimum fall and held water.

246 Mr Lewer disagreed and added that there was no compulsion on the Builder's part to put on a rainhead or other device.

Item 14 (site drainage)

247 The experts agree that the pits do not have lockable gates. Mr Shepherd was concerned about the size and depth of some of the pits and the risk of access to them by the children.

248 Mr Lewer said he did not know where the pits were. In answer to this, Mr Shepherd referred the Court to certain photographs in his report (Exhibit 6, CB p 672).

Item 15 (internal doors)

249 The experts partially agree in respect to this item: the laundry door should be replaced; one door binds on the floor and the top and bottom edges of the doors are not painted and sealed as stipulated by the door manufacturer.

250 But Mr Lewer argued that the manufacturer's recommendation for sealing did not amount to a requirement. Mr Shepherd disagreed with this and in his report (Exhibit 5, CB p 505), he referred to what he characterised as a peremptory requirement for undercoating.

Item 16 (Disabled amenities)

251 Mr Shepherd argued that the bathroom in Block B should be treated as disabled. Mr Lewer disagreed with this. It was put to Mr Shepherd that this was a design issue, but Mr Shepherd maintained that it was more than that: the design was required to and did not comply with the requirements of Australian Standard 1428.1 in serial respects. He set out the detail of this in a table in Exhibit 5, pp 508-510.

Item 18.1 (air conditioning)

252 Mr Shepherd said the air conditioning units should be moved, preferably on a side wall, so that access to the roof would not be required.

Item 18.2 (mechanical ventilation)

253 Mr Shepherd was initially challenged upon his expertise in expressing his view about this requirement.

254 Mr Lewer argued, with reference to provision F 4.7 (Exhibit F, p 18) that so long as there were 'openable' spaces in the wall, as there was (because of an open door), the provision was satisfied. He argued that without calculations, Mr Shepherd was not justified in his opinion. But Mr Shepherd countered that he had provided calculations: they were in one of his reports (Exhibit 6, p 684) and maintained that to get proper ventilation, the doors would need to be opened at all times; which was impracticable. This meant that mechanical ventilation was required to bring fresh air in.

255 This prompted the suggestion to Mr Shepherd that the problem was a design issue, which he disagreed with but which proposition Mr Lewer adopted. The latter said that if the Owner wanted something more than what the standard provided for, which was reflected in a drawing, it should be responsible for it itself.

Parties' legal contentions on defects - general

The Builder's submissions

256 The Builder's Counsel made no submissions, or very few submissions, about the individual defects or scope of rectification. This followed the course of the evidence in which little challenge was made to Mr Shepherd's views on

individual defects. Counsel's contentions were substantially directed to the applicable law.

257 His first contention was that the Owner's claim was ousted because of a lapse of time. The Builder's starting point is the proposition that, subject to variation, the contract regulated the parties' rights, including when claims could be made for defects. Counsel cited the observations of White J (as his Honour then was) in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWSC 1302 at [73]-[77], in which his Honour approved the views of Cole J in *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (1994) 13 BCL 378.

258 Next, the Builder submitted that by the operation of cl 4(d) of the contract, once the PCA had signed off on works as compliant under the regulatory regime, then subject to the defects liability period, the Builder was deemed to have complied with the requisite regulatory requirements.

259 The Builder then submits that as the child care centre was operational by January 2017, 'practical completion' had been reached. On that basis, the defects liability period of 26 weeks expired no later than 18 July 2017. After that, by the operation of cl 21, the Owner no longer had any right to recover damages for any defective works.

260 The Builder also submitted that whether or not defects were apparent during the defects liability period, it could not be liable for works resulting from design flaws.

261 The Builder also contended that it would be unreasonable to award damages for works given the delay in the Owner claiming the defects, and on the basis that it could not be established that the Owner seriously intended to rectify them. On the basis of authority, an absence of intention is reflective of the notion that it would not be 'reasonable' for the rectification to occur.

The Owner's contentions

262 The Owner submitted that cl 4(d) of the contract did not, properly construed, have the operation contended for by the Builder. By its terms, it dealt only with the "requirements of the Authority". This was not a sufficiently clear ouster of

an Owner's rights in general law for damages for defective works[6]. If it was as broad as the Builder contended, it would negate a remedy, for example for breach of the express right under cl 1 of the contract. If it was so broad, it could leave to the absurd, if not inconvenient result, that false or deceptive representations might be made to an authority which, if it induced an authority to grant a certificate, would oust an Owner's remedy for defective works. There was no authority to support the Builder's construction of cl 4(d) for the standard provision. Reference was made to Victorian authority[7] as one example where a builder's reliance upon a similar deeming provision was ineffective to relieve the Builder of responsibility for damage caused by defective work. Clause 4(d) only established the Builder's entitlement to obtain an occupation certificate.

