SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Civil)

BEDROCK CONSTRUCTION AND DEVELOPMENT PTY LTD v CREA

[2021] SASCA 66

Judgment of the Court of Appeal
(The Honourable Justice Doyle, the Honourable Justice Livesey and the Honourable Justice Bleby)

25 June 2021

APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES

CONTRACTS - BUILDING, ENGINEERING AND RELATED CONTRACTS - PERFORMANCE OF WORK

PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - JUDGMENTS AND ORDERS - INTEREST ON JUDGMENTS

PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - JUDGMENTS AND ORDERS - SATISFACTION AND SET-OFF OF JUDGMENTS

PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - COSTS

In late December 2015 or early January 2016, the appellant building company (Bedrock Construction and Development Pty Ltd) (Bedrock)) and the respondent restaurateur (Mr Crea) entered into a contract (the Contract) for Bedrock to undertake a renovation and fitout of a restaurant in the Adelaide CBD (the Site).

The Contract provided for Bedrock to carry out the relevant works in accordance with, and to the standard set out in, construction drawings provided by Mr Crea. The Contract contained a clause which provided that the contractor was required to correct any defects, or finalise any incomplete work, within 10 days after receiving a written instruction to do so.

On Appeal from DISTRICT COURT OF SOUTH AUSTRALIA (HIS HONOUR JUDGE O'SULLIVAN) DCCIV-17-346

Appellant: BEDROCK CONSTRUCTION AND DEVELOPMENT PTY LTD Counsel: MR M HOFFMANN QC WITH MR D RIGGALL - Solicitor: STARKE LAWYERS

Respondent: ANTHONY CREA Counsel: MR R ROSS-SMITH - Solicitor: DW FOX TUCKER LAWYERS

Hearing Date/s: 06/04/2021

File No/s: CIV-20-003403

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Mr Crea, through the contractually-appointed superintendent (the Architect), issued three defects lists to Bedrock, dated 12 April 2016 (Revision A), 20 April 2016 (Revision B) and 13 May 2016 (Revision C). By 3 May 2016, Bedrock had rectified a number of the defects on the Revision A and B defects lists. However, from 11 May 2016, Mr Crea effectively refused Bedrock further access to the Site, and on 19 May 2016, the Architect purported to issue a notice of termination pursuant to the Contract. Bedrock did not undertake any further work.

Mr Crea issued proceedings in the District Court, seeking damages in contract and tort for the allegedly defective work. Bedrock subsequently filed a cross-claim, seeking damages on account of the balance due to it on progress claims, and in respect of variations and delay costs. The trial of the claim and cross-claim occurred over several days commencing in December 2019.

In August 2020, the trial judge published his reasons. Mr Crea was largely successful in his defects claim, and Bedrock enjoyed partial success on its cross-claim. In relation to the defects claim, the trial judge accepted that Mr Crea had refused Bedrock access to the Site from about 11 May 2016, but found that this prohibition was reasonable and declined to disallow or reduce the claim on this basis. His Honour also found that the notice issued on 19 May 2016 did not effect a valid termination pursuant to the Contract, but that the Contract had been validly terminated at common law on this date.

After hearing submissions from both parties, the trial judge awarded interest on the claim and cross-claim, and ordered that Bedrock pay 60 per cent of Mr Crea's costs. His Honour entered separate judgments in favour of Mr Crea and Bedrock in the GST and interest inclusive amounts of $123,714.37 and $97,016.34, respectively.

Bedrock now appeals the orders of the trial judge. It relies upon seven grounds of appeal, namely that his Honour erred:

1. in finding that Bedrock had no right to attend the Site to carry out rectification work after on or about 11 May 2016;

2. in finding that Mr Crea was entitled to terminate the contract at common law and that he did so through the Architect on 19 May 2016;

3. in finding that Bedrock had been given opportunities to rectify all defects, but had not done so;

4. in finding that Bedrock had failed to notify Mr Crea of its intention to carry out rectification and completion works on Monday, 9 May 2016;

5. in ordering that Bedrock's interest entitlement did not commence to run until the date that its cross-claim was instituted, being a date later than when Mr Crea's entitlement to interest commenced to run;

6. in ordering that Mr Crea have 60 per cent of his costs of the action; and

7. in failing to enter a balance judgment.

Held, per Doyle JA (Livesey and Bleby JJA agreeing), allowing the appeal:

1. In circumstances where the Contract provided Bedrock with a contractual opportunity of at least 10 working days to rectify any defects, and the evidence did not permit a finding that this entitlement had been given, the trial Judge's award of damages for Mr Crea's defects claim should be reduced.

2. It is unnecessary to reach a final view on the issue of whether the Contract was validly terminated, as neither party suggested that the trial judge's conclusion in this regard was of any practical significance.

3. As a significant proportion of the cross-claim was an agreed liquidated sum that fell due before the date the cross-claim was instituted, it is appropriate to award Bedrock interest on the entirety of its cross-claim from the same date Mr Crea was awarded interest on his defects claim.

4. There was no good reason to depart from the usual approach of entering a balance judgment.

5. As the grounds on which the appeal has been allowed will both alter the assessment of the parties' respective degrees of success below, and result in the substitution of a judgment with a net entitlement in favour of Bedrock, it is appropriate that the Court reconsider the issue of costs.

District Court Act 1991 (SA) s 33, s 39; *District Court Civil Rules 2006* (SA) r 224, referred to. *Crea v Bedrock Construction and Development Pty Ltd* [2020] SADC 124; *Crea v Bedrock Construction and Development Pty Ltd* [2020] SADC 169; *Bellgrove v Eldridge* (1954) 90 CLR 613; *The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067; *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2010) 26 BCL 335; *Turner Corporation Ltd v Austotel Pty Ltd* (1994) 13 BCL 378; *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49; *Badge Constructions Pty Ltd v Penbury Coast Pty Ltd* [1999] SASC 6; *Ticknell v Duthy Homes Pty Ltd* [2020] SASCFC 24; *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 441, considered.

BEDROCK CONSTRUCTION AND DEVELOPMENT PTY LTD v CREA [2021] SASCA 66

Court of Appeal - Civil: Doyle, Livesey and Bleby JJA

1 **DOYLE JA:** These proceedings concern various disputes that arose in relation to the contract between the appellant building company (Bedrock Construction and Development Pty Ltd (**Bedrock**)) and the respondent restaurateur (Mr Anthony Crea) pursuant to which Bedrock undertook the renovation and fitout of a pizzeria in the Adelaide CBD.

2 Mr Crea brought proceedings seeking damages for various alleged defects in the work undertaken by Bedrock. In its cross-claim, Bedrock claimed various amounts said to be due to it under the contract. The trial judge held that Mr Crea was entitled to judgment on his claim in the amount of $105,159.67 (inclusive of GST), and that Bedrock was entitled to judgment on its cross-claim in the amount of $83,641.93 (inclusive of GST).[1]

3 Having then heard the parties in relation to the issues of interest and costs, the trial judge made additional awards of interest in favour of both parties on their respective claims, resulting in judgment sums, inclusive of GST and interest, of $123,714.37 and $97,016.34 respectively. His Honour also ordered that Bedrock pay Mr Crea 60 per cent of his costs of and incidental to the litigation.[2]

4 In this appeal, Bedrock relies upon several grounds of appeal challenging the trial judge's awards of damages, interest and costs.

Factual background

5 In late December 2015 or early January 2016, Mr Crea and Bedrock entered into a contract (**the Contract**) for Bedrock to undertake a renovation and fitout (**the Works**) of a new restaurant on Morphett Street, Adelaide, known as Antica Pizzeria e Cucina (**the Premises** or **the Site**).

6 The business name Antica Pizzeria e Cucina was owned by C & N Group (Aust) Pty Ltd (**C&N**), which also operated the restaurant. Mr Crea is the sole director and shareholder of C&N.

7 Mr James Henderson is the sole director and shareholder of Bedrock.

8 The form of the Contract was a standard form "Simple Works Contract – ABIC SW-2008".

9 Under clause A6 of the Contract, Mr Ryan Genesin was appointed the superintendent, or 'Architect', to administer the Contract on behalf of the owner,

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1 *Crea v Bedrock Construction and Development Pty Ltd* [2020] SADC 124.
2 *Crea v Bedrock Construction and Development Pty Ltd* [2020] SADC 169.

Mr Crea. Mr Genesin is an interior designer from the firm Genesin Studio. Mr Genesin and Mr Crea communicated with Bedrock through Mr Henderson.

10 The Contract provided for Bedrock to carry out the Works in accordance with, and to the standard set out in, the construction drawings. The contract sum was initially $381,337, but was subsequently increased by reason of variations.

11 Bedrock commenced the Works on about 7 January 2016. The Contract called for weekly progress payments. Mr Crea made progress payments totalling $429,115, the last of which was made on 14 April 2016.

12 The date for Practical Completion under the Contract was 12 March 2016. There were some delays which resulted in Mr Genesin granting an extension of time for completion. Bedrock was still carrying out the Works when, on 22 April 2016, Mr Crea took possession of the Premises, and commenced operating the restaurant. No notice or certificate of Practical Completion was issued by Mr Genesin. However, by reason of clause M8, the Works were to be treated as having reached Practical Completion on 22 April 2016 (being the date the owner took possession of the Site).

13 Pursuant to clause M13, there was a defects liability period of six months commencing from this date of Practical Completion.

14 Clauses M11 to M14 addressed the parties' rights in respect of the correction of defects in the Works. They provided as follows:

> M11 Contractor to correct *defects* and finalise *necessary work*
>
> 1. The contractor must correct any *defects* or finalise any incomplete *necessary work*, whether before or after the date of *practical completion,* within the agreed time as stated in an instruction or if no time is stated, within 10 *working days* after receiving a written instruction from the architect to do so.
>
> M12 If the contractor fails to correct *defects* and finalise *necessary work*
>
> 1. If the contractor fails to correct a *defect* or finalise any incomplete *necessary work* within the time nominated under clause M11 or fails to show reasonable cause for the failure together with a timetable for correcting the problem that is acceptable to the architect, the owner may use another person to correct the problem at the cost of the contractor.
>
> 2. If the owner is required to use another person to rectify a problem, the owner is entitled to make a *claim to adjust the contract.*
>
> 3. If the owner makes a *claim to adjust the contract* the architect must *promptly* assess the claim and may issue a certificate under clause N4.
>
> M13 Defects liability period
>
> 1. The defects liability period is shown in item 25 of schedule 1 and commences on the date of *practical completion* of the *works.*

2. The architect may notify the contractor that, in respect of any part of the *works* that has undergone significant correction within the first defects liability period, a further defects liability period of equal length to the first defects liability period may run for that part. The notification must be given at the time of acceptance of the corrected *necessary work.*

M14 Contractor's obligations during and after defects liability period

1. If there is any remaining *defect* or incomplete *necessary work*, or the contractor becomes aware by instruction from the architect or from its own observations of any *defect* or incomplete *necessary work* during the defects liability period, it must *promptly* return to the *site* and correct the *defect* or finalise the incomplete *necessary work.* This obligation continues until the *defect* is corrected or the incomplete *necessary work* is finalised, and does not come to an end when the defects liability period is over.

