Court of Appeal
Supreme Court

New South Wales

Case Name:	Krolczyk v Winner t/as J Winner Building Services
Medium Neutral Citation:	[2022] NSWCA 196
Hearing Date(s):	16 May 2022
Date of Orders:	05 October 2022
Decision Date:	5 October 2022
Before:	White JA at [1] Kirk JA at [2] Griffiths AJA at [3]
Decision:	1. Within 21 days hereof, the parties should seek to agree proposed short minutes of order which give effect to these reasons, including as to the costs of the appeal and the costs below. 2. If they are unable to reach agreement, each party should within that period file and serve written submissions not exceeding eight pages in length in support of their respective positions. 3. Final orders will then be made on the papers and without a further oral hearing.
Catchwords:	BUILDING AND CONSTRUCTION – Contract – Whether contract existed – Whether respondent engaged as either builder or supervisor – Alleged partly written and partly oral contract – No contract in existence BUILDING AND CONSTRUCTION – Defective work – Duty to mitigate loss – Whether appellants acted reasonably to mitigate loss

Legislation Cited:	Civil Procedure Act 2005 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Design and Building Practitioners Act 2020 (NSW) Home Building Act 1989 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	Ayre Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd (1985) 2 NSWLR 309 Braham v ACN 101 482 580 Pty Ltd [2020] VSCA 108 Cavasinni v Cavasinni [2001] NSWSC 223 Ermogenous Greek Orthodox Community of SA Inc (2002) 209 CLR 95; [2002] HCA 8 Expectation Pty Ltd v PRD Realty Pty Ltd 140 FCR 17; [2004] FCAFC 189 Fabre v Lui (No 2) [2015] NSWCA 312 Fox v Percy (2003) 214 CLR 118; [2003] HCA 22 House v The King (1936) 55 CLR 499; [1936] HCA 40 Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 193 CLR 603; [1998] HCA 38 Jadwan Pty Ltd v Rae & Partners (A Firm) (2020) 278 FCR 1; [2020] FCAFC 62 Karacominakis v Big Country Developments Pty Ltd [2000] NSWCA 313 Krolczyk v Winner (t/as J Winner Building Services) (District Court of NSW, 20 October 2021, unrep) Krolczyk v Winner (t/as J Winner Building Services) (District Court of NSW, 9 August 2021, unrep) Le v Scott [2022] FCAFC 31 Lee v Lee (2019) 266 CLR 129; [2019] HCA 28 Leichhardt Municipal Council v Green [2004] NSWCA 341 Magann v Trustees of the Roman Catholic Church for the Diocese of Parramatta [2020] NSWCA 167 Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2) [2011] NSWCA 344 Nutrient Water Pty Ltd v Baco Pty Ltd (No 2) [2010] FCA 304 Peric-Davies v Mazdo [2004] NSWCA 20; (2004) 40 MVR 210 Robinson Helicopter Co Inc v McDermott [2016] HCA 22; (2016) 331 ALR 550 Rockdale City Council v Micro Developments Pty Ltd [2008] NSWCA 128

	Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd [1976] 1 NSWLR 5 The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659 Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 193 CLR 603; [1998] HCA 38
Texts Cited:	Cheshire & Fifoot Law of Contract (11th Australian ed, 2017) JD Heydon, Heydon on Contract (Thomson Reuters, 2019) Williston on Contracts, 3 ed
Category:	Principal judgment
Parties:	Ted Peter John Krolczyk (First Appellant) Janice Margaret Muir (Second Appellant) Jarad Keith Winner trading as J Winner Building Services (Respondent)
Representation:	Counsel: D O'Connor with C Langford (Appellants) M Klooster (Respondent) Solicitors: Adams & Partners Lawyers (Appellants) Michael Atkinson & Associates (Respondent)
File Number(s):	2021/00243855
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	District Court
Jurisdiction:	Civil
Citation:	NA
Date of Decision:	09 August 2021
Before:	Olsson SC DCJ
File Number(s):	2018/00133146

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

Judgment

Introduction

Primary judgments summarised

Liability judgment (LJ)

(a) Whether or not Mr Winner was the builder or supervisor

(i) First period

(ii) Second period

(iii) Third period

(iv) Fourth period

(v) Fifth period

(b) Work on the project

(c) The defective works

(i) The brickwork

(ii) Wall framing (erroneously described as “The slab” at LJ[102(2)])

(iii) Floor framing

(iv) Roof framing

(v) Laundry and storage framing

(vi) Floor joists powder room foot/bracing

(vii) Concrete slab

(xii) Video recordings of Mr Winner's work in pouring the concrete slab

The objective evidence relied upon by the primary judge

(i) BoQ1 (8 November 2015)

(ii) The cost of estimates (3 February 2016)

(iii) BoQ2 (11 March 2016)

(iv) Ms Muir's check list (14 July 2016) provided to the certifier

(v) Application for Construction Certificate (1 July 2016)

(vi) Ms Muir's text message dated 13 July 2016 to the engineer and Mr Winner's email to Ms Muir dated 26 July 2016:

Non-compliance with UCPR

(d) Adequacy of primary judge's reasons on liability (ground 3)

(e) Primary judge's approach to credit (ground 4)

(f) Onus regarding intention to create legal relations (ground 5)

(g) Particular defective works (grounds 7 and 8)

(i) Ground 7: Floor framing

(ii) Ground 8: First floor west wall

(iii) Wall framing and related issues

(h) Mitigation (ground 6)

(i) Did the primary judge err in finding that Mr Winner had the benefit of an exclusion in the Home Building Act 1989? (ground 9)

(j) Failure to consider appellants' reliance upon the Design and Building Practitioners Act 2020 (ground 10)

(k) Indemnity costs (ground 11)

Conclusion and Orders

HEADNOTE

[This headnote is not to be read as part of the judgment]

Mr Winner (the respondent, who is a licensed builder and quantity surveyor), and his aunt and uncle, Ms Muir and Mr Krolczyk (the second and first appellants respectively), the registered proprietors of a property in Windsor, NSW (**Windsor property**), commenced discussions in 2011 about planned renovation works to the Windsor property. Discussions fell away for some years, but in July 2015 the parties discussed the matter again and work commenced on the Windsor property. Mr Winner performed some work personally and otherwise assisted with the progression of the renovation project, for example, by assisting with the development application process and enlisting other tradespeople to do work on site. By September 2016, the appellants became aware that some of the works were defective.

The parties disputed the nature of the arrangements pursuant to which the works were undertaken. The appellants contended that Mr Winner agreed to be the builder for the project pursuant to a partly written and partly oral contract that fell within the ambit of s 18B of the *Home Building Act 1989* (NSW). Alternatively, they claimed that Mr Winner was a supervisor of the project. Mr Winner contended that he worked on this project merely as a favour to his aunt and that the appellants held owner builders' permits themselves. At first instance the primary judge (Olsson SC DCJ) found in favour of Mr Winner, holding that the parties did not form a contract to the effect that Mr Winner was the builder or, alternatively, supervisor of the renovations at the Windsor property. Her Honour did, however, find that a more limited agreement existed between the parties, namely that they would work together to get the project completed. In a separate costs judgment, her Honour found that the appellants acted unreasonably in declining an offer of compromise contained in a *Calderbank* letter dated 7 March 2018, and ordered the appellants to pay Mr Winner's costs on the ordinary basis up to 7 March 2018 and thereafter on an indemnity basis. The appellants appealed from these two decisions.

The Court held (Griffiths AJA, White and Kirk JJA agreeing), upholding the appeal in part:

As to delay:

The delay of almost 12 months between the hearing of the matter and delivery of judgment at first instance was not indicative of a dereliction of judicial duty, but rather reflected the way in which the case was presented below and the difficulties of resolving the numerous disputed issues and facts: [84].

As to ground 1 (the correct appellate approach to reviewing the primary judge's findings of fact) and ground 4 (primary judge's approach to credit):

The primary judge found neither Ms Muir nor Mr Winner to be a "particularly impressive" witness. Where those witnesses gave conflicting evidence, the primary judge sensibly resolved the conflict by determining which of their accounts was supported by contemporaneous objective evidence: [86]–[88]. Ground 1 was rejected. Furthermore, the primary judge was not obliged to grade the respective levels of those witnesses' lack of credibility or reliability: [144]–[145]. Ground 4 was rejected.

As to ground 2 (the primary judge's analysis of objective evidence):

The appellants' complaint, made by reference to twelve separate instances, that the primary judge either overlooked or misconstrued objective evidence which purportedly supported their overall claim, was rejected: [91]–[137].

As to ground 3 (adequacy of primary judge's reasons on liability):

The appellants' complaints were rejected, in part for the reasons given in respect of ground 2. Furthermore, the primary judge was not required to provide explanatory reasoning as to the nature of the parties' relationship in the event that the Court found that there was no contract between them: [141]–[143].

As to ground 5 (onus regarding intention to create legal relations):

The primary judge did not erroneously place the onus on the appellants to prove that there was an intention to create legal relations: [148]–[150].

As to grounds 7 and 8 (particular defective works):

The appellants' claims that Mr Winner was responsible for alleged defective works relating to floor framing and the first floor west wall were rejected: [161], [174]. The appellants' claim that Mr Winner was responsible for defective wall framing and related work (items 1, 4 and 5) was upheld: [175]–[183].