263 In relation to cl 21(a) and (b), the provisions did not represent a codified bar to an Owner's recovery for damages for breach of contract. The decision in *Turner Corporation* (followed in *Bitannia*), upon which the Builder relied, dealt with different provisions. In both cases, the builder had been removed from the site and the owner sought to address defective works. The thrust of the decision(s) was that it is in incumbent upon the owner to give the builder notice that if the builder did not rectify the works, the owner could take steps to terminate the contract, fix the defects and sue to recover the costs of rectification, and there was a failure by the owner in that case to comply with the contractual regime. Clause 21 was designed to give the builder opportunity to rectify, but it did not exclude rights where an owner becomes aware of faults or defects only after the expiry of the 'contract maintenance' period. In this case, defects were not apparent within this period. The defects identified by both experts in this case were serially in non-compliance with BCA and Australian standards; and, in sequence, they were only apparent after August 2018, well after the 'contract maintenance period'. The Owner was not prevented by cl 21 from bringing a claim for damages for defects it claimed since they were not of a kind which had appeared during that discrete period.

264 In response to the Builder's point about 'design defects', the Owner further submitted that the Builder's obligation was to produce works in conformity with

[6] Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd (1994) 13 BCL 378 per Cole J.
[7] Toomey v Scolaro Concrete Constructions (in liq) (No. 2) [2000] VR 279.

the law; in the sense of compliance with the BCA and the Australian Standards. This was regardless of whether or not they were performed in accordance with the plans and specifications. The Owner referred the Court to the Court of Appeal's decision in *The Owners – Strata Plan No 66375 v King* [2018] NSWCA 170. The Owner contended that a builder cannot evade responsibility for something omitted in the architectural plans or drawings where its obligation is to comply with the requirements of the BCA and/or Australian Standards. The Owner said that where there was an apparent problem stemming from a design flaw, it was said to be incumbent upon the Builder to seek further direction from the Owner or an engineer or both. This was said to follow from the decision in *The Owners – Strata Plan No 66375 v King*.

265 In response to the Builder's point that the Owner has never had any real intention to rectify the defects, the Owner relied upon the *Bellgrove* principle and accepted that the rectification works had to be both necessary and reasonable. Although the works had not been undertaken since defects had been identified, the Owner submits, in August 2018, the delay has not been protracted. There was always a difficult choice for an owner in this Owner's position as to whether it should rectify first (and incur substantial expense in doing so) then sue, or seek a Court determination of that rectification would be appropriate. The cross-claim was filed on 21 October 2019, 14 months after the proceeding had commenced.

The Builder's submissions in reply

266 The Builder submitted that cll 4(d) and 21, read together, limit the Owner's rights; and both are intended to reflect the risk allocation agreed between owner and builder. There was no reason to narrowly construe cl 4. It was intended to signify that once practical completion has occurred, the premises are safe to be occupied.

267 As to cl 21, the Owner is protected in the sense that the limitation extends only to defects or faults which are patent and the defects liability period allows the Builder the opportunity to rectify those defects. But once the Owner's PCA has signed off under cl 4(d), in effect, to declare that there are no patent defects, the Owner should be held to that effective declaration. There is nothing unfair

about this for an Owner. Even under legislation intended to be more beneficial to owners – the *Home Building Act* 1989 (NSW) – owners of residential properties are protected to the extent that such owners only have a period of 2 years to bring claims. It is unsurprising that in the commercial space, a period might be shorter.

268 Counsel did, however, argue that in relation to certain items, the Builder could not be accountable for 'design flaws' and, further, that given that engineering drawings were not incorporated in the architectural plans, the Builder could not be responsible for any omitted item. Counsel instanced the complaint about mechanical ventilation as an example of this. The same thing might be said about item 1 (the ramps). To accede to the Owner's submissions would mean that builders (of commercial works) generally may be subjected to extremely onerous obligations.

269 Separately, on the recovery of *Bellgrove* damages, the Builder submitted in reply that the Owner did not agitate its claim until 6 months after the Builder's own claim. This was a long time after it had commenced operations at the child care centre. There was no legitimate basis for seeking to preserve evidence in preference to fixing an identified series of problems.

Findings on the Builder's general contentions

Is there a time bar?