2. The architect cannot give the first instruction to correct an outstanding *defect* or to finalise any incomplete *necessary work* after the end of the defects liability period, unless it is for the rectification of a latent *defect* and the final certificate has not been issued.

15 Relevantly to the dispute between the parties in these proceedings, I note in particular the specification in clause M11 that the contractor (Bedrock) was required to correct any defects, or finalise any incomplete work, within 10 working days after receiving a written instruction, or such other date as specified in that instruction.

16 Mr Genesin issued three defects lists to Bedrock, dated 12 April 2016 (Revision A), 20 April 2016 (Revision B) and 13 May 2016 (Revision C).

17 The 12 April 2016 Revision A defects list identified 157 items.[3] They ranged in significance from some relatively minor defects that could be easily remedied through to some more fundamental matters.

18 The 20 April 2016 Revision B defects list identified 105 items. While there were four entirely new items on this list, most had been included in the Revision A defects list, but had not been rectified either at all or to Mr Crea's satisfaction. In the case of some items the rectification works had resulted in further or different defects in respect of the same items.

19 By 3 May 2016, Bedrock had attended the Premises and rectified a number of the defects brought to its attention in the Revision A and Revision B defects lists. However, during the course of an inspection and meeting at the Premises on that day, attended by Mr Genesin and Mr Henderson and described in more detail later in these reasons, a large number of defects were identified by Mr Genesin as having still not been rectified either adequately or at all. These

[3] This number of defects, as well as the numbers of defects for the Revision B and C defects lists referred to below, are taken from the parties' supplementary submissions. Slightly different numbers appear elsewhere in the materials, apparently on the basis that some of the items have been grouped or broken down differently.

defects were subsequently listed in the 13 May 2016 Revision C defects list sent by Mr Genesin to Mr Henderson.

20 The Revision C defects list identified 90 items. Again, virtually all of these items had been in the Revision A and Revision B defects lists, albeit that some had been partially addressed or had otherwise changed in their description. There were three entirely new items.

21 The 3 May 2016 meeting was a difficult one, and Mr Henderson's relationship with Mr Crea and Mr Genesin thereafter deteriorated rapidly. By email dated 11 May 2016, Mr Crea informed Mr Henderson that he was taking advice from a building inspector about the defects and told him to hold off from doing any further work in the interim, effectively refusing him further access to the Site. And by email dated 13 May 2016, Mr Genesin reiterated this position to Mr Henderson. Mr Henderson became abusive towards Mr Genesin and Mr Crea and, on 15 May 2016, Mr Crea obtained an intervention order against Mr Henderson.

22 On 19 May 2016, Mr Genesin sent a notice of termination to Bedrock, purportedly pursuant to clauses Q1 and Q2 of the Contract.

23 On 28 June 2016, Mr Genesin prepared a 'Certificate of Defects', and apparently issued the certificate on 22 July 2016. It referred to the defects in the Revision C defects list dated 13 May 2016, stating that they were required to be rectified pursuant to clause M11.1, but had not been rectified. It stated that the owner, Mr Crea, had taken away the rectification work, would engage another person to rectify the defects, and would make a claim to adjust the Contract in respect of rectification costs pursuant to clauses M12.1 to M12.3. The document concluded with a certification by Mr Genesin that the cost of the rectification work had been independently appraised by Mr Denis Camporeale of Arcon Consulting Services Pty Ltd, and then listed the cost of each of the individual items.

24 Despite the formal nature of this document, and its references to the Contract, there was no provision for any such document under the Contract, and it was not ultimately said to have any contractual force or status. Indeed, Mr Crea had purported to terminate the Contract by the time this document was issued.

25 There were no further communications between Mr Genesin and Mr Henderson, or anyone else on behalf of Bedrock, in relation to the rectification of defects. Bedrock did not undertake any further work in relation to the defects.

26 Although not in evidence, there is reference in the documentation to Mr Genesin issuing a 'Certificate of Payment' dated 7 March 2017 in respect of the cost of the rectification work the subject of the Certificate of Defects, and in

the amount of $221,518 (inclusive of GST). Again, this document was not ultimately relied upon as having any contractual status or force.

Procedural background

27 On 16 March 2017, Mr Crea issued proceedings against Bedrock in the District Court, seeking damages in the sum of $221,518 (inclusive of GST)[4] for breach of its contractual or tortious duties, or in the alternative for payment on the Certificate of Defects dated 28 June 2016.

28 On 10 April 2017, Bedrock issued proceedings in the Magistrates Court against both Mr Crea and C&N, seeking payment of its final progress claim in the amount of $85,996. The Magistrates Court action was transferred to the District Court and, on 26 June 2017, it was consolidated with the District Court action with the result that it became a cross-claim. The cross-claim was ultimately filed in the District Court proceedings on 13 September 2017.

29 Although named as a party in the cross-claim, C&N was a non-contracting party and played no role in the proceedings. The trial judge dismissed the cross-claim against C&N as lacking any contractual foundation.

30 After some confusion, Bedrock's cross-claim ultimately sought an amount of $103,144.80 (inclusive of GST),[5] comprising:

- the sum due under progress claims 1-4 - $46,735.00
- variation claims - $29,856.20
- prolongation or delay claim[6] - $30,852.00
- less credit for signage - ($3,925.00)
- less error in prolongation claim - ($373.40)

Total - $103,144.80 (inclusive of GST)

31 There was no dispute between the parties that Bedrock was entitled to the balance of $46,735 (being $42,486.36 plus GST) due under progress claims 1-4, subject to adjustment for any amounts owing to Mr Crea pursuant to his defects claim.

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4 cf the reference in paragraph 23 of the statement of claim, and the attached Schedule 1, to rectification costs of $257,514.40 (inclusive of GST).

5 The trial judge referred to this amount as inclusive of GST at [28]. However, it appears from later references (at [958], and in his Honour's interest and costs judgment at [9]-[11]) that the subtotals other than the first were exclusive of GST.

6 Also referred to as Variation 21.

32 In February 2019, the Court referred Mr Crea's defects claim to an arbitrator. On 10 July 2019, the Arbitrator delivered her award in which she determined the cost of rectification of incomplete and defective work to be $103,396.70 (exclusive of GST), but did not determine Bedrock's liability for those costs.

33 Pursuant to s 33(4) of the *District Court Act 1991* (SA), the Court was required to adopt the award as its judgment in respect of the issues it addressed, unless good reason to the contrary was shown.

34 Bedrock objected to the Court's adoption of the Arbitrator's award on various grounds, namely:

(i) specific challenges to four items (totalling $16,807.50);

(ii) challenges to seven items on the ground that the relevant defects were the result of defective design work for which Bedrock was not responsible, or at least a combination of defective design and defective workmanship (totalling $16,711.50);

(iii) challenges to some of the items on the ground that they related to incomplete (nine items, totalling $9,291) or defective work (20 items, totalling $39,224.20) which Bedrock was not given the opportunity to complete or rectify;

(iv) challenges to nine items on the ground that the 'defects' were the result of an instruction or direction from Mr Genesin or Mr Crea (totalling $25,892.50); and

(v) challenges to the quantum of four of the items on the ground that the contemplated rectification work was unreasonable in the sense that term was used in *Bellgrove v Eldridge*.[7]

35 The trial of the claim and cross-claim occurred over several days commencing in December 2019. Mr Crea gave evidence, and also called Mr Genesin as a witness. Bedrock called two witnesses, Mr Henderson and Mr David Neal (Bedrock's vinyl subcontractor).

36 Mr Crea was largely successful in his defects claim. Bedrock enjoyed some limited success in respect of five of the items that were the subject of challenge (ii) above (that is, allegations that the costs were referable to defective design work for which Bedrock was not responsible), resulting in a reduction of $7,797 from the Arbitrator's award, reducing the amount owing from $103,396.70 to $95,599.70 (exclusive of GST). Bedrock was otherwise unsuccessful in its challenges to Mr Crea's defects claim.

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7 *Bellgrove v Eldridge* (1954) 90 CLR 613.

37 In relation to Bedrock's cross-claim, it enjoyed partial success. In addition to the agreed balance due on progress claims 1-4 (of $42,486.36), the trial judge held that Bedrock was entitled to recover $16,441.33 in respect of variations, and $21,035.43 in respect of delay costs, less a credit to Mr Crea for signage in the amount of $3,925, giving a total of $76,038.12 (exclusive of GST).

38 In August 2020, the trial judge delivered his reasons, indicating his intention to award damages in favour of Mr Crea in the amount of $105,159.67 (being $95,599.70 plus GST) on his defects claim, and in favour of Bedrock in the amount of $83,641.93 (being $76,038.12 plus GST) on its cross-claim.

39 Upon the invitation of the trial judge, the parties made submissions as to interest and costs in September 2020. In December 2020, his Honour delivered his reasons on the issues of interest and costs, awarding interest on both the claim and cross-claim, and ordering that Bedrock pay 60 per cent of Mr Crea's costs of the action. His Honour entered separate judgments in favour of Mr Crea and Bedrock in the GST and interest inclusive amounts of $123,714.37 and $97,016.34 respectively.

Grounds of Appeal

40 In its notice of appeal, Bedrock identified nine grounds of appeal. However, it no longer presses Grounds 5 and 6. The remaining grounds may be summarised as follows.

41 Ground 1 contends that the trial judge erred in finding that Mr Crea reasonably prohibited Bedrock access to the Site to carry out rectification work from on or about 11 May 2016, such that Bedrock had no right to attend the Site to carry out rectification work, or to complete incomplete work, after that date. Bedrock contends that the trial judge so erred in circumstances where (i) the Contract provided for rectification of defects by the contractor, (ii) Bedrock and the specified subcontractors or trades were competent and willing to carry out the rectification works, (iii) there was no pleaded case that the relationship between the parties had broken down such that it would be unreasonable for Bedrock or the subcontractors to be permitted to rectify the defects and complete the incomplete work, and (iv) Mr Crea had only permitted Bedrock access on two days (being Mondays when the restaurant was not trading) following his taking of possession of the Site on 22 April 2016. Bedrock contends that because it was prevented from exercising its contractual entitlement to rectify and complete the Works, the trial judge ought to have reduced Mr Crea's entitlement to damages on his defects claim.

42 Ground 2 contends that, having found that the Contract was not validly terminated under the terms of the Contract, the trial judge erred in holding that Mr Crea was entitled to terminate the Contract at common law, and that he did so validly through his agent Mr Genesin on 19 May 2016.