As to ground 6 (mitigation):

This ground only had significance for items 1, 4 and 5, in respect of which the appellants established liability: [184]. The primary judge ought to have found that Mr Winner had not discharged his onus of establishing that the appellants acted unreasonably in not mitigating their loss: [195]. Ground 6 was upheld.

As to ground 9 (benefit of an exclusion in the Home Building Act 1989):

While the primary judge found that Mr Winner would be entitled to the benefit of an exclusion in the *Home Building Act 1989* if he supervised the works, that finding must be read in context of the reasons as a whole. Her Honour made express findings that Mr Winner was not engaged as a supervisor: [199]. Ground 9 was rejected.

As to ground 10 (failure to consider appellants' reliance upon the Design and Building Practitioners Act 2020):

The primary judge made express findings that Mr Winner did not supervise the project. No appealable error in those findings was demonstrated and, accordingly, the legislation could have no application to him based on a claim that he was supervising the work: [206].

As to ground 11 (indemnity costs):

The reasonableness of the offer of compromise served on the appellants had to be assessed at the time of the making of the offer: [217]. The primary judge failed to take into account that, by 15 February 2018, Mr Winner had accepted responsibility for the wall framing (which had potential ramifications for the appellants' claims under items 1 and 5) and that the appellants were entitled to take into account that Mr Winner carried the onus of establishing a failure to mitigate: [221]. Ground 11 was upheld.

JUDGMENT

Introduction

1 **WHITE JA:** I agree with Griffiths AJA.

2 **KIRK JA:** I have read the comprehensive judgment of Griffiths AJA in draft. I agree with his Honour's reasons and proposed orders.

3 **GRIFFITHS AJA:** This appeal arises in the context of a family dispute relating to the renovation of a residential home at Windsor, which is owned by the appellants. The respondent, Mr Winner, is a licensed builder and quantity surveyor who was involved in the renovations. The nature and extent of his involvement is at the heart of the dispute.

4 Mr Winner is the nephew of the second appellant, Ms Muir.

5 Ms Muir and her husband, Mr Krolczyk (who is the first appellant) appeal from two judgments and several orders of the District Court. The first judgment (*Krolczyk v Winner (t/as J Winner Building Services)* (District Court (NSW)), 9 August 2021, unrep) found that Mr Winner was not engaged as the builder. The primary judge also found that if Mr Winner were engaged as supervisor, he could not be liable for defective work as it was all carried out or supervised by appropriately licensed contractors. For completeness, it should also be noted that the primary judge dismissed a separate cause of action based on alleged misleading or deceptive conduct, which ruling is not challenged in this appeal.

6 The second judgment (*Krolczyk v Winner (t/as J Winner Building Services)* (District Court (NSW)), 20 October 2021, unrep), dealt with costs. The primary judge ordered that the then plaintiffs (whom I shall refer to hereinafter as the appellants) pay the costs of Mr Winner on the ordinary basis up to 7 March 2018 and thereafter on an indemnity basis.

7 The appellants claimed that they entered into a contract with Mr Winner as the builder for the project. In the alternative, they claimed that Mr Winner was a supervisor of the project. They claimed that the contract was partly written and partly oral and fell within s 18B of the *Home Building Act 1989* (NSW). They sought damages in the amount of approximately $200,000. Their legal

challenge was initially brought in 2017 in the NCAT and was transferred to the District Court in April 2018.

8 Mr Winner denied that he was contracted as the builder, or as a supervisor. He said that he was simply doing his aunt a family favour. Mr Winner emphasised that Mr Krolczyk had obtained an owner builder permit under the *Home Building Act* in respect of the renovations and that his aunt had previously obtained an owner builder permit for the installation of a pool and shed at the Windsor property. Mr Winner acknowledged that he was involved in some of the renovation work at the Windsor property which proved to be defective.

Primary judgments summarised

9 I will summarise the primary's judge's reasons for rejecting the appellants' claims regarding liability, before summarising her Honour's second judgment concerning costs. It is necessary to describe in some detail her Honour's primary findings of fact and the basis for those findings in view of the appellants' challenge to the approach taken by her Honour in respect of large parts of her fact finding.

Liability judgment (LJ)

(a) Whether or not Mr Winner was the builder or supervisor

10 The primary judge noted that the appellants claimed that Mr Winner agreed to be the builder, or alternatively the supervisor, of the works at the Windsor property, for which he would be paid $30,000. The contract was said to be partly written and partly oral based on three meetings which occurred on 20 July 2015, 5 August 2015 and 25 November 2015 (at LJ[5]).

11 The primary judge stated that where it is claimed that a building contract can be identified from a series of communications, it is both appropriate and necessary to consider the surrounding commercial circumstances and the subject matter of the communications (at LJ[8]).

12 Her Honour then made the following findings in respect of the following five relevant periods.

(i) First period

13 First, as to the period in 2011, her Honour noted that in this period Ms Muir had obtained an owner builder permit to construct a shed and pool at the Windsor property. Although finding that the appellants had not decided on the scope and detail of the house renovations in 2011, the primary judge noted that Ms Muir and Mr Winner had a further meeting in September 2011 during which Mr Winner said that he could "draw something up for you to have a look at" (at LJ[13]). Her Honour did not accept that, at this meeting, Mr Winner offered to undertake the building work as well as draw up plans, primarily because the discussions were "very much in their infancy" and the appellants had not agreed about the scope or detail of the works (at LJ[14]). Her Honour found that the contemporaneous evidence supported that view, including the parties' exchange of correspondence dated 27 September 2011 and 22 October 2011, in which Mr Winner forwarded Ms Muir handwritten plans and there was no discussion in those emails as to Mr Winner's being the project builder (at LJ[15]).

(ii) Second period

14 The second period is 2015. The appellants contended that a text message exchange dated 20 July 2015 supported their case that Mr Winner had agreed to be their builder from that date. They placed particular reliance upon Mr Winner's text which said: "Like last time we need to get the plans right first to obtain a bill of quantity of costs". The primary judge found that the reference to "last time" was a reference to 2011, at which time nothing was agreed apart from the preparation of draft plans (at LJ[18]).

15 As to a further meeting on 5 August 2015, Ms Muir gave evidence that Mr Winner had told her that he would be "the supervisor and your builder". She said that Mr Winner said those words after he had asked her to obtain an owner builder permit. She added that she told him that she already had such a permit for the pool and shed and, when Mr Winner asked whether Mr Krolczyk could obtain an owner builder permit, she said that he would not be around because of his work hours. After noting Mr Winner's different version of that conversation and his claim that he had only agreed to draw plans so that he could estimate the likely costs of the works, the primary judge said that she

would determine which version was more probable by considering "objective evidence as well as matters of credit" (at LJ[23]).

16 Her Honour then explained why she found Ms Muir's evidence on this matter to be unsatisfactory (at LJ[24]–[27]). She drew attention to information contained in a blank owner builder permit application form which stated that if the owner builder permit holder engaged a contractor "to do work over $20,000.00 on the project, the contractor must take out insurance under the Home Building Compensation Fund and give a certificate of insurance to you" (at LJ[27]).

17 The primary judge noted that there was no evidence that any insurance was taken out nor that a certificate was provided to the appellants (at LJ[28]). Her Honour also took into account that Ms Muir's evidence under cross-examination on this issue was "illogical and disingenuous" (at LJ[30]).

18 The primary judge concluded that she preferred Mr Winner's evidence concerning the 5 August 2015 meeting (at LJ[31]).

(iii) Third period

19 The third period relates to post 5 August 2015. After noting an exchange of messages between Mr Winner and Ms Muir from August to November, the primary judge noted that the plans drawn by Mr Winner were not lodged with the Council until February 2016 (at LJ[33]).

20 As to the appellants' claim that a document dated 8 November 2015 and entitled "Bill of Quantities" (**BoQ1**) was part of the written contract, the primary judge noted the following parts of the document:

(a) the reference to there being a $600 fee for an "Owner Builder", which appeared to suggest that the appellants either had, or would obtain, an owner builder permit for the project;

(b) there was no explanation for an item which allocated $1,500 for "Maintenance & Warranty period";

(c) the BoQ1 made no reference to a daily fee of $400 payable to Mr Winner for his work on the site;

(d) under the heading "Contingency" on the last page, there was a reference to $30,000 against the item "supervisor fee"; and

(e) at the bottom of the BoQ1 form, the following statement appeared:

> Includes CDC fees, *my fees*, drafting fees, includes painting, tapware…
>
> (Emphasis added, and noting that "CDC" refers to the certifier.)

21 At LJ[39] the primary judge stated:

> There are several points to be made about this:
>
> (i) Prior to this BoQ, there had been no discussion regarding the proposed terms of a contract.
>
> (ii) No clear description of the works existed; the plans were far from ready for submission to Council.
>
> (iii) There was no agreed contract price
>
> (iv) There was no agreed commencement or completion date.
>
> (v) There was no mechanism for dealing with variations …
>
> (vi) There was no agreement about the intervals at which progress claims could be made nor the time for payment.
>
> (vii) There was no discussion regarding workers compensation and building works insurance.