270 In *Turner Corporation v Austotel Pty Ltd*, Cole J considered a standard form of building contract known as "*Building Works Contract – JCCA 1985 With Quantities (Third Print – August 1988)*". That contract contained clauses the same, or materially the same, as the present contract. In particular it included the same provisions as clause 1.03 describing the builder's obligations, clause 3.05 requiring the proprietor to allow the builder reasonable access to the site and the works to make good defects the architect required be carried out under clauses 5.04-5.06, and 6.11. After discussing the provisions, Cole J said (at [394]-[395]):

> "It follows, in my view, that the contract does provide a code which establishes the rights, obligations and liabilities of the parties, and the mechanisms by which completion of the Works is to be achieved. In summary, the Builder is given possession of the site for the purpose of and with the obligation to bring the Works to Practical Completion by the Date for Practical Completion. The

> Proprietor has no general right to bring others onto the site to perform or complete portions of the Works. However, if prior to Practical Completion there appears defects or omissions in the Works, the Architect may give to the Builder a notice to rectify those defects or omissions within a reasonable time. If the Builder fails to rectify or complete the defects or omissions as so directed by the Architect, the Proprietor by contractual right, after a further notice from the Architect to the Builder, may engage others to enter upon the site and rectify or complete those defects or omissions.
>
> Once Practical Completion is achieved under the contract, the defects liability period commences and the Builder surrenders possession of the site back to the Proprietor. Although the Proprietor then has possession of the site, the Builder retains the right to enter upon the site to permit it to rectify notified defects, and it has the obligation to rectify such notified defects within a reasonable time as directed by the Architect, and in any event not later than a reasonable time after the expiration of the defects liability period. If it fails to do so, the Proprietor may, after a further notice from the Architect, have the notified defective or omitted works performed by others at the Builder's costs. Alternatively, by agreement, the omitted or defective works may be removed from the contract works with an appropriate monetary adjustment to the contract sum. A third alternative is that the Proprietor may be able to rely upon the default of the Builder to rectify the defective or incomplete works as a ground for terminating its employment under the contract and thereafter having the works completed by others at the Builder's cost pursuant to cl 12. However, if none of these three contractual powers is exercised, the Builder may become entitled to a final certificate which will result in it [being] entitled to plead completion of performance of the Works 'in accordance with the terms of the agreement to the reasonable satisfaction of the Architect'.
>
> *There is, in my view, no room for a 'wider common law right' in the Proprietor to treat noncompliance with the contractual obligation by the Builder as a separate basis for claiming damages being the cost of having a third party rectify or complete defective or omitted works. That is because the contract specifies and confers upon the Proprietor its rights flowing from such breach; that is, the parties have, by contract, agreed upon the consequences to each of the Proprietor and the Builder, both as rights and powers flowing from and the consequences of, such breach. The word 'may' is used because there are alternative contractual rights available to the Proprietor.*
>
> It also follows, in my view, that the Proprietor has no entitlement to recover the cost of work performed by others at the request of the Proprietor unless prior to such work being performed the Architect has given the notice required by cl 5.06.01 prior to the Date for Practical Completion, or pursuant to cl 5.06.01 as incorporated by cl 6.11.05 after the Date for Practical Completion." (emphasis supplied)

271 Cole J's observations were followed by White J in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWSC 1302 at [73]-[77]. I was informed by Counsel that *Bitannia* had been subsequently considered without disapproval.

272 Counsel for the Builder accepted that neither Cole J in *Turner* or White J in *Bitannia* addressed themselves to a provision like cl 4(d). I accept that cl 4(d) is not to be read in isolation, and has to be read in the context of other provisions

(including cl 21) of the contract as a whole, but I do not find that even viewed in context, cl 4(d) represents a bar to an owner to bring a claim for damages for defective works even where defects emerge after the issue of a construction certificate. It matters not, for this purpose, whether it is the Owner's PCA who has exercised a delegated power. The provision speaks of the "requirements of an Authority". It does not refer to the rights of the Owner (or the Builder). Just because the Authority's requirements are satisfied, cl 4(d) does not indicate any consequences that follow for the rights of an Owner. There may be restrictions upon what a local council may do after its requirements have been deemed to have been complied with, but that does not expressly or impliedly constitute a restriction or limitation upon an owner's rights in general law. Further, in my view, it is possible to conceive of circumstances where construction certificates are issued in circumstances where an authority has mistakenly formed the view that conditions of consent (including compliance with, say, the requirements of the BCA) have been complied with. Counsel for the Builder accepted that *Bitannia* and *Turner* did not address a provision like cl 4(d) and no other authority was indicated to the Court which would support the very broad contention advanced on the Builder's behalf.