43 Ground 3 contends that the trial judge erred in finding that Bedrock had been given opportunities to rectify all defects but had not done so. Ground 4 contends that the trial judge erred in finding that Bedrock failed to notify Mr Crea of its intention to carry out rectification and completion works on Monday, 9 May 2016. Both Grounds 3 and 4 are better seen as aspects of Bedrock's challenge to the trial judge's approach to Mr Crea's defects claim the subject of Ground 1, and are conveniently addressed in conjunction with that Ground.

44 Ground 7 contends that the trial judge erred in ordering that interest on Bedrock's claim be confined to interest from the date of commencement of its cross-claim.

45 Ground 8 contends that the trial judge erred in ordering that Bedrock pay 60 per cent of Mr Crea's costs of the action.

46 Ground 9 contends that the trial judge erred in entering two separate judgments rather than a balance judgment.

The defects claim

47 As Grounds 1, 3 and 4 each require consideration of Mr Crea's defects claim, it is appropriate to commence with a closer consideration of the evidence, and the trial judge's findings and reasoning, on this aspect of the case.

48 Each of Mr Crea, Mr Genesin and Mr Henderson gave evidence that was relevant to the defects claim. The trial judge's treatment of their evidence bearing directly on this aspect of the case is addressed below. However, it is relevant to note that the judge also made some more general observations about the evidence of each of them. It is fair to say that his Honour had at least some reservations about each of them as witnesses.

49 In relation to Mr Crea, the trial judge referred to his inability to recall much of what occurred. While his Honour was prepared to afford him some latitude in this respect, he nevertheless formed the impression that Mr Crea was in some respects overly cautious and not wanting to commit to a position. The judge considered that on occasions Mr Crea was evasive in his evidence. In giving examples of these difficulties with his evidence, the judge referred to his evidence in relation to the defects. In particular, he mentioned Mr Crea's inability to recall any of the discussions about Bedrock's attempts to obtain access to carry out rectification work. The judge said that while he accepted that Mr Crea may not have any specific recollection of particular conversations, he did not accept that Mr Crea did not recall Bedrock's attempts to access the Premises to address the items on the defects list. In the judge's view, Mr Crea's evidence in this respect was evasive.

50 As for Mr Genesin, the judge explained that his role as Architect under the Contract required him to be impartial in some, but not all, aspects of his role. Mr Genesin accepted that he did not always act impartially, but the judge did not

think that this, of itself, affected Mr Genesin's credit as a witness. The judge said that overall he accepted Mr Genesin as a truthful witness. But he said that there were occasions when he was defensive in his evidence, particularly where his own design work was being called into question.

51 The trial judge also described Mr Henderson as being defensive in his evidence; that his evidence was directed towards justifying his actions. While acknowledging that this was understandable to an extent, the judge considered that it resulted in Mr Henderson engaging in reconstruction on occasions.

The evidence relevant to the defects claim

52 By April 2016, the date for Practical Completion under the Contract had passed, but the Works were not complete.

53 On Wednesday, 13 April 2016, Mr Genesin sent Mr Henderson an email attaching the Revision A defects list. It was dated 12 April 2016 and was said to relate to an inspection on 11 April 2016. It contained 157 items. Neither the email nor the defects list made any reference to particular provisions of the Contract. Nor did they nominate any particular date for the defects to be addressed.

54 Mr Genesin's covering email included:

> Please see attached the defects list.
>
> Generally speaking the level of finish has been rough, rushed and a poor attempt to look at the documentation which is very clear and detailed.
>
> …
>
> After repeatedly extending the date of completion and promised Saturday 9thApril as your final day, we still have trades installing up till yesterday. We need the remaining works to happen promptly and professionally as the site is getting setup and furnished and food deliveries and kitchen preparation starting today. You need trades to be aware and clean up their mess as they complete this list. …
>
> We are happy to run through some key items on site as noted in comments, otherwise works just need to be completed.

55 Mr Henderson responded by email the same day, expressing disappointment at having received the defects list. He said that there had been mistakes in the drawings with which they had been provided, and gave explanations for some of the other difficulties that had arisen with the Works. He concluded by informing Mr Genesin that "[w]e have made a commitment to complete all the defects by the end of the weekend…any extras…most of which have been done will be complete by Sunday as agreed with [Mr Crea]."

56 In his evidence, Mr Genesin said that there was a subsequent Site meeting, following which Bedrock commenced to remedy the defects. The trial judge

proceeded on the basis that this meeting occurred, but acknowledged that the evidence did not enable identification of the date of this meeting, or what occurred during the meeting.

57 On Monday, 18 April 2016, Mr Henderson emailed Mr Genesin. He commented upon 11 of the items on the defects list, and said that "all other items were either completed that day or prior to this email." In referring to this email, the trial judge said that it "clearly shows that Bedrock was prepared to rectify defects at that stage."

58 Over the balance of 18 and 19 April 2016, there were several further emails exchanged between Mr Henderson and Mr Genesin in relation to the 11 items Mr Henderson had mentioned in his email. In an email late on 19 April 2016, Mr Genesin informed Mr Henderson that "[w]e have gone through the defects list again today and will reissue the list with the remaining items that need to be actioned."

59 On 21 April 2016, Mr Genesin emailed Mr Henderson (copied to Mr Crea) the Revision B defects list. It was dated 20 April 2016, referred to an inspection on 19 April 2016, and contained 105 items. As mentioned, while the list included a small number of entirely new items, most were items that had been included on the Revision A defects list. They were still on the Revision B defects list because they had not been addressed (either adequately or at all), or because the rectification work that had been undertaken had resulted in the identification of further or different defects.

60 The 21 April 2016 covering email from Mr Genesin referred to "the defects list followed up onsite Tuesday", adding that "[t]here are still many items that need attention please see attached." After summarising some of those items, the email concluded "[p]lease let the client and myself know when this can happen."

61 As set out earlier in these reasons, Mr Crea took possession of the Site on 22 April 2016. Hence the defects liability period ran from this date.

62 On 25 April 2016, Mr Henderson sent an email to Mr Genesin and Mr Crea in relation to the defects that were being asserted, stating that "[w]e need to make a time early one morning, i.e. 4AM or late after dinner to close out the remaining few items. Please let us know which night suits. Preferably Tuesday or Wednesday."

63 Mr Crea responded by email later the same day, stating that "Mondays are best for the shop as we are closed that day."

64 By this point in time, the restaurant had commenced operation. As such, and as indicated in the above email from Mr Crea, the Site was only available on Mondays for Bedrock and its subcontractors to carry out the rectification work necessary to address the defects. The two Mondays which subsequently took on

some significance in the evidence at trial were 2 and 9 May 2016. There was also a Site meeting on 3 May 2016 that was the subject of significant oral evidence.

Access to the Site on 2 May 2016

65 Mr Henderson and Bedrock's subcontractors attended the Site on the morning of Monday, 2 May 2016. They were not able to gain access when they arrived, but were given access later in the day.

66 The trial judge referred to Mr Henderson's evidence to the effect that he had obtained approval to access the restaurant on the Monday from Mr Crea (rather than Mr Genesin). The evidence at trial included an email on Sunday, 1 May 2016 from Mr Henderson to various of his subcontractors, advising them of access to the restaurant the following day. The email was copied to Mr Crea, but Mr Henderson said he also spoke to Mr Crea to get his approval to attend on the Monday.

67 Mr Crea's evidence was that he did not recall making arrangements with Mr Henderson for the trades to return to the Site. He recalled Mr Genesin telling him that they wanted to return to the Site, but said that Mr Genesin had not been agreeable to this occurring. When asked whether he had any objection to the defects work being carried out, Mr Crea said "well we [meaning he and Mr Genesin] chose the litigation side to deal with it."

68 Mr Crea denied making any arrangements with his staff for the trades to be given access on 2 May 2016. He said that only he and Mr Genesin could have made any such arrangements.

69 Mr Genesin said that he did not see the 1 May 2016 email copied to Mr Crea on the day it was sent, and was not aware of it until the following day. He agreed that the trades were not given access until later in the day on 2 May 2016, but said that that was because no arrangements had been made with him. He was critical generally of Mr Henderson's lack of communication with him as to the rectification work.

70 The trial judge ultimately found as follows on this topic:

> Given Mr Crea's attitude towards having the work done in accordance with the design prepared by Mr Genesin and for which he had paid, I consider it unlikely Mr Crea would have agreed to anything to do with rectification without first consulting with Mr Genesin. In particular, there is nothing to suggest Mr Crea knew what was going to be done by way of rectification of defects on Monday 2 May 2016. Under those circumstances I do not accept Mr Henderson spoke with Mr Crea about Bedrock's sub-contractors attending at the restaurant on Monday 2 May 2016 to carry out rectification work.

71 The trial judge also found that Mr Henderson did not tell Mr Genesin prior to 2 May 2016 that Bedrock and its trades intended to attend the restaurant to carry out rectification work that day. His Honour considered that the failure to

speak with Mr Genesin about this matter arose out of the tension between Mr Henderson and Mr Genesin that existed by that point in time.

Site meeting on 3 May 2016

72 By an exchange of emails on 2 May 2016, a Site meeting was arranged for the following day. The meeting had been suggested by Mr Genesin to "run through the list" with Mr Henderson.

73 On 3 May 2016, Mr Genesin and Mr Henderson met on Site and went through the Revision B defects list. Both Mr Genesin and Mr Henderson gave evidence about this meeting. The following is taken from the trial judge's summary of that evidence.

74 Mr Genesin said that the meeting occurred at the restaurant, commencing at between 3.30 pm and 4.00 pm. He and Mr Henderson went through each of the items on the list to check on the work done, and to see what else might be outstanding in order for him to produce a Revision C defects list. He said that they worked through the list together, and made notes on it. He denied that there was any suggestion by Mr Henderson that items on the list were a result of a change in the scope of works, or any instruction given to Bedrock; or that it was otherwise unreasonable for Bedrock to have to rectify any item.

75 However, Mr Genesin said that as they talked things through, Mr Henderson became frustrated. He said that when they were approaching the kitchen area, and discussing a major issue with the vinyl flooring, Mr Henderson became angry and stormed out, slamming the door. He said that the meeting finished at this point.

76 According to Mr Genesin, he did not ever meet with Mr Henderson again. He prepared and sent Revision C of the defects list, but said that Bedrock did not ever address the items on this list.

77 Mr Henderson described his meeting with Mr Genesin at the restaurant on 3 May 2016. He said that they went through the Revision B defects list, and made various notes on that list. He told Mr Genesin that Bedrock was committed to finishing the items on that list.