22 The primary judge gave the following explanation as to why she had difficulty concluding that the BoQ1 formed the written part of a contract (at LJ[40] ff):

> (a) the title of the document was not suggestive of a contract and rather constituted a list of the works to be done and their likely cost;
>
> (b) the reference to "supervisor fee" appeared under the heading "Contingency", which suggested that it had not been agreed at that stage. In any event, her Honour found that, at its highest, the item was only for supervision and not building work;
>
> (c) Ms Muir did not suggest in any of her affidavits that she attempted to negotiate the $30,000 figure for Mr Winner's alleged supervisory services, even though she said it was a lot of money and keeping costs down was important for her; and
>
> (d) Ms Muir conceded in cross-examination that the BoQ1 "was nothing more than a costing and that Mr Winner had not offered to build anything by issuing" it (at LJ[44]).

23 Her Honour concluded that the objective evidence suggested that the BoQ1 was used as a reference point for the works which were still in fluid form as at November 2015 (at LJ[45]).

(iv) Fourth period

24 The fourth period focussed on a lengthy meeting of approximately two and a half hours on 25 November 2015 between Ms Muir and Mr Winner. The primary judge summarised the contest between those persons as to what was said.

25 At LJ[49] the primary judge stated that there was no objective evidence up until 25 November 2015 that Mr Winner had offered to build anything and that it was "surprising" that there was no written document if it were the case that Mr Winner had offered to be the builder prior to this point. Her Honour also noted that nothing was discussed at the 25 November 2015 meeting as to how and when Mr Winner's fee was to be paid. Her Honour added (at LJ[50]) that it was unclear why, if Mr Winner was the builder, he would charge separately for any physical work he did. At LJ[52], the primary judge said that if Ms Muir's version of the 25 November 2015 meeting was correct, she would have expected that the $400 daily fee for Mr Winner's work would have been included in the second BoQ, which was issued on 11 March 2016 (**BoQ2**). Such a fee was not included and the primary judge also noted that the "supervisor fee" remained under the "Contingency" section of that revised document.

26 Her Honour concluded that the objective evidence did not support Ms Muir's case (at LJ[53]).

(v) Fifth period

27 The fifth period related from 25 November 2015 to 6 March 2016. Her Honour noted that Mr Krolczyk completed the owner builder course in January 2016, with Ms Muir's full knowledge. Her Honour considered that this was inconsistent with her claim that Mr Winner was the builder (at LJ[54]).

28 From LJ[55]–[82] the primary judge addressed various communications and events which occurred during this period. In particular, the primary judge noted that a breakdown of costs prepared by Mr Winner for the purpose of Ms Muir lodging documents with the Council contained no item next to the entry "Home Warranty Insurance", nor was any allowance made for supervision (at LJ[57]). Her Honour explained that because an owner builder was not required to take

out Home Warranty Insurance unless they intended to sell the house within 7 years of the work being undertaken, whereas a builder had to obtain insurance if the work was valued at more than $20,000, the document indicated that the appellants were the builders.

29 The primary judge explained why she found Ms Muir's responses in cross-examination to this matter to be "not convincing" (at LJ[59]).

30 The primary judge explained why she also found Ms Muir to have given "curious evidence" about the matters which needed attention before development consent would be given (at LJ[61]).

(b) Work on the project

31 At LJ[65] ff, the primary judge noted that work started on the site around 11 March 2016, after Mr Winner introduced three tradesmen to Ms Muir. On that day, Mr Winner provided the appellants with the BoQ2, which had some changed costings. But there was no mention of the $400 daily fee for Mr Winner's work and the "supervisor fee" still appeared under the heading "Contingency".

32 After noting that the appellants began paying the tradesmen organised by Mr Winner directly in cash, her Honour found that the parties gave differing accounts as to the progress of the works (at LJ[67]–[68]). Accordingly, her Honour said that she had had regard to the objective evidence (at LJ[68]). Her Honour attached particular significance to an application form completed by Ms Muir for, *inter alia*, the construction certificate. Under the heading "BUILDER/OWNER BUILDER", Ms Muir crossed out the word "BUILDER" and nominated Mr Krolczyk as the "OWNER BUILDER". The primary judge described this document as "persuasive" (at LJ[72]).

33 At LJ[73] ff, the primary judge described the significance of other contemporaneous documentation. Her Honour noted that on 26 July 2016, Mr Winner emailed Ms Muir stating that she and Mr Krolczyk needed to sign the first page of the specifications booklet. Mr Winner had written: "usually I only provide this if I am going to be the builder but Paul has told me that regulations require it now for all builders" (at LJ[80]).

34 The primary judge described Ms Muir's answers in cross-examination in relation to this matter as "confusing and evasive" (at LJ[81]).

35 At LJ[82], the primary judge described the 26 July 2016 email and text messages relating to it as "unequivocal" in demonstrating that Mr Winner was stating that he was *not* the builder. Her Honour added that Ms Muir was the only person with access to the site, whereas the "builder" did not (at LJ[83]). The primary judge described at some length Ms Muir's work on the site, to which the primary judge found she had access much of the time (at LJ[84]).

36 The primary judge noted that around the time the Development Application was approved on 16 June 2016, Mr Winner engaged the certifier on behalf of the appellants and that the certifier issued a Construction Certificate on 27 July 2016 (at LJ[85]).

37 The primary judge described work which was done in mid-2016 prior to, and including, the pouring of the concrete slab on 5 August 2016. Her Honour noted that Ms Muir's evidence was that Mr Winner had overseen the pouring of the slab and assisted in vibrating the concrete (at LJ[89]). Her Honour referred to a photograph of Mr Winner standing on or near the slab but concluded that she could not tell what Mr Winner was doing and could not make any assumptions based on the photograph. As will emerge, the appellants now complain that the primary judge made no reference to videos of the concrete pouring which they say demonstrated Mr Winner's significant involvement in that work.

38 The primary judge found that brickwork started around mid-August 2016 and that although Mr Winner had introduced the bricklayer, Mr Des Parr, he had little or no involvement with the brickwork and the bricklayer accounts were paid by Ms Muir directly (at LJ[90]). The primary judge noted that Mr Parr gave evidence that Mr Winner introduced him to Ms Muir and that he took all his instructions from her. The primary judge noted that the certifier emailed Ms Muir on 15 August 2016 in which he told her that "As owner/builder you are taking responsibility for the trades that are engaged during construction…." (at LJ[92]).

39 At LJ[93], the primary judge found that Mr Winner had begun "constructing the walls and roof of the dwelling on top of the slab" and that problems emerged almost immediately, particularly with regard to the height of the wall, which did not comply with the plans and had "a flow on effect with the height of the roof".

40 At LJ[94] to [101], the primary judge made various findings concerning tradesmen who worked on the site. She found that both Mr Leigh Murphy (a carpenter) and Mr Adam Long (a licensed plumber) were paid in cash directly by Ms Muir and it was she who gave them their instructions. Mr Murphy said that he met Mr Winner on the site on only three relevant occasions. In the appeal the appellants complain that the primary judge overlooked parts of Mr Murphy's evidence.

41 Her Honour also made findings in respect of payments received by Mr Winner, noting that there was a factual dispute between the parties on this subject. Her Honour noted that Mr Winner issued an invoice on 13 September 2016 in the amount of $800, which was later paid. Mr Winner said that this was the only payment he received (at LJ[96]).

42 In contrast, Ms Muir's evidence was that, after the slab was poured, Mr Winner asked her to pay a first instalment of $10,000 and that she paid it in two instalments in September 2016 in the cash amounts of $7,000 and $3,000 respectively. Mr Winner denied receiving these amounts.

43 Given the factual dispute, the primary judge said she looked to the objective evidence and found as follows:

(a) no invoice was adduced in evidence regarding the alleged first instalment, nor was there any text message or email, any relevant bank statement showing a withdrawal, or any receipt;

(b) after noting Ms Muir's evidence that it was all "verbal", the primary judge explained at some length her reservations with Ms Muir's evidence on this topic (at LJ[99]). Her Honour highlighted the absence of contemporaneous objective evidence to establish that the payment had been made apart from an item in a spreadsheet prepared by Ms Muir purportedly recording the payment of $10,000. The primary judge viewed as significant the fact that this item was only belatedly raised in Ms Muir's third affidavit and there was no explanation for this oversight; and

(c) the primary judge concluded that she was not satisfied to "the requisite degree" that a cash payment of $10,000 had been made to Mr Winner (at LJ[100]).

(c) The defective works

44 The primary judge made the following findings regarding Mr Winner's involvement in, and responsibility for, particular defective works, after noting that the licence status of the various subcontractors was directly relevant (at LJ[102]):

(i) The brickwork

45 The primary judge noted that there was no evidence or suggestion that Mr Winner carried out any brickwork.

(ii) Wall framing (erroneously described as "The slab" at LJ[102(2)])

46 The primary judge found that Mr Winner was responsible for defects in the wall framing but added that this made little difference as the work had to be demolished after weather exposure.

(iii) Floor framing

47 The primary judge noted that there was a factual contest as to whether Mr Winner did any of the floor framing work in circumstances where the works were carried out by a licensed carpenter, Mr Mick Robinson, and a labourer by the name of Kayne working under his supervision. The primary judge then stated that, assuming Mr Winner did some of the floor framing, her Honour was not satisfied whether it was done in Mr Winner's own right or under the direct supervision of Mr Robinson.