273 I consider that there is greater force to the Builder's contention centred on cl 21, to the extent that the subject matter of that provision is directed to defects or faults which 'appear'. There is no express definition of this word in the provision, and it was not suggested that its meaning was circumscribed by custom or usage. It should take its plain and ordinary meaning. In my view, a defect or fault appears if it is 'readily visible', or 'self-evident', which are two common definitions of the word 'appear'. Further, in my view, uninstructed by authority presented to the Court on this point, whether a defect or fault 'appears' is an objective question of fact. The regime deals with what might otherwise be called *patent* defects or faults; those that are 'minor' in nature and which do not require investigation. They should be of such a kind that it would not be expected that an owner would need to engage an expert to ascertain whether they exist. Their identification does not depend upon the subjective characteristics or capacity of the owner: some owners are likely to be more adept than others at identifying faults. Nevertheless where, as here, an owner

purports to notify defects after practical completion, the omission to identify a defect subsequently claimed has some evidential significance to whether it 'appear(ed)' at the date of practical completion.

274 In my view, the Builder, who propounds the limitations in cl 21, carried at least an evidentiary onus to establish that the defects alleged by the Owner appeared at the date of practical completion. There was no systematic endeavour on the Builder's part to establish that each and every one of the serial defects complained of appeared before 18 July 2017 or the date for practical completion the Owner contended for. In this respect, the email sent by the Owner dated 17 March 2017, which identified a range of defects, and which was sent after practical completion (whichever of the parties' contentions of what that date actually was) did not include the defects the subject of the cross-claim.

275 Unless issue has been taken by the Builder, I infer that the defects of which the Owner complains were not 'apparent' at the date that the email was sent and did not 'appear' at the date of practical completion.

276 That means that subject to the very limited number of exceptions that the Builder relied upon (considered below in my specific consideration of individual defects), cl 21 is not engaged by the defects alleged by the Owner in the manner suggested by the Builder.

277 In short, neither cl 4(d) nor cl 21 acts, individually or in combination, as a time bar to the Owner's claim for damages resulting from defects.

Responsibility for design defects

278 As to the issue as to the Builder's responsibility for 'design' defects, I accept that the Builder's primary obligation, stated in cl 1 of the contract, is to provide works that comply with the plans and specifications. At a high level of generality, it may also be accepted that the Builder is not responsible for loss or damage caused by a "design defect".

279 I do not find that the Court of Appeal's decision in *Owners v King* cited by the Owner to be of much assistance. In that the case, the Court of Appeal engaged in the task of construing statutory warranties under the *Home Building Act 1989*

(NSW) and the pivotal conclusion of the majority of the Court was that the implied statutory warranty as to compliance with the law rendered the developer (in that case) liable for works which did not comply with the law even if they were design defects. White JA (with whom Ward JA agreed) noted (at [406]) that if this appeared harsh to a builder, then the builder would be well advised to seek contractual protection from an architect or other professional in the event it is in breach of its statutory warranty.

280 That case was of course directed to the context of residential building work; and not commercial construction of the kind in dispute here. At the hearing, there was no denial by the Builder, however, of its obligation to perform works that complied with the BCA or Australian Standards. Clause 7(a)(i) of the contract required compliance with laws, regulations and by-laws. Works which do not comply with the BCA amount to a contravention of a law[8]. In my view, where the Builder's work was shown to not comply with such requirements, it would not matter whether or not that was the result of a design flaw. Unlike cl 21(c)(iv), where the Builder is relieved of responsibility for design related defects of the kind engaged by cl 21 (i.e. defects or faults which had appeared at the date of practical completion), which provision arguably might amount to an exception or qualification to the general effect of cl 7(a)(i), there is no other provision yielding a similar exception to defects which had not appeared at the date of practical completion. In my view, there is no warrant to read in such additional qualification, relating to design-related defects, into cl 7(a)(i). To posit that the Builder was relieved of responsibility for its contractual obligation to provide, in effect, 'lawful' works because of design flaws would substantially negate the Owner's right to have the works comply with the BCA and I do not infer that an owner would lightly give up such right.

281 I do not agree with the submission that this view is apt to impose excessively onerous obligations upon a builder. Aside from White JA's suggestion in *King* about the builder's capacity to protect itself by entering arrangements with other professionals, it also has some practical capacity as well through the

[8] Compare Owners v King per White JA at [394], referring to the former s 76A(1) (currently s 4.2(1) and s 4.27) of the Environmental Planning and Assessment Act 1979 (NSW) and cl 78A of the Environmental Planning Regulations 1994 (NSW) (currently Reg 98 of Environmental Planning and Assessment Regulation 2000 (NSW)).

provision made for variations. To some degree also, a builder may in certain circumstances detect that there may be a problem with a design, and is at least to be expected to know when construction in accordance with a design might be unlawful for non-compliance with the BCA. In such case, it would be expected that the builder may seek further direction from the owner, or the architect. An analogous type of situation is indicated by cl 1(c) of the contract where the Builder discovers ambiguities or discrepancies between what is contained in drawings and specifications. If that practical step were to be taken, it might result in a variation. Ultimately, it is no proper answer for a builder to a complaint that work is defective for being unlawful that it is resultant from execution of what was designed.