78 Mr Henderson said that during the course of the 3 May 2016 meeting, he identified a number of items to Mr Genesin that ought not to have been included as defects, either because there had been a change in the scope of work as a consequence of an instruction by either Mr Genesin or Mr Crea, or because he did not agree with Mr Genesin's comments about the relevant item. The trial judge did not accept this aspect of Mr Henderson's evidence. His Honour reasoned that had there been a change in scope or instruction that meant that a particular item was not a defect, he would have expected this to be included in Mr Henderson's notes on the Revision B defects list. His Honour considered the

absence of any such note to be significant, and found that there was no discussion at that meeting to the effect claimed by Mr Henderson.

79 Mr Henderson acknowledged that he and Mr Genesin "had words" at that meeting, saying that they both became upset. He acknowledged that there was a disagreement, but denied that he lost his temper. He denied that he stormed out, but said that he did leave the meeting at one point to go and have a cigarette. He said he was "pretty sure" he returned to the meeting.

80 The trial judge was not able to make any finding as to whether Mr Henderson stormed out of the meeting on 3 May 2016. However, his Honour accepted that there was a disagreement between Mr Henderson and Mr Genesin as to the extent to which the defects had been addressed. His Honour said that there was tension between the two men, finding that "from 3 May 2016 … there was a breakdown in … what was already a strained relationship between Mr Genesin and Mr Henderson."

81 By the end of 3 May 2016, it was apparent that some of the work required to rectify defects had been undertaken, but that Mr Genesin did not agree that it had been done satisfactorily. Mr Genesin also did not accept that any of the defects were the product of directions given on Site by him or Mr Crea.

Access to the Site on 9 May 2016

82 There was a dispute in the evidence as to whether Mr Henderson subsequently made arrangements to attend the Site on the following Monday, 9 May 2016. The trial judge ultimately did not accept that access had been arranged in the manner described by Mr Henderson in his evidence. However, it is useful to summarise the evidence on this issue before returning to the chronological narrative.

83 A convenient starting point on this issue is the contemporaneous email communications between the parties.

84 The first of these emails was from Mr Henderson to Mr Genesin and Mr Crea on 6 May 2016. In that email, Mr Henderson referred to various of the items to be completed, saying "[w]e will aim to complete everything Monday and offer up a credit…for items…which can not be fixed due to design issues". After referring to a desire to resolve the matter amicably, and emphasising that the outstanding amount represented Bedrock's entire margin, the email concluded by requesting "[c]an we get the door unlocked at 9AM if possible please."

85 There was no response to this email in evidence. The evidence did include a subsequent email sent on 9 May 2016 at 10.08 am by Mr Genesin to Mr Henderson and Mr Crea. This email sought information about certain fittings that had been installed. While it included reference to Mr Genesin intending to "pop past" the restaurant later that day, it appears from the context that his

intention in so doing was to discuss some details with Mr Crea rather than any expectation that he would see or meet Mr Henderson there.

86 Mr Henderson responded to Mr Genesin and Mr Crea by email at 2.34 pm on 9 May 2016, asking "[l]et us know when we need to or can get in and close these items out even if it's after 10 pm dinner one night."

87 The next email in evidence was an email from Mr Crea dated 11 May 2016 to Mr Henderson (copied to Mr Genesin), and apparently in response to Mr Henderson's email from two days earlier. It included the following:

> Sorry we have been busy with the long weekend with Mother's day.
>
> At the moment we are getting advice from a building inspector recognised by the master builders association to check over the extensive defects list which is still growing. We have had over 5 customers and colleagues that are in the construction industry or actual builders all pick up on the same things being the quality of the vinyl floor installation and floor prep, condition of pipes, toilet locations, and hidden traps in the kitchen.
>
> Our plumbing issues of your trades giving us floor wastes and inspection points in the wrong positions has created grave concerns and made us get additional advice to make sure Antica has been built to Australian standards and building codes.
>
> Please hold off any further work until we can get advice on where we stand as this is major work and major costs if it needs to be corrected as we would be forced to shut for a minimum of 1-2 weeks, just to redo the vinyl floors which on our end is a weekly loss of $42K which is a huge cost considering we just opened 2 weeks ago and this would be something you would have to absorb.

88 Mr Henderson responded on 12 May 2016 in the following terms:

> We had all the trades booked in to fix the defects on the Monday.. disappointing that instead your tarnishing our reputation and not letting us in there to fix minor defects that are no doubt just a ploy for you to get out of paying us.

89 By email sent on 13 May 2016 from Mr Genesin to Mr Henderson (copied to Mr Crea), Bedrock was provided with the Revision C defects list. The covering email included descriptions of several of the more significant items, including the issues that remained in relation to the vinyl flooring and stone benchtops that had been installed. The email concluded with the following request that Bedrock hold off on further rectification work, and reference to clause M12 of the Contract:

> The client Anthony has requested we seek additional, independent advice from a building inspector that are recognised and registered by the Master Builders association. In trying to be fair to both parties, we feel this is the best way to move forward and understand what is deemed unsatisfactory and what is simply defective and can be negotiated through monies by both parties.
>
> Some key defects being fixed so far has caused further defects/repairs upon that defect, not to a satisfactory level, completed on your trades own accord and judgement without referring to the defects list, so at this stage we would advise you hold off any further

> repairs, to stop further defects from happening, until we get further advice and the report is complete which we are pushing for a quick turnaround. The report being put together should be available late next week but Anthony will keep you posted. Once the work has been accessed we can then access and adjust the remaining money owed and complete the defects period from then. Refer to clause M12 of the contract.

90 Later that same day, Mr Henderson responded by email to Mr Genesin (copied to Mr Crea):

> Can we please have access on Monday.. to fix the other items we already agreed.. and inspect your list.
>
> If this is a method of discounting it's a shitty method…. I thought you of all people would be above this and more professional.. you didn't pick it up on your various inspections… just some customer. I will bring in some experts too.. and we can all waste everyones time.
>
> And I will be claiming my contract $2600 a week for granted extensions of time on top of the remaining amount and variations ive claimed..
>
> I have been open book with you and Anthony.. and I have paid everyone in full.. the amount owing is my whole margin.. and money I need to go back to melbourne for my childs heart operation in two months.
>
> Just pay my last invoice… ill fix everything on your list.. or im going to shut the whole place down.. its that simple.

91 On 15 May 2016, Mr Henderson emailed Mr Genesin (copied to Mr Crea), responding further to the email from Mr Genesin that had attached the Revision C defects list. His email included:

> Please see below [referring to the comments he had inserted into the body of Mr Genesin's email in relation to some of the more significant items in the Revision C defects list] … we will be assigning completion of the remaining defects to a third party.. and will no longer have any direct involvement.

92 It appears that Mr Henderson's reference to assigning the remaining rectification work to a third party was intended to indicate that, in recognition of the deterioration in the relationship between him and Mr Genesin, Mr Henderson would not have any further personal involvement in that work. But he intended to convey that Bedrock was still willing to, and wished to, attend to the rectification work through the use of an independent supervisor. This construction is supported by the following passage from the comments Mr Henderson had inserted into the body of Mr Genesin's email:

> Claiming defects are a reason for not paying base contract amounts or variations when you wont allow access either at night or on Monday when you are closed is completely unreasonable … we request you allow us access to fix all the said defects. We will appoint an independent supervisor to supervise completion of defect works (and wont personally be in attendance).

93 Mr Henderson's oral evidence was that when he sent his 6 May 2016 email, he considered that the contested defects were still under discussion. He said that he had arranged for all the trades who had rectification work to do to attend at the Site on Monday, 9 May 2016; that he arrived at 8.30 am; that at this time the electrician, the tiler and the metal workers were also present; but that the Premises were not open. Mr Henderson said that he tried to ring Mr Crea and Mr Genesin, and then ultimately sent his 2.34 pm email referred to above. His recollection was that by the time he sent this email, he had received an email from Mr Genesin but had not been able to contact Mr Crea.

94 Mr Henderson's evidence was that he would have contacted either Mr Genesin or Mr Crea by text message to arrange access ahead of 9 May 2016, but when pressed he could not recall whether he in fact did so. A call for production of any text messages to these men between 6 and 9 May 2016 was not answered. Mr Henderson also said that he had spoken to Mr Crea and Mr Genesin about the topic of access the previous week.

95 Mr Henderson said that neither he nor his contractors were allowed back on Site at any time after Mr Crea's email of 11 May 2016 instructing him to "hold off any further work until we can get advice [from a building inspector] on where we stand".

96 Mr Crea's evidence was that he did not recall Mr Henderson attending on 9 May 2016 with several of the trades to carry out rectification work. He agreed that by 9 May 2016 he had decided, after consultation with Mr Genesin, that Mr Henderson should not return to the Site because of the number of defects.

97 Mr Crea was taken to his 11 May 2016 email in which he asked Mr Henderson to hold off on further work pending advice from a building inspector. While he initially said he could not say, he ultimately agreed that by this date his position was that Bedrock would not be permitted to return to the Site, and that he would not pay Bedrock the amount it was claiming because he had decided to seek his remedy through the courts. The trial judge described Mr Crea's evidence on this topic as evasive. His Honour said that "[w]here there is a conflict between Mr Crea's and Mr Henderson's evidence on the arrangements for Bedrock to attend the restaurant to rectify defects, I prefer Mr Henderson's evidence."

98 Mr Genesin's evidence was that there were no arrangements made for the trades to attend on Monday, 9 May 2016. He said that the Friday, 6 May 2016 email from Mr Henderson (referring to an intention to complete the defects work on the Monday, and requesting that the door be unlocked at 9 am) was sent at 6.24 pm; that he was not in the office at this time, and did not receive the email until the Monday.

99 Mr Genesin agreed that on 9 May 2016, Bedrock and its subcontractors attended the restaurant, but were not given access. He said that the reason they

were not given access was that their attendance had not been coordinated with him or his firm.

100 Mr Genesin also said that by 9 May 2016 the decision had been made that Mr Henderson and Bedrock would not be permitted to return to the Site to carry out rectification work. I have mentioned earlier his 13 May 2016 email to Mr Henderson saying as much. That said, at other points in his evidence, Mr Genesin suggested that the position was more in the nature of a "pausing" of access; that there had not been a final decision that Bedrock would not be permitted back on Site under any circumstances.

Other matters

101 Mr Genesin subsequently made direct arrangements with subcontractors to come back and rectify defects, specifically the electrician and the stone worker.

102 Before addressing the trial judge's factual conclusions and reasoning in relation to the defects claim, I conclude my summary of the factual context in which that issue fell to be considered by mentioning that it was an agreed fact that each of the subcontractors (being Martin Cameron (painter), Frank Passalacqua (joiner), Paolo Borghesan (stonemason and stone supplier) and Richard Kaesler (steel fixer)) were at all times willing and competent to carry out the rectification work. No point was taken as to Bedrock's failure to call these subcontractors as witnesses.