(iv) Roof framing

48 The primary judge noted that it was common ground that Mr Winner did not carry out these works.

(v) Laundry and storage framing

49 The primary judge noted that there was no evidence that Mr Winner carried out this work.

(vi) Floor joists powder room foot/bracing

50 The primary judge noted that there was no evidence that Mr Winner carried out this work.

(vii) Concrete slab

51 The primary judge found that Mr Winner "certainly" carried out some work and that it had significant defects. However, her Honour described the difficulty for the appellants' case as being that they knew in September 2016 that there were defects with the slab but they "apparently accepted it the way it was and moved on to the wall and roof framing".

(d) The issue of mitigation

52 The primary judge addressed the question of mitigation by reference to the parties' evidence, including the expert evidence given concurrently by Mr Bruce Frizzell (the appellants' expert) and Mr Stephan Iskowicz (Mr Winner's expert), which her Honour described as "very helpful" (at LJ[103]).

53 The experts were agreed that the existing timber framing for the roof, first floor walls and framing and ground floor timber posts required demolition and reconstruction because they had suffered significant damage due to exposure to the weather (at LJ[104]).

54 The primary judge found that Ms Muir was aware of the need to protect the timber elements from the weather and she purchased a tarpaulin from Bunnings Warehouse on 9 September 2016. Her Honour added that from about 21 October 2016 the appellants had total control of the site and that they made some effort to mitigate their loss, including drilling holes in the floor sheeting to permit water to drain and protecting the floor with black plastic. Her Honour noted Ms Muir's cross-examination on the issue of whether it was possible to protect other timber such as that for the walls or the roof (at LJ[107]).

55 The primary judge found that the problem with Ms Muir's evidence was that the appellants' then expert (Mr Capaldi, who was not called as a witness) had inspected the site on 2 November 2016 (including the roof) and took extensive photographs. Her Honour added that the objective evidence confirmed that scaffolding was on the site until early December 2016 (at LJ[108]).

56 The primary judge noted Mr Iskowicz's unchallenged evidence (at LJ[109]) that:

(a) scaffolding was in place during the period before particle board flooring started to suffer from weather exposure;

(b) "[c]anvas tarpaulins are commonly used in the building industry to minimise the effects of weather or exposure";

(c) some items would have been salvageable had the appellants protected the timber; and

(d) approximately 57% of the construction costs for the floor, wall and roof frame were salvageable.

57 For these reasons, the primary judge concluded that the appellants had failed to mitigate their damage in respect of any defective items for which Mr Winner was responsible.

(e) The primary judge's conclusion on the appellants' misleading or deceptive conduct claim

58 It is unnecessary to summarise the primary judge's reasons for rejecting the appellants' claim based on misleading or deceptive conduct as no point is taken in the appeal regarding that unsuccessful cause of action.

(f) The primary judge's conclusions on liability

59 In brief, the primary judge's conclusions and supporting reasoning may be summarised as follows:

- The evidence did not support a finding that Mr Winner carried out the work as either a builder or supervisor. Her Honour was unable to discern to a satisfactory standard the extent of the work personally performed by Mr Winner and whether the work was causative of any loss to the appellants. In circumstances where the appellants bore the onus, the primary judge was not satisfied that Mr Winner was liable in damages for defects in the work (at LJ[128]).
- Neither Ms Muir nor Mr Winner were "particularly impressive witnesses" and, accordingly, the primary judge said that she considered "the objective evidence carefully" (at LJ[129]).
- The parties did not turn their minds to a contract and the preponderance of objective evidence was that the appellants were well aware of the obligations of being an owner builder and their denials were "not plausible" (at LJ[130]).
- The two BoQs were consistent with Mr Winner's case and there was no consensus that Mr Winner would take responsibility for the works (at LJ[131]).
- It was disingenuous and illogical of the appellants to claim that (a) they obtained owner builder permits simply because Mr Winner told them to do so, and (b) they paid insufficient attention to the terms of the permits (at LJ[132]).

- The primary judge did not accept that Mr Winner was engaged by the appellants to carry out building works as the builder and her Honour found that there was no evidence capable of demonstrating that there was any intention to create legal relations nor a meeting of the minds. Rather, her Honour found "that the only agreement between the [appellants] and the [respondent] was that they would work together to get the project completed" (at LJ[133]).
- The primary judge did not accept Ms Muir's evidence that she did not give instructions to workmen on the site. Rather, she was intimately involved in the project and paid most, if not all, of the tradesmen in cash (at LJ[134]).
- The primary judge did not accept that Mr Muir paid Mr Winner the sum of $10,000 in cash for reasons which her Honour explained at LJ[135].
- The primary judge accepted Mr Winner's evidence and found that the only money he was paid was $800 for two days when he worked on the site (at LJ[136]).
- The primary judge reiterated that she was "comfortably persuaded" that Mr Winner was not engaged as a builder or as a supervisor (at LJ[137]).
- The primary judge explained why she would have rejected the appellants' claim for consequential loss by reason of having to live in rental accommodation after Mr Winner "left" the site (at LJ[138] ff). Assuming that there was a contract, that contract was abandoned by mid-2017 and thus, the claim for alternative accommodation could not succeed (at LJ[142]–[145]).

60 It is desirable to set out in full the primary judge's central findings at LJ[146]–[147]:

> 146 The objective evidence is that Mr Winner was not engaged as the builder. To the extent that he was engaged as supervisor, he could not be liable for the defective work as all of it was carried out or supervised by appropriately licensed contractors.
>
> 147 To the extent that he was responsible for any of the defective work, the owners' failure to mitigate and the consequential need for most of the work to be demolished, negates any award for damages.

61 It should be interpolated at this point that the primary judge's reasons for judgment on liability do not address an unpleaded argument which was belatedly raised by the appellants at the trial to the effect that s 37 of the *Design and Building Practitioners Act 2020* (NSW) applied so as to make Mr Winner liable as a person who carried out "construction work" and owed a duty to exercise reasonable care. That statute relevantly came into force on 10 June 2020 (that is, after the evidence had closed and prior to final addresses) and was expressed to have retrospective effect.

Costs judgment (CJ)

62 In the costs judgment, the primary judge noted that the proceedings had begun in the NCAT in 2017 and that the matter was transferred to the District Court on 13 April 2018. Prior to that date, Mr Winner had, by 15 February 2018, served all of his lay evidence in chief. On 7 March 2018, Mr Winner purported to make a *Calderbank* offer, which relevantly stated that Mr Winner would settle the proceedings if the appellants withdrew their claims against him, each party paid their own costs of the NCAT proceeding and the appellants released him in relation to all claims the subject of the NCAT proceeding. The offer was not accepted during the period it was open and the primary judge noted that, by the end of 2018, both parties had served their evidence (at CJ[9]). The primary judge noted at CJ[14] that there were two subsequent offers of compromise in March and April 2020 by what had then become three defendants in the District Court proceeding, but for reasons explained by her Honour only Mr Winner's offer in March 2018 was relevant. The primary judge also noted at CJ[19] that the respondent made a further *Calderbank* offer on the second day of the District Court hearing. It appears from her Honour's reasons for judgment on costs that the primary judge considered it unnecessary to determine the validity of that second offer. The parties do not question the correctness of that approach on the appeal.

63 The primary judge described the unsuccessful attempt at mediation which also included two additional defendants, being the certifier and the structural engineers respectively, and in relation to whom the proceedings were either discontinued or settled (at CJ[10]–[17]). The primary judge noted at CJ[22] that the relevant principles to be applied concerned the exercise of the discretion to award costs under s 98(1) of the *Civil Procedure Act 2005* (NSW). It was within that particular context that consideration need be given to the relevance of a *Calderbank* offer.

64 At CJ[26], the primary judge discussed some relevant principles regarding indemnity costs and an effective *Calderbank* offer. The relevant requirements for a *Calderbank* offer were stated as follows:

(1) Be marked "without prejudice as to costs";

(2) Be made in clear and precise terms capable of being accepted;

(3) State the time for which the offer is open which, in the circumstances of the case, must be a reasonable period;

(4) Make reference to the fact that the offer is in accordance with the *Calderbank* principles and that the offeror reserves its right to tender the offer in any application for indemnity costs;

(5) In certain circumstances, include reasons why the offer should be accepted;

(6) Constitute a genuine offer of compromise and whether it was unreasonable of the offeree not to accept it.

65 Having found that the March 2018 offer clearly satisfied the first four of those requirements (CJ[27]), the primary judge then focused her attention on the two remaining relevant requirements, namely whether the offer constituted a genuine offer or compromise and whether it was unreasonable of the offeree not to accept it.

66 The primary judge addressed whether these two requirements were met in the case of what her Honour erroneously described (at CJ[27]) as the "first offer of 16 March 2018". In fact, the first offer was set out in a letter dated 6 March 2018 which was emailed to the appellants on 7 March 2018.