Intention to rectify

282 I will defer consideration of the Builder's contention that it would be unreasonable to carry out the rectification works until after I have considered the scope of any rectification.

Observations about experts

283 Both experts were both knowledgeable and competent. Both carried strong convictions. In certain instances, I regarded Mr Lewer's complaints that he could not respond to matters raised by Mr Shepherd, or thought that it was illegitimate for Mr Shepherd to express commentary on certain matters, as being somewhat disingenuous, when regard was had to the voluminous nature of the latter's evidence previously served. Further, in certain instances, I perceived Mr Lewer as somewhat evasive; if not, at least, non-responsive to some of the questioning directed to him. This was partly illustrated when he refused to pass comment on the basis that a question raised of him (for example, ventilation) was a legal issue. That explanation from an expert may sometimes be appropriate, but in the context in which the questioning was put to him, I considered that it was plainly apparent that he was asked his view as a building expert and he could have answered the question. I also thought that at times, he adopted something of an adversarial stance towards Mr Shepherd; which was improper for an expert witness. Generally, I considered that Mr Shepherd's evidence was more closely tailored to the BCA requirements than Mr Lewer; who, I thought, was more focussed on practical outcomes or effects

of the works and who relied upon the breadth of his experience not clearly delineated.

284 Accordingly, my general disposition on contested issues was towards acceptance of Mr Shepherd's evidence over Mr Lewer's evidence when there was conflict.

Findings – individual contested defects

285 As indicated, the Builder had very little specifically to say against the proposition that for the contentious items they were not defects.

286 By the time the experts gave evidence concurrently, there was a substantial measure of agreement that defects existed. In most cases, the differences were in the extent of the defect and the nature of the appropriate rectification work.

287 In what follows, unless I make specific reference to the contrary, I find that the defects did not 'appear' at the date of practical completion (being some point in the first half of 2017). They only "appear(ed)" after extensive and very technical investigation culminating in Mr Shepherd's initial report in August 2018.

288 As to items 1 and 1.2, it is convenient to deal with them together as they give rise to similar issues. I find that there was a non-compliance with the BCA and AS 1428.1 in both respects. Where there was a dispute about ramps and rails, Mr Shepherd's evidence had clearly identified breach. Contrary to Mr Lewer's view, the works were not built according to the plans. For reasons already supplied, I accept the Owner's submission that the Builder's responsibility for non-compliance with its obligation under cl 7(a)(i) cannot be evaded because of what appears in the drawings.

289 As to item 3 generally, in my view, it is unnecessary to treat with Mr Lewer's theory (articulated, for the first time when giving evidence concurrently) about the presence of an aquifer as an explanation for the source of water. I agree with the Owner's submission that there were other clear indications that water was coming down the walls and was present in the concrete slabs. Further, I accept that it is not correct to say, as a matter of fact, that there was a dichotomy in what the architectural plans stipulated and the engineer's

drawings. The former stipulated the requirement to provide drainage. The general problem about the presence of water was the lack of ventilation. At any rate, the issue was compliance with the BCA requirement and I accept Mr Shepherd's opinion that there was non-compliance with F1.12 in the respects he identified.

290 As to items 4.1 and 4.2, I find that there defects in the rusty quality of the column bases and wall brackets. On the items 4.3 and 4.4, I prefer Mr Shepherd's opinions to Mr Lewer. I did not regard the latter as being in vigorous disagreement with Mr Shepherd.

291 As to item 5, I find that there was a non-compliance with AS 3660.1 through the failure to install a barrier, which could have included a chemical barrier. I regard this as a defect.

292 As to item 6, in relation to the glass blocks, I am satisfied that efflorescence has been created by gaps in the perimeter frames for the blocks, contrary to the BCA (FP1.4) and that this amounts to a defect. In relation to the door openings, I am not satisfied that there has been a non-compliance with a relevant standard of the BCA and prefer Mr Lewer's view that the problem arose from an issue of design. I do not accept that there is a defect in that regard.

293 As to item 7, I accept Mr Shepherd's view that water was leaking from the southern playground of Block A and that this was a breach of the obligation in cl 1(a) of the contract. I find that there was a defect.

294 As to item 8, it is unnecessary, in my view, to determine the precise quantity of penetrations through the sheeting in Roof A. Mr Shepherd indicated that he found more than one and I accept that evidence. It amounts to a breach of the BCA (FP1.5) and probably also AS 1562.1. I find that there was a defect.