103 There was also no suggestion, in the evidence or findings, that Mr Neal (the vinyl layer who gave evidence) was other than competent and willing to carry out rectification work.

The trial judge's factual conclusions

104 The trial judge summarised his factual conclusions in the following terms:

> [693] It is alleged by the plaintiff that Bedrock had failed, refused or neglected to remedy the defects. I do not accept that is the case and it is quite clear to me that it was at all times prepared to attend the Site in order to rectify any defects. I find that includes incomplete work.
>
> [694] I find that leading up to the meeting between Mr Genesin and Mr Henderson on Site on 3 May 2016, the relationship between Mr Henderson and Mr Genesin had deteriorated, but not to the extent it was unworkable. However, after the meeting on 3 May 2016, I find that the relationship had become unworkable. I find that on or about 9 May 2016, Mr Crea, with advice from Mr Genesin had decided to prohibit Bedrock from doing any further rectification work and that as a result Mr Crea sent an email to Mr Henderson on 11 May 2016 asking him to hold off on any further work pending his receipt of advice.
>
> [695] I find that Mr Genesin had lost faith in Bedrock's ability to remedy the defects in a workmanlike fashion. So much so is apparent from Mr Genesin's evidence that work done to remedy defects had to be re-done, which I accept.

[696] Insofar as 9 May 2016 is concerned, there is no doubt that Mr Henderson sent an email to Mr Genesin and Mr Crea at 6.24pm on Friday 6 May 2016, in which he asked for access to the restaurant the following Monday, however I accept Mr Genesin's evidence that he was not made aware of that email until the Monday morning, and that there was no co-ordination of trades with Mr Genesin. I do not accept that Mr Henderson communicated with Mr Crea and Mr Genesin over the weekend immediately preceding 9 May 2016 advising of the need to access the premises on the Monday.

[697] I find that Mr Crea and Mr Genesin were concerned as to whether Bedrock was capable of carrying out the defects rectification work in a competent fashion. That included not just the actual work itself but also the ability to organise the work required to rectify defects in a way that accommodated an operating restaurant. That included liaising with Mr Genesin as the Architect appointed under the Contract.

[698] On Sunday 15 May 2016 at 9.26pm, Mr Henderson replied to Mr Genesin's email sent 13 May 2016, which was copied to Mr Crea, enclosing the revision C defects list advising that:

> ...we will be assigning completion of the remaining defects to a third party and will no longer have any direct involvement.

[699] In my view, by this email Mr Henderson clearly recognised the breakdown of his relationship with Mr Crea and Mr Genesin. He explained that he was passing responsibility to a contractor employed by Bedrock, named 'Andy' who was Bedrock's supervisor.

The trial judge's reasoning

105 After setting out these factual conclusions, the trial judge commenced his reasoning in relation to Mr Crea's defects claim by addressing the question of whether Bedrock had a right to access the Site to carry out rectification work. His Honour referred in this respect to the reasons of Ball J in *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd*.[8]

106 That case related to a strata development consisting of a three storey building. The owners corporation sued the builder for a number of defects in its work said to constitute breaches of certain warranties implied by s 18B of the *Home Building Act 1989* (NSW). The owners corporation claimed the cost of rectifying the defects. The builder defended the claim on grounds that included an argument that the owners corporation failed to mitigate its loss by not permitting the builder to carry out the rectification work.

107 The trial judge paraphrased and relied upon the following passage from the reasons of Ball J in that case:[9]

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[8] *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067.

[9] *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 at [42]-[46].

[42] Generally speaking, a person who suffers loss as a consequence of a breach of contract is required to act reasonably in relation to that loss in order for the loss to be recoverable. An important aspect of this general principle is that the party who has suffered a loss is under a duty to mitigate its loss. Sometimes the use of the word "duty" in this context is criticised, since there is no requirement that the plaintiff act in a particular way and no requirement that the plaintiff minimise its loss: see, eg, J Carter, E Peden and GJ Tolhurst, *Contract Law in Australia*, (5th ed, 2007, LexisNexis) at [35-35]. Rather, the principle is that the plaintiff is not entitled to recover losses attributable to its own unreasonable conduct. …

[43] The duty to mitigate, however, is not the only example of the application of the general principle. Another is the principle that a plaintiff whose property is damaged or defective as a consequence of the defendant's breach is generally entitled to recover the costs of reinstating the property so that it corresponds to the contractual promise, except to the extent that it is unreasonable to insist on reinstatement: *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613 at 618-9.

[44] In the case of building contracts, it is also generally accepted that the owner must give the builder a reasonable opportunity to rectify any defects. Often, of course, the building contract itself requires [the builder][10] to repair defects or sets out a procedure by which defects are to be made good: see, eg, *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWSC 1302; (2010) 26 BCL 335. But, even if it does not, the owner is required to give the builder an opportunity to minimise the damages it must pay by rectifying the defects, except where its refusal to give the builder that opportunity is reasonable or where the builder has repudiated the contract by refusing to conduct any repairs: see J Bailey, *Construction Law*, (Vol II, 2011, Informa Law) at [14.109]; *Cassidy v Engwirda Construction Co (No 2)* [1968] Qd R 159 (reversed on other grounds in *Cassidy v Engwirda Construction Co (No 2)* [1968] QWN 47 (HC); (1968) 42 ALJR 168). That obligation may be an aspect of the duty to mitigate, since it may be less expensive for the builder rather than a third party to rectify the defects, particularly if the builder is still on site. But the obligation is not simply an aspect of the duty to mitigate. The cost to the builder of undertaking the repairs is likely to be less than the amount that a third party would charge the owner for the same work. In that case, the owner is not mitigating its loss, but rather the builder's damages.

[45] The question of what is reasonable depends on all the circumstances of the particular case. One relevant factor is what attempts the builder has made to repair the defects in the past and whether, in the light of the builder's conduct, the owner has reasonably lost confidence in the willingness and ability of the builder to do the work: see A Chambers, *Hudson's Building and Engineering Contracts,* (12th ed, 2010, Sweet & Maxwell) at [4-144]; *Eribo v Odinaiya* [2010] EWHC 301 (TCC) at [70].

[46] It is for the defendant to prove that the plaintiff has acted unreasonably. It is not for the plaintiff to prove that it acted reasonably: *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* [1963] HCA 57; (1963) 180 CLR 130 at 138; *Burns v MAN Automotive (Aust) Pty Ltd* [1986] HCA 81; (1986) 161 CLR 653 at 673 per Brennan J; *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 158 per Hope JA (with whom Priestley and Meagher JJA agreed);

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[10] The report of this case refers to “the owner”, but it seems from the context that his Honour meant to refer to the builder.

Karacominakis v Big Country Developments Pty Ltd [2000] NSWCA 313 at [187] per Giles JA (with whom Handley and Stein JJA agreed).

108 The trial judge also noted that in determining that the owners corporation in that case had not acted unreasonably, Ball J had regard to the considerations that the defects were significant, that the builder had made some inadequate attempts to repair the defects, and that the owners corporation had taken the reasonable step of engaging an expert to identify the defects.

109 The trial judge then turned to the provisions of the Contract in the present case. After addressing a couple of provisions no longer of any relevance, his Honour mentioned clause M11. His Honour noted that it obliged Bedrock to correct defects and finalise any incomplete "necessary work" (defined as all work including any temporary work necessary to complete the Works) whether before or after Practical Completion. His Honour noted that no time was stated in the Revision C defects list that was provided on 13 May 2016, but that Bedrock's access to the Site had in any event been refused from 9 May 2016 (that is, prior to preparation of the Revision C defects list).

110 The trial judge also mentioned clause M13, which in combination with item 25 of Schedule 1 to the Contract provided for a six month defects liability period. His Honour noted that clause M14 obliged Bedrock to rectify any defects or incomplete necessary work during, and in some circumstances after, the expiry of the defects liability period.

111 The trial judge then set out his reasons for concluding that Mr Crea acted reasonably in prohibiting Bedrock from accessing the Site:

> [707] I have found that at all times Bedrock was prepared to attend the Site in order to rectify any defects including incomplete work.
>
> [708] The issue is whether in prohibiting access to Bedrock, Mr Crea acted reasonably.
>
> [709] After Mr Henderson was provided with the revision B defects list on 21 April 2016, the relationship between himself and Mr Genesin had become strained.
>
> [710] Mr Genesin's evidence about allowing Bedrock back on Site was evasive. He accepted that Bedrock had been refused access, but then later categorised it more as "pausing".
>
> [711] I have already found that on or about 9 May 2016 Mr Crea had decided to prohibit Bedrock from returning to the Site and that he communicated that to Mr Henderson on 11 May 2016.
>
> [712] The reasons for refusing access are set out in Mr Crea's email to Mr Henderson sent on 11 May 2016 at 4.23pm and Mr Genesin's email sent to Mr Henderson on 13 May 2016 at 1.10pm.
>
> [713] Mr Henderson responded to Mr Crea's email sent on 11 May 2016 on 12 May 2016 at 3.45pm.

> [714] Mr Henderson's response to Mr Genesin's email sent 13 May 2016 was clearly sent under trying personal circumstances for Mr Henderson but these email exchanges demonstrate the extent to which the relationship had broken down.
>
> [715] As at 3 May 2016, three weeks after Mr Crea had taken possession, there were still a significant number of defects, with a value approaching $100,000 out of a contract value of approximately $381,000 and which according to the Arbitrator's Award had not been rectified.
>
> [716] Whereas Bedrock had an obligation to rectify the defects, I find it had been given opportunities to do so but had not rectified all the defects.
>
> [717] I have found that after the 3 May 2016 meeting, the relationship between Mr Genesin and Mr Henderson and therefore Bedrock had become unworkable. I find that both Mr Crea and Mr Genesin had no faith in Bedrock's ability to complete the Works. That lack of faith is also apparent from what I have found in the complete breakdown in the relationship between the parties, amply illustrated by Mr Crea taking out an intervention order against Mr Henderson.
>
> [718] Although I have found Mr Genesin's Notice of Termination given pursuant to clauses Q1 and Q2 is of no effect, the reasons given in the notice are instructive as to Mr Crea's decision to terminate the Contract. They include displaying a lack of urgency in rectifying/ attending to defects in the revision C defects list, although I am not satisfied that was the case given Bedrock was prohibited from attending the Site in effect, as from after the 3 May 2016 meeting. They also include unacceptable personal abuse and Bedrock's failure to carry out the Works in accordance with the Standards set out in the contract documents contrary to the provisions of clause A2 of the Contract.
>
> [719] I find that Mr Crea prohibited Bedrock access to the Site to carry out rectification work from on or about 11 May 2016 and that the prohibition was reasonable, such that Bedrock had no right to attend the Site to carry out rectification work or complete any incomplete work after on or about 11 May 2020.