67 The primary judge concluded that this offer did not fail because it did not contain a genuine offer of compromise. This was because her Honour found that, consistently with Mr Winner's pleaded case in which he denied that he was the builder, it was "the only offer that he could have made" and that his "compromise was to forgo the legal costs which he had incurred up until the time of the offer" (at CJ[33]). That necessarily was a reference to the respondent's costs in the NCAT. This finding was made against the background of the primary judge noting that the proceeding has commenced in the NCAT in 2017 and included an application and response which included a lucid denial by the respondent that he was the builder. Her Honour also noted at CJ[32] that, by 15 February 2018, the appellants had been served with the respondent's lay and expert engineering evidence for almost a month. She deduced that the appellants knew that the success of their case turned on a series of informal text messages, conversations and that two BoQs, which led her Honour to conclude that the appellants' "case was weak".

68 In concluding that it was unreasonable for the appellants not to accept the offer, her Honour found that the offer was made at a time when the appellants were adequately appraised of Mr Winner's case in response and where they had all his evidence in chief and ought to have appreciated the relative difficulty of proving a case in contract where there were no or scant written terms (at CJ[37]). The primary judge also noted at CJ[36] that the offer was made early in the proceedings before substantial legal costs had been incurred and that it was appropriate to make an early commercial offer (ie shortly before the proceedings were transferred to the District Court) because the appellants' claim "was relatively modest in comparison with the likely costs of a contested hearing".

69 Accordingly, the primary judge ordered that the appellants pay Mr Winner's costs on the ordinary basis up to 7 March 2018 and thereafter on an indemnity basis.

Primary issues on appeal

70 The following primary issues arise from the amended notice of appeal.

71 First, what, if any, is the relevance of the 12 months' delay in the primary judge delivering the liability judgment?

72 Secondly, in this appeal by way of rehearing, what approach should the Court adopt in reviewing the primary judge's numerous factual findings in circumstances where most of the findings were based on contemporaneous objective evidence rather than on credibility (ground 1)?

73 Thirdly, did the primary judge err in either failing to consider or misconstruing objective evidence which the appellants claim supported their contention that Mr Winner was either the builder or, alternatively, a supervisor (grounds 1 and 2)?

74 Fourthly, did the primary judge fail to give adequate reasons which addressed all significant evidence and issues (ground 3)?

75 Fifthly, did the primary judge err in the approach she took regarding the parties' credibility (ground 4) and the issue of onus of proof regarding intention to

create legal relations, an element which conditions the existence of a contract (ground 5)?

76 Sixthly, did the primary judge err in the approach she took to particular defects, including in respect of Mr Winner's unpleaded defence that even if he was supervising the works, they were not residential building works because of the operation of Sch 1, cl 2(3)(i)(iii) of the *Home Building Act* (grounds 7, 8 and 9)?

77 Seventhly, did the primary judge err in the approach she took to the question of mitigation (ground 6)?

78 Eighthly, did the primary judge err in failing to address the appellants' unpleaded argument that Mr Winner was liable under s 37 of the *Design and Building Practitioners Act* (ground 10)?

79 Finally, did the primary judge err in concluding that the *Calderbank* offer made by Mr Winner to the appellants on 7 March 2018 (also incorrectly described in the appellants' amended notice of appeal as an offer dated 15 February 2018) was a genuine offer of compromise that warranted an award of indemnity costs (ground 11)?

Consideration and Determination

80 The primary issues in the appeal will now be addressed. It is convenient to group some of the grounds in addressing those issues. The grounds of appeal will be addressed in a logical order, rather than consecutively. In an effort not to add unduly to the length of this judgment, I have endeavoured to summarise and address the parties' primary submissions on the appeal together with my conclusions and reasons in this section.

(a) Delay

81 The appellants highlighted the fact that there was a delay of almost 12 months between the end of the trial and the publication of the liability judgment. The appellants did not raise delay as a ground of appeal but they submitted that such a lengthy delay weakens the advantage that a primary judge has over an appellate court (citing, for example, *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17; [2004] FCAFC 189 at [69]–[70] and [78]). They contended

that such a lengthy delay is to be taken into account when considering the adequacy of the primary judge's findings of fact and her reasons.

82 For the following reasons, I do not accept those contentions. Assessing the significance of the delay must take into account the fact that the Court Book below was over 1600 pages in length. Faced with such voluminous evidentiary material, together with lengthy cross-examinations of the three primary witnesses, it is understandable that the primary judge would focus her attention on primary matters and primary submissions.

83 Although the appellants complain that the primary judge either overlooked or misconstrued various parts of the evidence and also provided inadequate reasons for judgment (which I will address further below), I consider that her Honour's 36-page liability judgment is generally coherent, logically structured and displays reasoning which is readily comprehensible.

84 In all the circumstances of this case, I am not persuaded that any particular significance attaches to the relatively lengthy delay in finalising the liability judgment. That delay is not indicative of a dereliction of judicial duty, but rather reflects the way in which the case was presented below and the difficulties of resolving the numerous disputed issues and facts.

(b) Correct appellate approach to reviewing the primary judge's findings of fact as to whether there was a contract (ground 1)

85 The appellants criticised Mr Winner's written submissions as oversimplifying the principles established in cases such as *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22. They relied on the recent discussion of the relevant principles by the Full Court of the Federal Court in *Jadwan Pty Ltd v Rae & Partners (A Firm)* (2020) 278 FCR 1; [2020] FCAFC 62 at [403]–[411] and in *Le v Scott* [2022] FCAFC 31 at [31]–[32]. The appellants also submitted that *Fox v Percy* does not impose any limitation on an appellate court in reviewing inferences drawn by a primary judge because the appellate court is in as good a position as the primary judge to decide the proper inferences to be drawn from the facts of the case (citing *Braham v ACN 101 482 580 Pty Ltd* [2020] VSCA 108 at [112]).

86 The appellants' additional submissions on this matter may be summarised as follows:

(a) The appellants did not need to demonstrate by "incontrovertible facts" that a contract for residential building work within the meaning of *Home Building Act* existed or that the primary judge's decision to the contrary was "glaring improbable". This was because a conclusion to that effect was not a finding of fact as referred to in cases such as ***Robinson Helicopter*** *Co Inc v McDermott* [2016] HCA 22; (2016) 331 ALR 550.

(b) The principles giving rise to appellate restraint do not apply where the primary judge's reasoning is centred on "objective evidence" rather than oral testimony.

(c) The primary judge relied on matters of credit in addressing the conversations on 5 and 25 November 2015 about which Ms Muir and Mr Winner gave conflicting accounts.

(d) The weight to be given to the primary judge's advantage was diminished because of the lengthy delay in publishing the liability judgment.

87 In my view, the appellants' contentions on this issue fail to acknowledge the nuanced approach taken by the primary judge in her fact finding. Most of the findings of fact which are now impugned by the appellants were not determined on the basis that the primary judge accepted Mr Winner's evidence and rejected that of Ms Muir on the basis that her Honour found Mr Winner's testimony to be stronger than that of Ms Muir in terms of credibility and reliability, based on the primary judge's impression from seeing and hearing them each give evidence.

88 As noted above, the primary judge found neither witness to be "particularly impressive" (at LJ[129]). In other words, generally the primary judge was not willing to resolve their conflicting evidence by undertaking what would be a challenging task of comparing the extent to which both witnesses lacked credibility or reliability. Generally speaking, where those witnesses gave conflicting evidence on relevant issues, the conflict was sensibly resolved by the primary judge determining which of their accounts was supported or contradicted by contemporaneous objective evidence. That approach was taken even where credit was also used to resolve conflicting evidence given by Ms Muir and Mr Winner. For example, as noted at [15] above, in resolving their conflicting evidence regarding the second period (ie up to 5 August 2015) the

primary judge explicitly stated at LJ[23] that she had considered objective evidence as well as matters of credit.

89 The relevant principles are relatively well settled. The difficulty lies in applying those principles in particular circumstances, including in identifying the extent to which individual findings of fact are likely to have been affected by the primary judge's impressions about the credibility and reliability of witnesses, based on seeing and hearing them give their evidence. The core principle established in *Fox v Percy* was reiterated in *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28 at [55]–[56] (per Bell, Gageler, Nettle and Edelman JJ):

> 55 A court of appeal is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law. Appellate restraint with respect to interference with a trial judge's findings unless they are "glaringly improbable" or "contrary to compelling inferences" is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. Thereafter, "in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge". Here, the trial judge's findings of primary fact were not disturbed. However, in material respects, the Court of Appeal found that the inferences that his Honour drew from those findings were wrong. Notably, the trial judge's finding that the driver was not wearing the seatbelt not only was contrary to each party's case but, if correct, on the Court of Appeal's analysis, would lead to the conclusion that there was no real prospect that the appellant was the driver. And the trial judge's acceptance of the RACQ's case, that the appellant had been pulled from the driver's seat to the passenger seat immediately behind in something less than 90 seconds, was, in the Court of Appeal's analysis, unlikely.
>
> 56 Having rejected the essential planks of the trial judge's reasoning, it was not to the point for the Court of Appeal to formulate the question as which of the two hypotheses the trial judge considered to be the more probable. Nor was it to the point to consider whether the trial judge had been unduly influenced by the DNA evidence. It was an error for the Court of Appeal to dismiss the appeals in this "very closely balanced" case on the footing that the trial judge's *decision* was neither glaringly improbable nor contrary to compelling inferences. It was the duty of the Court of Appeal to decide for itself which of the two hypotheses was the more probable. It was the duty of the Court of Appeal to persist in its task of "weighing [the] conflicting evidence and drawing its own inferences and conclusions", and, ultimately, to decide for itself which of the two hypotheses was the more probable. It did not. The appellant's second ground is made good. (footnotes omitted)

90 I am not persuaded that the impugned findings of fact by the primary judge were, or were likely to have been, affected to any significant extent by her

Honour's impressions about the credibility and reliability of the key witnesses, particularly Ms Muir and Mr Winner. As has been emphasised, her Honour found that neither was a particularly impressive witness. In those circumstances, it was correct for her Honour to approach the fact finding task by determining whether or not the conflicting accounts were supported or contradicted by contemporaneous objective evidence. That was the case even where the primary judge said that she had also considered matters of credit in resolving conflicting evidence given by Mr Ms Muir and Mr Winner, as occurred in relation to their different versions of events in 2015 up to 5 August 2015 (see at [15] above). In my view, her Honour's approach to fact finding, in the circumstances of this particular case, was entirely orthodox. Ground 1 is rejected.