295 As to item 10, whether it be technical or not, I find that there was a non-compliance of the BCA (F1.5) for the extent of the fall. I accept, also that there was a non-compliance with Australian Standards HB39 (Part 5.3), read with AS 3500. Mr Shepherd observed it holding water and I do not regard the non-compliance as merely trivial. I accept the Owner's submission that there is a

concern about the prospect of flooding in the roof. I find that there was a defect.

296 As to item 14, I find that Mr Shepherd answered Mr Lewer's challenge to identify multiple stormwater pits provided in the pavement, without grates locked. Mr Lewer did not dispute that this represented a significant safety hazard. I find that there has been a non-compliance with the Builder's obligation of workmanship in cl 1(a) and the work amounts to a defect.

297 As to item 15, on the narrow question as to whether the top and bottom edges of the internal doors should be painted or sealed, although this may be desirable, I am not persuaded that it is mandatory or that its omission amounts to a breach of contract. The manufacturer's warranty does not make it so.

298 As to item 16, in relation to Block A, I accept Mr Shepherd's evidence that the amenities do not comply with the requirements of AS 1428.1 in the respects enumerated in his table (Exhibit 5, CB pp 508-510) and are defective on that account. In relation to Block B, this is one instance where what might be regarded as a design flaw (the omission to provide for a disabled amenity) does not relieve the Builder of its responsibility to construct in accordance with the requirements of section F2.4 of the National Construction Code, and there was no dispute that they were not complied with. Accordingly, I find that this work is also defective.

299 As to item 18, in my view, this is another instance where, although there may have been a design flaw, the requirements of the Code (F4.6) for natural ventilation requires a *permanent* opening. Mr Lewer's view that natural ventilation is afforded by the doors being kept open leaves it too much to chance that they will in fact remain open and I prefer Mr Shepherd's view that this is impracticable. Given that the subject matter is baby and cot rooms, I am also concerned about the safety implications of the current situation. I find that this alleged defect has been made out.

SUGGESTED SCOPE OF RECTIFICATION WORKS

Items 1 (access ramps)

300 Mr Shepherd considered that it was necessary to dismantle and remove the front section of the ramps and remove parts to increase the landing size and width.

301 I accept that view.

Item 1.2 (rails)

302 Mr Shepherd considered that the rails needed to be wholly replaced. They needed to be reconfigured and repositioned and the handrail and grabrails affixed to ensure correct hand clearances, a clear path of travel, prevention of obstruction by plates and general compliance with the BCA and applicable standards. It was not just the end termination of the handrail, but also kick areas, the width between the handrails for each change in direction and the minimum 50mm clearance. Since the sections required off-site fabrication, it was simpler and cheaper to construct new rails; given the extent of the necessary modification for the existing length of rail.

303 Mr Lewer considered that only part of the handrail required removal. He identified certain areas on one of the diagrams in evidence (Exhibit 6, p 700).

304 I prefer Mr Shepherd's view that it would be uneconomic to engage in a piecemeal exercise. The rails should be replaced in their entirety.

Item 2 (the stairs)

305 Mr Shepherd considered that rectification of the stairs should occur in conjunction with the removal of the handrails. In relation to the external stairs, he believed that it was necessary both to grind the stairs and to top the stairs. Grinding them was to correct the erroneous rises. Topping them would provide a uniform finish. Thereafter, a nosing strip should be applied on the front to provide a non-slip surface. Mr Lewer only partially agreed with this. He did not consider that topping was necessary. He considered that this might put the stairs out of compliance on a concrete surface.

306 Again, I prefer Mr Shepherd's view on rectification; and his view that it is not enough just to grind the stairs; but it is appropriate also to top them.

Item 3

307 Mr Shepherd considered that the ground needed to be built up with concrete covering all low areas with the low areas being set to fall to a drainage point; to ensure that the concrete extended up onto the base of the external walls so as to prevent water entry to the exterior. Further, he suggested that a drainage sump and pump discharge line be connected to the stormwater drainage system. Ventilation openings should be cut and formed in external walls and a chemical air extraction system should be installed. All junctions of the external pavement with the external walls should be sealed so as to reduce water ingress into the subfloor areas.

308 Mr Lewer considered that it was necessary for water to be sumped and pumped out of the building.

309 Mr Lewer's solution struck me as being only temporary and was not a means of producing an enduring outcome. I prefer and accept Mr Shepherd's view.

Item 4.1 (column bases and wall brackets)

310 The experts agreed that the columns should be sanded back and painted. Mr Lewer added that he thought that annual maintenance was appropriate.