112 It followed from the above that the trial judge in effect rejected Bedrock's complaint that it was unreasonably refused access to rectify the defects that had been identified. His Honour declined to disallow or reduce Mr Crea's defects claim on account of this complaint.

113 The trial judge proceeded to consider the other challenges to Mr Crea's defects claim (being the five challenges to the adoption of the Arbitrator's award mentioned earlier in these reasons), which resulted in a modest reduction in the sum claimed from $103,396.70 to $95,599.70 (exclusive of GST).

Grounds 1, 3 and 4: the defects claim

114 As set out earlier, each of Grounds 1, 3 and 4 challenge the trial judge's reasoning and conclusions in relation to Mr Crea's defects claim. Each involves a challenge to the judge's factual conclusions as to the reasonableness of Mr Crea's conduct in refusing Bedrock access to the Site to carry out the rectification work necessary to address the defects. However, Ground 1 also includes a more fundamental challenge to the trial judge's approach. It includes

a complaint that the trial judge erred in approaching the defects claim on the basis that Mr Crea was entitled to refuse Bedrock access to the Site to carry out the Works, as long as it was reasonable for him to do so. The trial judge erred, so Bedrock complains, because such a case was not pleaded and was, in any event, inconsistent with the contractual regime applicable in the present case.

The pleaded case

115 Mr Crea's defects claim was pleaded in very general terms. After pleading that Bedrock failed to carry out the Works in accordance with the Contract, the statement of claim included the following:

> 15. The Works are substantially defective (the Defects).
>
> 16. The Defects relate to a significant part of the Works including plumbing and flooring and were notified to Bedrock by the Plaintiff and the architect between 7 April 2016 and 13 May 2016.
>
> 17. On 13 April 2016 the architect issued Bedrock under the Contract with a list of defects [Revision A] requiring rectification.
>
> 18. Some rectification work was carried out by Bedrock, but that was performed incompetently and did not remedy the defects.
>
> 19. Bedrock has failed, refused and neglected to remedy or correct the Defects as required of it pursuant to clause M11 and M14 of the Contract.
>
> Particulars of defects
>
> 20. On 13 May 2016 the architect issued Bedrock with a final list of outstanding defects [Revision C] to be rectified (The Notice Defects).
>
> 21. In breach of the contract, Bedrock has failed, refused or neglected to remedy the defects (the Notice Defects) contained in the Defects Notice.
>
> 22. The Plaintiff is entitled to engage other contractors to correct the defects pursuant to section M12 of the Contract because Bedrock has not remedied the defects assessed by the architect and the defects liability period has ended.
>
> 23. By reason of the Notice Defects and breaches of the Contract, the Plaintiff has incurred or will incur expenses and suffered loss and damage, being the cost of the rectifying the Notice Defects (which defects are in this pleading also called "the defective works').
>
> Particulars of loss and damage
>
> The cost of rectifying the Notice Defects is $257,514.40 (including GST). The Notice Defects and their reasonable rectification costs are set out in Schedule 1.
>
> The Plaintiff will also suffer a loss of profits because the Premises, being a restaurant, will be closed while the remedial works are carried out.

116 It can be seen that Mr Crea's pleaded case was based upon an alleged failure or refusal by Bedrock to remedy or address the defects identified in the Revision A defects list as it was required to do under clauses M11 and M14. The Revision C defects list was relied upon as an articulation of those defects (from the Revision A list) that remained outstanding, and hence in respect of which Mr Crea was entitled to retain another contractor to rectify. Mr Crea claimed an entitlement to recover the cost of so doing from Bedrock, pursuant to clause M12.

117 In its defence, Bedrock denied that the Works were defective, and pleaded various matters in support of that denial. Then, in response to Mr Crea's pleaded contractual entitlement to recover the cost of rectifying the defects, Bedrock relied upon several matters including that:

- Bedrock was at all times ready, willing and able to remedy the allegedly defective and incomplete work (paragraphs 16.1, 18.1, 21.2 and 22.2);
- Bedrock and its trades did address a number of the defects that had been identified in the Revision A defects list (paragraphs 16.2, 18.2, 19.1, 20.1 and 22.3);
- Mr Crea and Mr Genesin refused Bedrock and its trades entry to the Site, and a reasonable opportunity to remedy defects (paragraphs 15.1 and 22.1);
- Bedrock and its subcontractors were refused access to the Site on 9 May 2016 despite that access having been pre-arranged with Mr Crea and Mr Genesin (paragraphs 16.9, 18.6 and 22.5);
- Bedrock was directed by Mr Crea and Mr Genesin that it was not permitted to perform any further remedial works (paragraphs 16.10, 18.7 and 22.8);
- the Contract was unilaterally repudiated on 16 May 2016 when Bedrock was directed by Mr Crea and Mr Genesin not to return to the Site (paragraphs 16.8, 22.6 and 22.7);
- the actions of Mr Crea and Mr Genesin were unreasonable in that they prevented Bedrock and its subcontractors carrying out remedial works despite at all times being ready, willing and able to do so (paragraph 19.2); and
- but for the refusal of an opportunity to remedy the defects, Bedrock would have been able to remedy the defects at no cost to itself using subcontractors (paragraph 16.1).

Analysis

118 Based upon the above summary of the parties' pleaded cases, and indeed the way the parties argued and presented their cases at trial, it is apparent that the case was conducted upon the basis that Mr Crea's entitlement to damages on his defects claim was predicated upon Bedrock having a contractual opportunity to remedy the defects identified by Mr Crea (through Mr Genesin). Mr Crea's case was that Bedrock had failed or refused to take this opportunity, and Bedrock's case was that it was not afforded this opportunity. While Bedrock's defence did include reference, in paragraph 19.2, to the actions of Mr Crea (and Mr Genesin) being "unreasonable" in this respect – which might be interpreted as an allegation of a failure to mitigate – the relevance of the dispute about whether Bedrock was given a proper opportunity to remedy the defects was not confined in this way.

119 Importantly, this summary of how the case was conducted also reflects the regime for dealing with defects under the Contract. Focussing, as the parties did, upon clauses M11 to M14, it is apparent that the Contract contemplated that Bedrock was to have both an obligation and an opportunity to remedy any defects itself before it would be liable for the cost to the owner, Mr Crea, of using some third party to remedy those defects.

120 In its terms, clause M11 applied both before and after the date of Practical Completion. It was expressed in terms of an obligation on the part of the contractor (Bedrock) to correct or finalise defective or incomplete work within an agreed time or, in the absence of an agreement, within 10 working days.[11] While not expressed in terms of a corresponding opportunity, right or entitlement on the part of Bedrock to undertake that rectification work, that seems to me to have been implicit in clause M11. But to the extent it was not implicit in clause M11, it was at the very least inherent in the combined operation of clauses M11 and M12 in the sense that the latter only purported to entitle the owner to claim the cost of third party rectification of defects where the contractor had failed to correct or complete the work within the time nominated under clause M11. Indeed, even then, the builder was entitled to show reasonable cause for this failure and provide an acceptable timetable for correcting the problem.

121 In my view, the same reciprocity of obligation and opportunity was implicit in the operation of clause M14. That clause only applied during or after the defects liability period. It was expressed in terms of an obligation upon the contractor to promptly[12] return to the site and correct or finalise the work. However, in my view, this obligation carried with it an implicit entitlement on the part of the contractor to promptly correct or finalise the work.

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[11] "Working day" was defined to mean Monday to Friday, but excluding public holidays, rostered days off and recognised industry shut-down periods as specified.

[12] "Promptly" was defined to mean "as soon as practicable".

122 This reciprocity of obligation and opportunity is generally inherent in the rationale for, and operation of, contractual regimes for addressing defective works. As the authors of *Brooking on Building Contracts* explain, in the context of contractual regimes for addressing defects notified during the defects liability period (DLP):[13]

> Ordinarily, contractual provisions relating to a DLP are inserted primarily for the benefit of the builder. The usual contractual arrangement is that the builder not only has the obligation to rectify defective work during the DLP but, in most instances, has the right also to make good at its own cost those defects which appear during that period. If the principal does not give the contractor the opportunity to make good its defective work, then its claim for damages may be limited to what it would have cost the contractor to carry out the rectification works.[14] Typically, the cost to a builder to rectify defective work is substantially less than the cost to a proprietor of engaging an outside contractor to rectify. However, as always, the terms of the contract must be carefully examined.

123 Indeed, in the same section of this text, the authors refer to clauses M14, M15 and M17 of ABIC MW-2008 and ABIC MW-2018 (which are the equivalent of clauses M11, M12 and M14 of ABIC SW-2008 applicable in the present case) as operating in this way.

124 Properly understood, the passage from the reasons of Ball J in *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd*[15] relied upon by the trial judge is consistent with the above. In that case, Ball J was considering the position as a matter of common law, and reasoned that an owner was required to give a builder a reasonable opportunity to rectify defects, by way, it would seem, of an implied term, or at the very least as an aspect of the principles governing mitigation of loss.[16]

125 However, quite apart from this general common law entitlement on the part of a builder to a reasonable opportunity to rectify defects, Ball J recognised that the building contract itself will often set out a procedure by which defects are to be made good. Ball J referred in this context to the decision of White J in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd.*[17]

126 In that case, the plaintiff proprietors sought damages for the cost of rectifying defects which they had notified pursuant to the contractual procedure (under clause 6.11 of the applicable standard form contract), even though they had prevented the builder from rectifying those defects. The relevant clause in that case (clause 6.11) contemplated notification of defects through an instruction from the Architect to the builder that identified the defects and stated a

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13 Cremean, Whitten & Sharkey, *Booking on Building Contracts* (LexisNexis Butterworths, 6th ed, 2020).

14 See *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2010) 26 BCL 335.

15 *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 at [42]-[46].

16 *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 at [44]; citing *Cassidy v Engwirda Construction Co (No 2)* [1968] Qd R 159 at 166.

17 *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2010) 26 BCL 335.

reasonable time within which they were to be rectified. The clause provided that upon such notification, the builder "shall promptly make good such defects by appropriate rectification work and shall complete the same within or at any time stated in such instruction." The clause further provided that "[i]f any defect is not made good within or at the reasonable time as may be so stated by the Architect or otherwise within a reasonable time the proprietor may have the defect made good by others pursuant to the provisions of clause 5.06." Clause 5.06 provided a mechanism for the proprietor to retain a third party to carry out work and then recover the cost of that work from the builder.

127 White J accepted the builder's contention that clause 6.11 meant that the builder was both "obliged and entitled" to carry out the rectification work notified to it by the Architect.[18] It followed that the proprietors were not entitled to recover the cost of a third party carrying out the rectification work in circumstances where they had denied the builder the contractual opportunity to rectify contemplated by the regime provided for in clauses 5.06 and 6.11.