(c) Primary judge's analysis of objective evidence (ground 2)

The appellants' criticisms of the primary judge's review of the objective evidence

91 As noted above, a central complaint made by the appellants is that the primary judge either overlooked or misconstrued objective evidence which they contend supported their claims that Mr Winner was retained either as the builder or supervisor. They pointed to twelve separate instances in support of this complaint. The appellants claim that this material supported the existence of a contract for Mr Winner to undertake the residential building work as a builder.

92 I will deal with each of them in turn and explain why I reject the appellants' claims. The appellate court is in as good a position as the primary judge to assess and determine the significance of the relevant objective evidence.

(i) Text messages on 20 July 2015

93 The text messages exchanged between Ms Muir and Mr Winner on 20 July 2015 were relevantly as follows (emphasis as appears in the appellants' written submissions):

> Second appellant: … Jarad I know I stuffed you around last time, but if you are interested and have some time we are ready to proceed with the renovation and addition at Fairey Road. The plan of the addition and renovation is the same with a few modifications. Pls let me know one way or another if you are interested…

> Respondent: …Yes I willing to go ahead with your project. Like last time we need to get the plans right first to obtain a bill of quantity of cost. If u have your plans and want me to have a look send them to me email…
>
> Second appellant: Wonderful, SO happy, will get them to you in next couple of days…

94 The appellants acknowledge that the primary judge discussed these texts at LJ[17]–[18] but they complain that her Honour failed to address the underlined words which, they contend, supported the existence of the contract as claimed by them. They submitted that the text messages suggest that "plans" already existed and this was inconsistent with Mr Winner's case that he was only asked to draw plans.

95 I reject those submissions. The text messages are equivocal and do not go as far as the appellants claim. Moreover, and significantly, Ms Muir conceded under cross-examination that Mr Winner had not in this particular text message exchange offered to build anything, but rather the exchange was limited to what they had discussed in 2011, namely getting "the plans right".

(ii) Text messages on 7 and 10 August 2015

96 The relevant text messages exchanged between Mr Winner and Ms Muir on 7 and 10 August 2015 are as follows:

> Respondent: Hi jan can you please get from the council the 194 certificate to check if we can go comply and development so we can get approval in 2 weeks thanks just any time over the next week. U can get it over the counter at the council it's about $25 thanks we draw something up over the weekend
>
> Second appellant: Ok, no prob It will have to be next week as I'm out today
>
> Second appellant: 149 cert ordered, 8 working days!
>
> Respondent: Ok great thanks we have something too u in the next couple of days!

97 The appellants contended that the primary judge made no reference to this exchange and that the exchange tends to indicate that Mr Winner's involvement was not simply limited to the drawing of plans and extended to the "project" as a whole.

98 Even if the first contention is accepted, the second contention is rejected. The text message exchanges occurred relatively early in the history of the project. Consistently with the primary judge's finding at LJ[57]–[58] that Mr Winner was subsequently asked by Ms Muir to assist with some aspects of the

development consent process, the text exchanges are also consistent with the primary judge's ultimate finding that the only agreement between the parties was for them to work together to get the project completed (at LJ[133]).

(iii) The words "my fees" in BoQ1

99 The appellants complained that the primary judge did not consider the meaning of "includes … my fees" at the foot of BoQ1 and confined her consideration to the significance of the entry of $30,000 in respect of "supervisor fee" as located in the "Contingency" category. They submitted that the omission is all the more significant given the emphasis placed on these words in the cross-examination of Mr Winner and in the appellants' submissions below. They highlighted what they say was an unconvincing explanation by Mr Winner that the words "my fees" may have been a "typo" and/or that the document was simply a "template". The appellants contended that it is difficult to reconcile that explanation with the covering email to BoQ1 (which was not referred to by the primary judge) and which stated: "I have wrote [sic] on the bottom of the spread sheet what is and isn't included".

100 I do not accept the appellants' primary contention that the primary judge erred in making no reference in her Honour's reasons to the significance of the expression "includes … my fees" in BoQ1. It is important to appreciate the structure of the primary judge's reasons. At LJ[36] the primary judge highlighted several parts of BoQ1 (which her Honour described as "an interesting document"). They include the express reference in that document to "Owner Builder $600.00"; express reference therein to a "Maintenance & Warranty period"; the fact that there was no reference in it to a daily fee of $400 payable to Mr Winner for his work on the site; and the express reference in the document, under the heading of "Contingency", to an item "supervisor fee $30000". Furthermore, at LJ[37] the primary judge made a separate explicit reference to the fact that, at the end of BoQ1, there is a reference to "includes … my fees". Shortly thereafter, at LJ[39], the primary judge set out several explicit points about "this".

101 Fairly read, the reference to "this" is a reference to **all** the various parts of BoQ1 as particularised at LJ[36]–[38]. The primary judge then explained at

some length at LJ[39]–[45] why she did not find BoQ1 (or any individual aspect of it) to form part of the contract. Rather, her Honour concluded that the document was "used as a reference point for the works which were still in fluid form at that stage" (at LJ[45]). This reasoning applies equally to that part of BoQ2 that refers to "includes … my fees". I reject this aspect of ground 2.

(iv) An email dated 13 December 2015

102 The appellants complain that the primary judge made no reference to the email dated 13 December 2015 from Mr Winner to a certifier, Mr Paul Morgan. They contend that the document suggests that Mr Winner took on a more managerial role in the project as a whole. The email relevantly said:

> Can you please have a quick look over this one for me to go CDC.
> I will attach the 149 in another email.
> It is on 7.4 HA and is a 144m2 addition to existing house.
> My main concern is the balcony and verandah if this will comply?
> Can you please have a quick look over it and see If I have a chance.

103 For the following reasons, I am not satisfied that the primary judge's failure to make express reference to this document constitutes appealable error. First, in its own terms, the document does not establish that Mr Winner had been retained as either a builder or supervisor. Rather, the terms are equivocal.

104 Secondly, it is notable that Mr Winner was not cross-examined on this document, nor was it the subject of submissions by the appellants below.

105 Finally, as the respondent pointed out, the document goes no higher than indicating that Mr Winner was involved in the development approval process, which is consistent with the primary judge's unchallenged findings at LJ[57]–[58].

(v) An email dated 1 February 2016

106 The appellants complain that the primary judge failed to refer to the email sent on 1 February 2016 by Ms Muir to Mr Tim Morrison (who advised the appellants on flooding issues), in which Ms Muir suggested that she understood Mr Winner to be the builder. This was said to arise from the fact that Ms Muir wrote in her email that she had "[r]eceived this just now from the certifier via the builder".

107 The difficulty with this complaint is that the matter was not included in the appellants' submissions below, nor did Ms Muir give any evidence regarding the email.

108 The email is also inconsistent with the application for a construction certificate which is dated 1 July 2016 and was signed by the appellants. This document post-dates the commencement of the project works. Significantly, the document has the word "BUILDER" struck out and the first appellant's name is given as the "OWNER BUILDER".

109 Finally, little if any probative weight ought be given to the email dated 1 February 2016 in circumstances where it is plain from other documentation that Ms Muir and Mr Winner were at loggerheads on the issue of who was the builder. This is well-illustrated by their exchange of text messages on 8 October 2016 in which Ms Muir asserted to Mr Winner that he was the builder, which Mr Winner denied. In response he asserted that Mr Krolczyk was the owner builder.

(vi) Evidence that Mr Winner advised the appellants about owner builder permits

110 The appellants complain that the primary judge did not give any meaningful consideration to text messages (which were incorrectly described by the primary judge as emails) sent on 19 January 2016 in which Ms Muir asked Mr Winner: "Do you need the homeowners certificate to lodge the DA? …" and also sent him a text which said: "You didn't answer my question regarding owner builder certificate, cause Ted hasn't finished the course yet!". The appellants complain that the primary judge did not give full consideration to Mr Winner's advice to the appellants, even though this was emphasised in cross-examination and in submissions.

111 This document does not demonstrate that Mr Winner was performing the role of a builder or a supervisor. As the primary judge found at LJ[56], Mr Winner's statement that he had "organised a team to start mid February at the latest" is consistent with the primary judge's ultimate finding at LJ[133] that the parties had agreed to work together to get the project completed. Mr Winner never denied that he organised some of the works, as the primary judge correctly observed at LJ[6].