Item 4.3 (subfloor framing – support for beam)

311 This was the subject of analysis in Mr Shepherd's detailed rectification costing. The beam should be brought into conformity with the engineering design.

Item 4.4 (subfloor framing – floor joist blocking)

312 I understood it to be agreed that the issue could be fixed by re-instating the blocking.

Item 5 (termite protection)

313 I find that the insertion of a chemical barrier is appropriate.

Item 6 (external door openings – glass block)

314 Mr Shepherd indicated the junction of the glass block frame with the wall should be scraped and resealed. So too should the surface of the grout between the blocks be scraped and resealed.

315 I accept that evidence.

Item 7 (Block A suspended playground)

316 Mr Shepherd favoured installing a waterproof membrane to the junction of the concrete playground area and wall in accordance with the Australian Standard for external waterproofing.

317 I accept that evidence.

Item 8 (Roof A penetrations)

318 Mr Shepherd argued for the removal of rubber deck flashing; the supply and installation of folded metal back tray flashing and the insertion of new rubber flashing in order to ensure long term protection against water entry and minimise deterioration of flashings and sealants.

319 Mr Lewer favoured pulling off the sheet, removing any sealant and fitting a new flashing over a suitable sealant and ensuring that there was enough room for water to pass.

320 I did not detect any real difference between these approaches but to the extent that there is any, I prefer Mr Shepherd's view.

Item 9 (Roof A cappings and flashings)

321 The experts agreed that the damaged flashings needed to be removed and replaced; that additional fixings were required to deal with laps not being fastened; that the proper number of fixings were to be provided for barge capping and sheet fixings and the nylon anchors had to be removed and replaced.

Item 10 (Roof A Box Gutter)

322 Mr Shepherd argued for the removal of the existing butter and provision of the correct minimum falls. A new custom folded box gutter needed to be fabricated, incorporating the correct fall and a sump at the outlets. Roof sheeting then needed to be reinstated. All of this was required to protect the building against water ingress.

323 I accept that evidence.

Item 11 (insulation)

324 I understood there to be no dispute that insulation needed to be reinstated into Block A.

Item 12 (awning roof)

325 The experts agreed that the damaged sheets needed to be replaced with new roof sheets.

Item 13 (external walls – penetrations)

326 The experts agreed that the penetration needed to be cleaned and sealed with an approved sealant.

Item 14 (site drainage)

327 Mr Shepherd referred to the detailed rectification costing for the scope of this rectification. The purpose was to ensure the health and safety of all persons accessing the site.

328 Mr Lewer appeared to suggest that the answer to this problem, if there was one, was on-going security, to prevent the children accessing the pits.

329 I disagree. He gave no indication as to the cost of such security. I prefer Mr Shepherd's solution which is more economical and likely to be safer; as it will not be subject to human fallibility.

Item 15 (internal doors)

330 It was agreed that the laundry door needed replacement. I so find.

Item 16 (Disabled amenities)

331 Mr Shepherd argued that rectification required the removal of non-compliant fittings and the supply and installation of the components in accordance with the requirements of the Australian Standard, as summarized in his table appearing in Exhibit 5, CB pp 508-10, where this was necessary for both buildings.

332 I accept that evidence.

Item 17 (Window restrictions)

333 The experts agreed that window restriction devices needed to be fitted to each of the offending window sashes.

Item 18.1 (air conditioning)

334 The experts agree on the relocation of the two units, to be refitted along the western wall.

Item 18.2 (mechanical ventilation)

335 Mr Shepherd argued for the fitting of ventilation openings in the walls between the cot rooms and the baby rooms and the supply of ventilators in each of the baby rooms to provide sufficient capacity to comply with BCA requirements.

336 I accept that evidence.

Item 19 (stormwater pit)

337 Mr Shepherd argued for the cutting back of the existing sealant, and resealing of the pipe/tank junction of each pipe on both sides of the pit wall.

338 There is no dispute about this and I accept the evidence.

Item 20 (previously agreed items)

339 The parties have agreed amongst themselves as to the appropriate scope of rectifications for these items.

Are rectification works unreasonable?