128 Indeed, White J held that the regime in clauses 5.06 and 6.11 was tantamount to a code outside of which there was no entitlement on the part of the proprietor to recover damages for defective work.[19] In so holding, White J relied upon the following passage from the reasons of Cole J in relation to the relevantly identical contractual provisions in *Turner Corporation Ltd v Austotel Pty Ltd*:[20]

> 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

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18 *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2010) 26 BCL 335 at [81].

19 *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2010) 26 BCL 335 at [71]-[77].

20 *Turner Corporation Ltd v Austotel Pty Ltd* (1994) 13 BCL 378 at 394-395; see also the application of this passage in *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49 at [305]-[306].

> 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 non compliance 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 to 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.

129 It is not ultimately necessary to reach a concluded view as to whether clause M14 provided Bedrock with a contractual opportunity or entitlement to rectify the alleged defects. While the statement of claim made passing reference to clause M14 (paragraph 19), the pleaded entitlement to recovery of the cost of rectifying the alleged defects was pursuant to clause M12 (paragraph 22). As explained above, that clause, when read in conjunction with clause M11, plainly provided Bedrock with a contractual opportunity of at least 10 working days to rectify any defects. I say “at least” 10 working days because, as mentioned earlier, by reason of clause M12, even if the rectification work was not completed within 10 days, the contractor might be afforded further time if it showed reasonable cause together with an acceptable timetable to correct the problem.

130 In my view, this contractual opportunity of at least 10 working days within which to rectify defects was not, either expressly or impliedly, constrained by any notion of reasonableness. The owner, Mr Crea, was required to afford the builder this contractual opportunity to rectify in order to be entitled to recover damages referable to the cost of a third party to rectify the defects. It was not enough that the builder was afforded some other “reasonable” opportunity. I do not think there is any room, in the face of the express contractual provisions for addressing defects, for the existence of some wider common law right to recover damages of that nature. Such a right would cut across the contractual regime agreed between the parties.

131 It follows from the above that the trial judge erred in overlooking the significance of the contractual regime for addressing the rectification of defects,

and in particular clauses M11 and M12. More specifically, his Honour erred in approaching Mr Crea's defects claim on the basis of a common law right to damages reflecting the cost of a third party rectifying as long as Bedrock had been given a 'reasonable' opportunity to rectify. His Honour did not ever squarely address the operation of clauses M11 and M12, and whether Mr Crea had afforded Bedrock the 10 working days contemplated by those clauses. Perhaps significantly in this regard, I observe in passing that when paraphrasing the passage from the reasons of Ball J in *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd*[21] that I have set out earlier, the trial judge omitted the sentence in paragraph [44] that qualified the relevance of common law principles by stating that "[o]ften, of course, the building contract itself requires [the builder] to repair defects or sets out a procedure by which defects are to be made good: see, eg, *Bitannia Pty Ltd v Parkline Constructions Pty Ltd.*"

132 Approaching Mr Crea's defects claim, as it should have been, on the basis that it was a claim for the cost of rectification works under clause M12 by reason of Bedrock having failed or refused to rectify or complete in accordance with clause M11, it is apparent that there is a difficulty with the claim. The difficulty is that, even on the trial judge's findings, Mr Crea did not afford Bedrock the opportunity to remedy or complete the Works to which it was entitled under clause M11.

133 It is true that, on the trial judge's finding (based upon his adoption of the Arbitrator's award), a number of the defects that were on the Revision A defects list were not rectified adequately or at all. However, I do not think this was sufficient to establish an entitlement to damages in respect of these defects. The reason for this is that the evidence did not establish that Bedrock was provided the 10 working days opportunity to carry out rectification work contemplated by the Contract.

134 The Revision A defects list was dated 12 April 2016, but was only provided to Bedrock by email on Wednesday, 13 April 2016. Assuming the 10 working days contemplated by clause M11 commenced at that time,[22] by the end of the following week (being Friday, 22 April 2016), only seven working days had passed. Bedrock contends that there were less than seven full days access during that period because there were interruptions to its access whilst restaurant staff were being trained, and by reason of Mr Crea taking possession of the Site on 22 April 2016.

135 From 22 April 2016, Bedrock's access to the Site was confined to Mondays, when the restaurant was closed. Further, because Monday 25 April 2016 was a public holiday, the following two Mondays, 2 and 9 May 2016, were,

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[21] *The Owners - Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 at [42]-[46].

[22] And that the clause required or assumed full or clear working days, so that it commenced to run the following day.

at best (from Mr Crea's perspective), the eighth and ninth working days following provision of the Revision A defects list.

136 Even then, the evidence reveals, and it was not disputed, that Bedrock and its trades were not given full access on either 2 or 9 May 2016. On the former they had access for part of the day only, and on the latter they did not have any access at all.

137 Because he treated the issue as one of mitigation, the trial judge addressed the issue of access on these days with a view to determining whether Mr Crea or Mr Genesin had unreasonably refused access to Bedrock and its trades on these days, with the trial judge ultimately concluding that the refusal of access was not unreasonable, at least in part on the basis that Bedrock, through Mr Henderson, did not take adequate steps to arrange access for those days.

138 On the other hand, if the issue is approached with a view to determining whether Bedrock was given the (at least) 10 working days opportunity contemplated by clauses M11 and M12, then the evidence and findings point to a conclusion favourable to Bedrock. On the evidence, and the trial judge's findings, Bedrock (and its trades) remained ready, willing and able to carry out the necessary rectification works throughout. Mr Henderson did not object to Bedrock and its trades being confined to access on Mondays, and indeed expressly communicated their availability to attend early in the morning or late at night, if that suited Mr Crea.

139 While clearly annoyed by the lack of recognition or acceptance of the effectiveness of the rectification work that had been undertaken, Mr Henderson continued to communicate his willingness to continue with the rectification works. His written communications ahead of both 2 and 9 May 2016 were premised upon him attending the Site on those days. Even if it may be accepted, on the trial judge's findings, that Mr Henderson did not make clear arrangements with Mr Genesin to ensure access on those days, it cannot be said that Bedrock refused or failed to attend on those days. Rather, Bedrock and its trades did attempt to undertake work on those days, but were thwarted in their attempts by reason of the Site being largely inaccessible to them.

140 The net effect of the above is that the evidence did not permit, and the trial judge did not make, a finding that Bedrock had been given 10 working days access to the Site by the end of 9 May 2016. And it was not given any access to the Site at all after that date.

Conclusion and implications

141 It follows that Mr Crea did not establish his entitlement to recover the cost of a third party rectifying the defects identified in Revision C, and that the trial judge erred in concluding that he did. The appeal should be allowed on this

basis, with the result that there is no need to address the balance of the essentially factual complaints raised under Grounds 1, 3 and 4.

142 However, because of the manner in which the parties presented the case below, and on appeal, it is not a straightforward matter to determine the precise implications of this conclusion for Mr Crea's defects claim.

143 On one view, it could be said that the whole defects claim should have failed by reason of the failure by Mr Crea to afford Bedrock the 10 working days access to which it was entitled. But I think this would be to go too far, and indeed I do not understand Bedrock to contend for such an outcome on appeal. In paragraphs 10 and 42.2 of its written submissions, and in its supplementary written submissions, Bedrock appears to accept that the appropriate approach would be to reduce Mr Crea's damages to remove the component referable to those items which Bedrock could have rectified, if given a few additional days access, at essentially no cost to itself. In my view, that reflects an appropriate approach.

144 In seeking to attach a dollar figure to this reduction in Mr Crea's damages, Bedrock identified some 33 items which it contended fell within this category, and which represented a total cost of $43,212.50 (exclusive of GST) in accordance with the findings of the Arbitrator. It selected these items on the basis that they were items that the Arbitrator had found were capable of being addressed within a relatively short duration (about one day or less).

145 Mr Crea opposed a reduction of this order. He did so on the basis that, on the Arbitrator's estimates, it would have taken a total of close to 25 days of work by the trades to carry out all of this rectification work. Even allowing for the fact that multiple trades would have been able to undertake work at the same time, Mr Crea contended that the claimed reduction in the defects was unrealistic and excessive. He gave several illustrations of rectification tasks that would have needed to be carried out sequentially (rather than in parallel with other tasks), or which would otherwise have required intervals between the various aspects of the task to be carried out. Mr Crea ultimately contended that the reduction should be confined to about $12,000, or less than one-third of the amount contended for by Bedrock.

146 While Mr Crea sought to support his lower reduction by pointing to the uncertainty in the evidence as to extent to which the defects could have been addressed within a few extra days, I do not attach much significance to this submission. It was for Mr Crea to establish his entitlement to damages on account of the defective works. In circumstances where Mr Crea did not provide the 10 working days opportunity to carry out the rectification works contemplated by the Contract, it seems to me that the uncertainty in the evidence in this respect was more a problem for Mr Crea than Bedrock.

147 In summary, the evidence does not allow a precise assessment. The Court is left to do what it can to assess the appropriate award of damages on the evidence available to it. Approaching the issue in a relatively broad way, and making some allowance for difficulties that Bedrock and its trades might have experienced in completing all of the 'short duration' items within a few extra days and at essentially no cost to Bedrock, I propose to reduce the damages otherwise payable by Bedrock on the defects claim by an amount of $35,000 (exclusive of GST).

148 From its supplementary submissions, it seems that Bedrock also seeks a further reduction in the damages otherwise payable on the defects claim on account of those items that were not notified in the Revision A defects list. Of those amounts that the parties agree were new items, most were included in the 'short duration' items and so have already been addressed. Those that were not included in this amount are very modest in value. I will make a further reduction of $1,000 (exclusive of GST) in respect of these items.

149 In addition to these items that the parties agree were new items, there were a handful of other items which Bedrock contends were described in sufficiently different terms in Revisions B and C of the defects list that they were effectively new defects that it was never given an opportunity to rectify. Mr Crea does not accept this characterisation of these additional items, describing them as simply altered descriptions to reflect either the partial completion of the relevant items, or the consolidation of various items earlier notified.

150 The amount potentially in issue in this context is in excess of $30,000, the bulk of which relates to three items or groups of items, being defects described as replacing vinyl flooring, relocation of stone panel joints and replacing a vanity top.[23] It is very difficult for this Court to make any meaningful assessment of the competing submissions in respect of this aspect of the defects claim. In the end I am not persuaded it is appropriate to make any reduction in the sum awarded by the trial judge on account of these items. The requirement for, and the value of, the rectification work for these items reflected figures determined by the Arbitrator and adopted by the trial judge, and Bedrock did not suggest that these were items that it could have addressed within 10 working days access to the Site. Their general descriptions suggest they were unlikely to have been able to be addressed within a few days of additional access, particularly if the other items for which I have made reductions were to be carried out at the same time. In the case of at least the vinyl flooring and stonework, this was effectively conceded by Bedrock.