(vii) Evidence that Mr Winner dealt directly with, and managed, tradesmen

112 The appellants complain that the primary judge failed to consider the following communications, which they submitted tend to demonstrate that Mr Winner dealt directly with, and managed, third parties involved in the project:

(1) an email from Mr Winner to Residential Engineering in June 2016, giving directions as to "engineer drawings", requesting that the work be "bill[ed] under my name and invoice[d] to me" and noting the project "[h]as just being verbally approved after 5 months in council so im keen to get it going a.s.a.p";

(2) texts from May 2016, in which Ms Muir asked Mr Winner if he is "coming over tomorrow with the plumber" and the respondent: replies "no it's Thursday at 7am", later says that "the plumber just messaged me the price for all the rough in materials and labour", requests that the second appellant "fix up Adam tomorrow", and notes "[t]he Total I have allowed for plumbing is $8000 in the bill of quantities but they still have a little bit to do in the new part when ready"; and

(3) other texts from May 2016, in which the respondent checks with the second appellant whether he is "right to send Oliver up on Saturday", apparently reminds her to send through details about windows and other fittings needed "for next week", and asks how she is "going" with the electrical plans.

113 The primary judge noted (at LJ[6]) that Mr Winner admitted that he had organised some of the works but said that his aunt and uncle organised and supervised the work themselves in circumstances where both held owner builder permits.

114 For the following reasons, I do not consider that the matters relied upon by the appellants demonstrate that the primary judge failed properly to engage with significant objective evidence. First, as to the email exchange with the engineer in June 2016 in which Mr Winner asked the engineers to proceed with engineer drawings, gave directions as to relevant particulars of the renovation, said that he was "keen" to get it going as soon as possible and asked the engineers to bill under his name and invoice him, Mr Winner admitted under cross-examination that he engaged the engineer on behalf of the appellants. I accept Mr Winner's submission that such conduct by him is equivocal on the question whether he was the builder and/or supervisor, as opposed to simply carrying out an agreement with family members to work together to get the project completed, as found by the primary judge at LJ[133].

115 Moreover, the primary judge correctly placed great weight on other important objective evidence which strongly demonstrated that Mr Winner was not the builder or supervisor (see [130] ff below).

116 As to the text messages from May 2016 which were exchanged between Ms Muir and Mr Winner concerning the plumbing by Mr Long, I consider that the appellants have overstated the significance of this material in circumstances where:

(a) as noted above, Mr Winner acknowledged that he had organised some of the works, but the critical issue was whether this was done in his capacity as a builder and/or supervisor or simply working together with his aunt to get the project done;

(b) significantly, Mr Winner was not taken to these documents in cross-examination nor were they the subject of submissions;

(c) as Mr Winner pointed out, the primary judge's factual findings on this issue (at LJ[95] and [134]) have not been challenged on the appeal; and

(d) as to the text messages between Ms Winner and Ms Muir in May 2016 regarding the electrician (Mr Oliver Parr), the appellants' complaints are rejected for similar reasons, namely that:

(i) Mr Winner acknowledged that he had organised some of the works;

(ii) the central question was whether Mr Winner's conduct was in his capacity as builder and/or supervisor, as opposed to simply working together with his aunt to get the project done, and

(iii) a significant issue in that central enquiry was identifying the person who was providing instructions and the primary judge found (at LJ[134]) that it was Ms Muir who gave instructions to workmen on the site, including to the electrician, and those findings are not challenged on appeal.

(viii) Texts in January 2016

117 The appellants complain that, although the primary judge referred to certain texts which were sent in January 2016 (at LJ[55]), her Honour failed to consider their meaning. The texts involve Ms Muir asking the respondent: "When do you think you may be able to start?" and Mr Winner replying: "[W]e can start getting things ready and strip real soon. I have organised a team to start mid February at the latest".

118 The appellants say that these texts supported their version of events and, in particular, that Mr Winner was responsible for managing trades.

119 For similar reasons, I consider that the appellants have overstated the significance of these text messages in circumstances where:

(a) Mr Winner acknowledged that he had organised some of the works;

(b) the imprecision and uncertainty in the case of the pronoun "we"; and

(c) moreover, the central issue being whether Mr Winner did this as a builder and/or supervisor or simply to help out his aunt in getting the project done was ultimately determined by the primary judge by reference to objective evidence (see [129] ff below).

(ix) The text in March 2016

120 The appellants complain that the primary judge made no reference to the text sent in March 2016 in which Mr Winner stated that he had acquired building materials from Bunnings Warehouse for a total of $635 on the appellants' behalf and asked for repayment.

121 The primary judge's failure to address the significance of Mr Winner asking Ms Muir to reimburse him $635 for building materials purchased by him at Bunnings is hardly material in supporting the appellants' claim that Mr Winner was the builder and/or supervisor. That is because, as Mr Winner pointed out, a builder would not ordinarily inform their client of the raw costs incurred in providing building services (absent a contract on a costs/plus basis and, in any event, it is unlikely that a builder would seek prompt repayment of such a small amount). The position is different if the person seeking reimbursement is someone who agreed with a family member to work together to get the project done.

(x) Miscellaneous texts

122 This aspect of the appellants' case relates to texts where Ms Muir asked Mr Winner whether he had been in touch with the concrete polisher and Mr Winner responded, "I didn't forget I want an answer on the slab as much as u do". Mr Winner also texted that if the concrete polisher did not turn up, "I will get

someone else there on Tuesday" and added that Ms Muir did not have to be there.

123 As to the text message exchange regarding the concrete polisher, the appellants have overstated the significance of the primary judge's omission to deal with this exchange in circumstances where:

(a) it is consistent with the primary judge's finding (at LJ[6]) that Mr Winner organised some of the works;

(b) Mr Winner was not cross-examined about the text message exchange nor was it the subject of submissions below; and

(c) like most of the other materials which the appellants complain were not addressed by the primary judge, the text message exchange is equivocal on the central issue.

(xi) Mr Winner's phone records

124 The appellants complain that the primary judge made no reference to Mr Winner's phone records, which indicated that he was regularly in the vicinity of the worksite, which supported their version of events.

125 No appealable error has been demonstrated in respect of the primary judge's omission to address the significance of the phone records in circumstances where:

(a) the phone records would simply indicate Mr Winner's physical location and it is difficult to see their significance regarding the central issue, which required an assessment of whether Mr Winner's work and actions indicated that he had been retained as a builder and/or supervisor, rather than working under an agreement with his aunt to get the project done; and

(b) moreover, the phone records are of considerably less weight when measured against the primary judge's finding (at LJ[65] and [83]–[84]) that Ms Muir was the only person who could provide access to the site and that she was onsite much of the time.

(xii) Video recordings of Mr Winner's work in pouring the concrete slab

126 The appellants complain that the primary judge overlooked the video evidence which they say clearly showed Mr Winner was heavily involved in the pouring of the concrete slab. They added that, after being shown the video, Mr Winner appeared to concede that he had assisted with the concrete pouring but then

added that he was not a concreter. They also emphasise that the video was relied on by them in both their written and oral submissions below.

127 At LJ[89], the primary judge referred only to a photograph of Mr Winner standing on or near the concrete slab and she said that she could not tell one way or the other from the photograph what Mr Winner was doing. The primary judge made no explicit reference there to the videos. Regard must be had also, however, to the primary judge's finding at LJ[102(7)] under the heading "Concrete slab", where her Honour made an unequivocal finding that "Mr Winner certainly carried out some work" and that it had significant defects. It may well be that her Honour had in mind the video evidence in reaching that conclusion concerning Mr Winner's involvement in pouring the concrete slab.

128 In any event, there is another reason why the appellants' complaint on this issue must be rejected. Despite her Honour's unequivocal finding that Mr Winner carried out some of the concreting, her Honour regarded this as immaterial because the appellants were aware of the defective slab in September 2016 but acquiesced in work proceeding nevertheless on the wall and roof framing.

The objective evidence relied upon by the primary judge

129 I have sought to demonstrate the lack of substance in the appellants' claim that objective evidence was either overlooked or misconstrued by the primary judge. Much of that alleged objective evidence is equivocal on the central issue.

130 That is to be contrasted with six documents which the primary judge correctly found supported the ultimate conclusion that Mr Winner was not retained under a contract as builder or supervisor, but rather was carrying out a family agreement with his aunt for them to work together to finish the project. Those documents are as follows.

(i) BoQ1 (8 November 2015)

131 As noted above, the primary judge gave detailed consideration to BoQ1 (at LJ[34]–[45]). Her Honour emphasised the significance of the reference in the document to "Owner Builder $600.00" (at LJ[36(i)] and other relevant features of the document which her Honour explained were inconsistent with it being

viewed as part of the alleged contract. Moreover, her Honour took into account Ms Muir's concession in cross-examination that the document was nothing more than a costing and that Mr Winner had not offered to build anything by issuing it (at LJ[44]).