340 In *Repfix Industries Pty Ltd v FBD Group* [2020] NSWDC 514, I recently summarised my understanding of the principles associated with the recovery of rectification damages as follows:

> "[174] …The owner was entitled to have something built in accordance with the plans and specifications. Where that has not been done, the usual measure of damages is the amount required to rectify the defects complained of. If that cannot be proven, however, it is open to the owner to claim damages based on diminution of the property on which the works were performed.
>
> [175] But that is only a starting point. The measure of damages recoverable by the owner for rectification works is the amount required to give the owner the equivalent of a building on land which is substantially in accordance with the contract. In practical terms, this is measured by the difference between the contract price and the cost of making the work substantially conform to the contract *(Bellgrove v Elridge* (1954) 90 CLR 613).
>
> [176] Nevertheless, the entitlement to receive rectification damages depends upon findings that (a) rectification works are a *reasonable* course to adopt, and (b) are *necessary* to produce conformity to the contract (*Bellgrove* at 618-9). In this regard, the High Court has said that it would only be in fairly exceptional circumstances that the standard of *un*reasonableness would be met (*Tabcorp* at [17]), such as where the owner used a technical breach to secure an

uncovenanted profit, or where the cost of rectification is out of all proportion to the benefit to be obtained from the rectified work (*Wheeler & Anor v Ecroplot* [2010] NSWCA 61 at [81]). I understand the High Court to be using those circumstances as illustrative of the proposition of when a Court might find that works were unreasonable, rather than an exhaustive statement of when such finding of unreasonableness might be made.

[177] Reasonableness and proportionality require factual assessments. Caution should be exercised in relation to the assessment of 'reasonableness' lest a party 'radically undercut' the bargain the innocent party had contracted for (*Tabcorp* at [19]). But in deciding whether rectification would be reasonable or not, the Court will have regard to the purpose of the building work – that is, the objective that the owner sought to achieve, as understood by the parties (*Westpoint Management Ltd v Chocolate Factory Apartments Ltd; Chocolate Factory Apartments v Westpoint Finance & Ors* [2007] NSWCA 253 at [48]).

[178] Where a technical breach is being used to secure an uncovenanted profit, then the innocent party's intention may be relevant. In *Westpoint*, Giles JA said (at [60] -[61]):

> "...The plaintiff's intention to carry out the rectification work, it seems to me, is not of significance in itself... The significance will lie in why the plaintiff intends or does not intend to carry out the rectification work, the light it sheds on whether the rectification is necessary and reasonable…
>
> "…An intention not to carry out the rectification work will not of itself make carrying out the work unreasonable, but it may be evidentiary of unreasonableness; if the reason for the intention is that the property is perfectly functional and aesthetically pleasing despite the non-complying work, for example, it may well be found that rectification is out of all proportion to achievement of the contractual objective or to the benefit to be thereby obtained."

[179] This passage was referred to approvingly in *Cordon Investments Pty Ltd v Lesdor Properties* [2012] NSWCA 184 at [229]) which … post-dated the High Court's reasons in *Tabcorp*."

341 I apply those principles in this case.

342 As was noted in the High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, the circumstances in which rectification works to bring works into conformity with contractual obligations is taken to be unreasonable are fairly exceptional. As it happens, in *Repfix*, I had found that those exceptional circumstances were made out.

343 I do not accept the proposition that the proposed rectification is unreasonable in this case. I accept the Owner's submission that there have been serial departures from the requirements of the BCA and Australian Standards in relation to the works. It cannot be said that to undertake rectification works will be out of all proportion to the contractual objectives. The many problems are

not trivial but are significant and, in many cases, give rise to safety concerns in a context where many members of the public (including many small children) are users of the works.

344 I do not find that the delay in first investigating and thereafter prosecuting the claim for damages for the defective works to be inordinate; or simply a contrivance to reduce the Owner's exposure to the Builder's variations claim to secure any uncovenanted profit.

345 I accept that the Owner is entitled to rectification, as agreed or as found by me, as being reasonable and necessary.

SUMMARY

346 As indicated, some of the contested variations claimed by the Builder have been accepted. I have rejected those that remained contested at the hearing. I have found that the Builder is entitled to interest and the claimed profit margin on progress claim 12 and, to the extent variations have been found, interest and the claimed profit margin on progress claim 13. The Builder is also entitled to a profit margin in relation to the Landscaping. There is no dispute that the Builder is also entitled to the GST component on some of these components.

347 Many of the defects alleged by the Owner in its cross-claim were previously admitted or admitted in the hearing. I have found that the preponderance of those defects which were contested has been established.

348 The parties should confer on the further course of the proceeding and bring in short minutes for orders consistent with these reasons and any further directions concerning the conduct of the proceeding within 21 days. As indicated, issues concerning the quantum of variations (including profit margins, interest and GST), the quantum of the profit margin for the landscaping, and the quantum of costs of rectifying the defects are to be referred to a referee.

349 Questions as to costs of the proceedings will be considered after the referral. The referral may, of course, be obviated if the parties can agree amongst themselves as to these matters and can agreed to final orders to dispose of the proceeding, but that is a matter for the parties.

350 Liberty to apply is granted on 3 days' notice.

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