151 As mentioned earlier, the trial judge allowed an amount of $95,599.70 (exclusive of GST) for Mr Crea's defects claim. Reducing this by a total of approximately $36,000 (exclusive of GST) on account of the matters outlined above, the amount awarded on the defects claim should be reduced to a rounded

[23] The separate ground addressing this last item (Ground 5) was abandoned.

sum of $60,000 (exclusive of GST). The GST inclusive amount of the claim should be reduced from $105,159.67 to $66,000.00.

Ground 2: termination

152 As set out in the 'Factual background' at the commencement of these reasons, on 19 May 2016, Mr Crea purported to terminate the Contract through a notice of termination issued by Mr Genesin to Bedrock pursuant to clauses Q1 and Q2.

153 The trial judge held that the Contract was not validly terminated pursuant to the mechanism provided in clauses Q1 and Q2. This conclusion is not challenged.

154 However, the trial judge went on to hold that the terms of the Contract did not, either expressly or impliedly, exclude the right of a party to terminate the Contract at common law. After referring to Mr Crea's concerns about the quality and timeliness of Bedrock's work (particularly in addressing the defects that had been identified), and the deterioration in the relationship with Mr Henderson to the point where it had broken down and become unworkable, the trial judge concluded that Mr Crea "had good reason to terminate the Contract and that he did so by his agent, Mr Genesin, on 19 May 2016."

155 The trial judge went on to add that, "[n]otwithstanding that termination, the provisions of the Contract remain on foot for the purpose of regulating the parties' rights insofar as those rights had already been acquired."

156 In Ground 2, Bedrock challenges the trial judge's conclusion that Mr Crea validly terminated the Contract. It does so on the basis that (i) no case of termination pursuant to some common law right had been pleaded or run at trial; (ii) the Contract was relevantly a code and thereby excluded any such common law right; and (iii) there was no basis for the trial judge to have found a breach of the Contract by Bedrock sufficient to entitle Mr Crea to invoke any common law right to terminate that might have existed.

157 I have some reservations as to the soundness of the trial judge's conclusions on this issue. In circumstances where Mr Crea did not plead, or otherwise contend for, a common law right to terminate the Contract, it does seem problematic for the judge to have reached the conclusion he did. Further, and in any event, even assuming the existence of a common law right to terminate, I am not persuaded that the trial judge identified any breach of the Contract by Bedrock that would have permitted Mr Crea to exercise that right. To the extent that the judge's reasoning in support of the validity of Mr Crea's purported termination was addressed to this issue, it has been significantly undermined by the conclusions that I have reached in respect of Grounds 1, 3 and 4. In circumstances where I have concluded that Mr Crea refused Bedrock access to the Site without having afforded it the contractual opportunity to rectify to which

it was entitled, it is difficult to see how Mr Crea could have been justified in terminating on the grounds he relied upon.

158 I do not, however, consider it necessary to express any concluded view on these issues. The reason for this is that neither party suggested that the trial judge's conclusion that the Contract was validly terminated on 19 May 2016 was of any practical significance. While Bedrock contended that the conclusion was erroneous, it did not suggest that overturning this conclusion would, of itself, affect the outcome of the appeal. Indeed, counsel for Bedrock characterised Ground 2 as merely a "fallback", or an alternative to Ground 1.

159 It may be that Bedrock apprehended that the judge's conclusion that the Contract was validly terminated might in some way stand in the way of it resisting Mr Crea's defects claim on the basis that it was denied access to the Site. As I do not think that is so, and no utility has otherwise been identified in this Court determining whether the judge erred in concluding that the Contract was validly terminated, I do not consider it necessary to express a final view on the issue.

Ground 7: interest

160 The trial judge held that Mr Crea was entitled to recover $105,159.67 (being $95,599.70 plus GST) in respect of his defects claim. His Honour held that Bedrock was entitled to recover $83,641.93 (being $76,038.12 plus GST) on its cross-claim. As explained earlier in these reasons, the sum awarded on the cross-claim consisted of $42,486.36 on account of the agreed balance due on progress claims 1-4, $16,441.33 in respect of variations, and $21,035.43 in respect of delay costs, less a credit of $3,925.00 in respect of some signage.

161 In addressing the issue of interest, the trial judge considered it appropriate to award interest at the Court rate rather than the rate specified in the Contract. In respect of Mr Crea's claim, the judge held that pre-judgment interest should run from the date of issue of his claim (16 March 2017). In the case of Bedrock's cross-claim, the judge considered that pre-judgment interest should run from the date it filed its cross-claim in the District Court (13 September 2017).[24]

162 The judge awarded Mr Crea interest on his claim in the sum of $18,554.70, giving a total judgment in his favour of $123,714.37 (inclusive of GST). His Honour awarded Bedrock interest on its cross-claim in the sum of $13,374.41, giving a total of $97,016.34 (inclusive of GST).

163 Bedrock's challenge to the trial judge's approach to the issue of interest under Ground 7 of its notice of appeal was confined to a complaint about his Honour's determination that its interest entitlement did not commence to run

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[24] The judge referred in his reasons to both 13 July 2017 and 13 September 2017. It seems that the former is mistaken, albeit that the judge ultimately used this date in his calculations.

until the date that its cross-claim was instituted, being a date later than when Mr Crea's entitlement to interest commenced to run. Bedrock's complaint was that this was an erroneous approach in circumstances where a significant portion of Bedrock's claim related to an agreed sum of liquidated damages ($46,735) in respect of progress claims 1-4, whereas the entirety of Mr Crea's claim was in respect of unliquidated damages. In support of this complaint, Bedrock relied upon the provision in s 39(2) of the *District Court Act* to the effect that a party's entitlement to interest in respect of a liquidated claim is to be calculated from the date the amount claimed fell due "unless the Court otherwise determines".

164 In my view, there is force in this complaint. I consider that the trial judge erred in confining the duration of Bedrock's award of interest in the manner he did. In circumstances where a significant proportion of the cross-claim was an agreed liquidated sum that fell due at some earlier point, and Bedrock had by April 2017 issued its claim in the Magistrates Court in respect of the sum ultimately claimed in its cross-claim in the District Court, it was not appropriate to confine Bedrock's entitlement to interest to a period commencing from the later point in time when Bedrock's cross-claim was filed in the District Court. However, rather than award interest on part of the cross-claim from some earlier date, I consider it appropriate in the circumstances of this case to simply award Bedrock interest on the entirety of its cross-claim from the same date that Mr Crea was awarded interest on his defects claim, namely 16 March 2017. In my view, the appropriateness of this approach is reinforced by my conclusion later in these reasons that the parties' respective claims ought to have been treated as off-setting claims.

165 It is thus necessary to make adjustments to both parties' entitlements to interest. It is necessary to reduce Mr Crea's entitlement to reflect the reduction in the damages payable in respect of his defects claim by reason of Bedrock's success on Grounds 1, 3 and 4. It is necessary to increase Bedrock's entitlement to reflect the slight increase in the period for which it is entitled to interest.

166 In making these adjustments, I have used the same rates for pre-judgment interest as the trial judge; namely, the relevant Reserve Bank cash rate plus 4 per cent for the period up to 18 May 2020, and then the rate of 5 per cent through to the date of judgment (4 December 2020). And, like the trial judge, I have calculated the interest on the GST exclusive figures, before then adding it to the GST inclusive figures.

167 I would award Mr Crea interest on his claim in the (rounded) amount of $11,500, reducing his total entitlement in respect of his defects claim to $77,500[25] (inclusive of GST).

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[25] Being $66,000 plus $11,500.

168 I would award Bedrock interest on its claim in the (rounded) amount of $15,500, increasing its total entitlement in respect of its cross-claim to $99,141[26] (inclusive of GST).

Ground 9: separate judgments

169 The trial judge entered separate judgments in respect of Mr Crea's claim and Bedrock's cross-claim. His Honour did not accede to Bedrock's submission below that he should exercise his discretion under r 224(2) of the *District Court Civil Rules 2006* (SA) to enter a single judgment for the difference between the two sums held to be owing. Rule 224(2) provided the Court with a broad discretion to enter a 'difference judgment' or 'balance judgment' in circumstances where a plaintiff succeeds on a claim and the defendant succeeds on a cross-claim.

170 The trial judge acknowledged that, as a matter of principle, equitable set-off would have been available. However, in nevertheless declining to enter a balance judgment, his Honour relied upon the failure of Bedrock to plead an entitlement to set off its cross-claim.

171 In Ground 9, Bedrock challenges the trial judge's refusal to enter a balance judgment.

172 There is ample authority to the effect that set-off will be available, and a balance judgment ordinarily appropriate, in circumstances where an owner and builder have competing claims arising out of the same building contract. I refer in particular in this respect to the reasons of Debelle J in *Badge Constructions Pty Ltd v Penbury Coast Pty Ltd*,[27] as recently cited by the Full Court in *Ticknell v Duthy Homes Pty Ltd*.[28]

173 In my view, this approach was apposite in the present case. As there was no suggestion of any prejudice to Mr Crea as a result of Bedrock's failure to plead an entitlement to set-off, I do not consider that there was any good reason to depart from this usual approach. I consider that the trial judge erred in doing so.

174 I would therefore enter a single judgment in favour of Bedrock against Mr Crea, in the amount of $21,641, being the difference between their respective entitlements of $99,141 and $77,500.

Ground 8: costs

175 In Ground 8, Bedrock makes various challenges to the trial judge's order that it pay 60 per cent of Mr Crea's costs of the action and the Arbitration.

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[26] Being $83,641 plus $15,500.

[27] *Badge Constructions Pty Ltd v Penbury Coast Pty Ltd* [1999] SASC 6 at [11]-[14].

[28] *Ticknell v Duthy Homes Pty Ltd* [2020] SASCFC 24 at [418]; see also *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 441 at [8]-[9].

176 Given that I would allow the appeal on other grounds which will not only alter the assessment of the parties' respective degrees of success below, but also result in the substitution of a judgment with a net entitlement in favour of Bedrock rather than Mr Crea, it is appropriate that there be a reconsideration by this Court of the issue of costs.

177 I would hear the parties further as to the costs of the action, Arbitration and appeal.

Conclusion

178 I would allow the appeal. I would set aside orders 1, 2 and 3 made by the trial judge on 4 December 2020. I would enter a single judgment in favour of Bedrock in the amount of $21,641 (inclusive of GST and interest). I would hear the parties further as to the costs of the action, Arbitration and appeal.

179 **LIVESEY JA:** I agree with the reasons of Doyle JA.

180 **BLEBY JA:** I agree that the appeal should be allowed for the reasons given by Doyle JA, and with the orders that his Honour proposes.