(ii) The cost of estimates (3 February 2016)

132 The primary judge addressed the significance of this document at LJ[57]–[58]. Mr Winner provided a breakdown of costs to assist Ms Muir in compiling the documents which she needed to lodge with the Council. Understandably, the primary judge attached particular significance to the fact that there was no entry alongside the item "Home Warranty Insurance". Her Honour explained that this omission was significant because an owner builder was not required to take out Home Warranty Insurance in particular circumstances, but a builder was so required if the value of the work was more than $20,000. Her Honour correctly concluded that the document was consistent with the appellants being the builders.

(iii) BoQ2 (11 March 2016)

133 This document was addressed by the primary judge at LJ[66]. Mr Winner provided the revised BoQ to the appellants around the same time as work commenced on the site. Her Honour correctly noted that the "supervisor fee" was still nominated under the heading of "Contingency".

(iv) Ms Muir's check list (14 July 2016) provided to the certifier

134 Ms Muir had completed the document, "Matters for the issue of the Construction Certificate", and returned it to the certifier. Her Honour understandably found it significant that the box on the pro forma requesting "Builder's details" was left blank and that the words "Owner Builder" were handwritten against the box for "Provide copy of HOW insurance" (at LJ[73]–[78]).

(v) Application for Construction Certificate (1 July 2016)

135 Her Honour addressed the significance of the Application form for a Construction Certificate (at LJ[70]–[72]). Ms Muir completed the application. Understandably, the primary judge described the document (at LJ[72]) as "persuasive" because Ms Muir had acknowledged under cross-examination

that she prepared the document without reference to Mr Winner. Of particular significance is the fact that halfway down the first page of the form, Ms Muir had crossed out the word "BUILDER", leaving the words "OWNER BUILDER", and identified Mr Krolczyk as the Owner Builder.

(vi) Ms Muir's text message dated 13 July 2016 to the engineer and Mr Winner's email to Ms Muir dated 26 July 2016:

136 Ms Muir's text to the engineer was addressed by the primary judge (at LJ[79]). Significantly, Ms Muir described Mr Winner as her "Project Manager". Her Honour then addressed at LJ[80] the significance of Mr Winner's email to Ms Muir which passed on advice Mr Winner had received that Ms Muir and Mr Krolczyk had to sign the first page of the specification booklet and that "usually I only provide this if I am going to be the builder". Her Honour correctly attached weight to this document in circumstances where, fairly read, Mr Winner was addressing a hypothetical situation in which he was the builder, whereas this was not the case where Ms Muir and Mr Krolczyk held owner builder permits.

137 As counsel for Mr Winner pointed out in oral address on the appeal, the primary judge was correct to attach significant weight to these documents because they were substantially contemporaneous with work commencing on the site in March 2016 and with the grant of the Construction Certificate on 27 July 2016.

Non-compliance with UCPR

138 Finally, there is another reason why grounds 1 and 2 should fail. It relates to the fact that, as pointed out by counsel for Mr Winner, the appellants failed to identify in either the amended notice of appeal or in a document accompanying their written submissions, a written statement which identified the challenged findings of fact and the alternative findings sought by them on the appeal, as required by the Uniform Civil Procedure Rules 2005 (NSW) (**UCPR**) r 51.36(2).

139 The importance of parties complying with the UCPR requirements was emphasised by Bell P (with whom Macfarlan and Payne JJA agreed) in *Magann v Trustees of the Roman Catholic Church for the Diocese of Parramatta* [2020] NSWCA 167 at [53]–[55]. As Bell P stated at [55], "It is of

particular importance … that the procedure *required* by the UCPR is adhered to" in a fact intensive matter of the kind which is present here.

140 The "procedure does not represent a procedural option" for the following three reasons given by Bell P at [56]:

> First, it serves to focus the mind of the lawyer drafting the submissions on precisely what factual errors are relied upon to underpin the appeal, and whether there is a proper basis in the evidence to challenge that finding or those findings. Secondly, adherence to the rule is important as a means of putting the respondent on fair notice as to the level of detail at which the decision at first instance is to be challenged. Thirdly, adherence to the procedure is vitally important in delineating this Court's task on appeal and assisting the Court with all relevant evidentiary references. The high volume of appellate work conscientiously undertaken by this Court demands that practitioners who should have the closest familiarity with the evidentiary record in a given matter, frequently running to thousands of pages of documentary evidence and transcript, assist the Court with precise and accurate references to that record, as required by the rules, in respect of those findings of primary fact which are sought to be challenged.

(d) Adequacy of primary judge's reasons on liability (ground 3)

141 As to ground 3, which claims that the primary judge failed to give adequate reasons dealing with all significant evidence and issues, the appellants' complaint was largely directed to their related claims that the primary judge either overlooked or misconstrued relevant objective evidence. Those claims have been rejected.

142 It is convenient to address some additional complaints by the appellants regarding other aspects of her Honour's reasons on the judgment of liability. First, there is no substance in the appellants' complaint that the primary judge needed to provide explanatory reasoning as to the nature of the relationship between the parties in the event that the Court found that there was no contract between them. As noted, the primary judge explicitly found at LJ[133] that the only agreement between the parties was that they would work together to get the project completed. This finding was made in that part of her Honour's reasons for judgment under the heading "Conclusions". Although her Honour did not set out the reasons in this section for her conclusion regarding the nature of the relationship between the parties, it was unnecessary for her to do so because those reasons are apparent from her Honour's earlier analysis as

to why she did not accept that Mr Winner was retained under contract to be the builder or supervisor.

143 Secondly, in their outline of written submissions, the appellants identified various matters as requiring an explanation of the nature and extent of the parties' relationship if the primary judge was correct that there was no contract to retain Mr Winner as either builder or supervisor. There are several difficulties with this aspect of the appellants' case:

(a) The appellants overlook the fact that, although the primary judge found that there was no contract to retain Mr Winner as either builder or supervisor, her Honour made a critical finding that there was a more limited agreement between the parties, namely that they would work together to get the project completed.

(b) This central finding as to the limited nature of the parties' agreement is not inconsistent with the primary judge's findings that Mr Winner performed certain preparatory work (including issuing BoQ1 and BoQ2, providing the estimate of costs and preparing various other documents in support of the development application). Nor is it inconsistent with the Court's finding below that Mr Winner personally performed some construction work, including in relation to the concrete slabs and the walls and roof, together with the finding that Mr Winner received $800 for two days' work for carpentry. As the respondent pointed out in the appeal, these matters are all equivocal. They might be the actions of a builder or alternatively the actions of a nephew helping his aunt to get the project completed.

(c) Moreover, as has been explained at [130] ff above, there was ample objective evidence, as identified by the primary judge, which supported her Honour's conclusion that the agreement between the parties was far more limited than that claimed by the appellants.

(d) I also accept the respondent's submission that, insofar as complaint is made about the adequacy of the primary judge's reasoning and analysis concerning the significance of the reference in both BoQs to a $30,000 supervisor fee, her Honour provided adequate reasons at LJ[34]–[45], [52] and [66] why this matter was not determinative.

(e) Finally, the appellants' claim of inadequate reasoning in respect of the supervisor's fee fails to grapple with the fact that the primary judge made an explicit finding that Ms Muir did not pay Mr Winner any first instalment of $10,000 in respect of the supervisor's fee, a finding which was plainly open on the

> evidence as explained by her Honour. This finding is not challenged on the appeal.

(e) Primary judge's approach to credit (ground 4)

144 As to the appellants' complaints that the primary judge did not sufficiently explain her adverse findings regarding Ms Muir's credit and failed to address many of their criticisms of Mr Winner (whom they argued below was a liar), these contentions lose much of their force in circumstances where the primary judge described both Ms Muir and Mr Winner as not being "particularly impressive witnesses" (at LJ[129]). Perhaps even more significantly, and probably in the light of her Honour's assessment of both those witnesses, her Honour resolved the conflicting evidence of those witnesses on most issues by contemporaneous objective evidence, as is apparent from the summary above.

145 It is accepted, however, that some of the primary judge's fact finding took into account credit, such as her Honour's resolution of the conflicting evidence given by Ms Muir and Mr Winner regarding their meeting on 5 August 2015 (see [15] above). But in that and other cases where the primary judge resolved conflicting evidence by reference to credit, account was also taken of relevant contemporaneous objective evidence. I reject any contention by the appellants that the primary judge was obliged to grade the respective levels of these witnesses' lack of credibility or reliability. In the circumstances, the resolution of their conflicting evidence was best found in the contemporaneous objective evidence.

(f) Onus regarding intention to create legal relations (ground 5)

146 The appellants contend that the primary judge erred in not finding that it was for Mr Winner to disprove an intention to create legal relations (citing *Cavasinni v Cavasinni* [2001] NSWSC 223 at [26]–[29]). This ground relates to her Honour's finding at LJ[133] that there was no intention to create legal relations and no meeting of the minds between the parties. Her Honour added that, in her assessment, the parties did not turn their minds to the legal aspects of their relationship.

147 Although there is some debate as to whether an intention to create legal relations is an essential additional element where there is an agreement and the presence of consideration (see, for example, Williston on Contracts, 3 ed, s

21), it remains the law in Australia that intention, objectively determined, is a necessary element (see *Ayre Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 336-337 per McHugh JA and *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; [2002] HCA 8 at [24]–[25]). In other words, there needs not only to be a contract but the parties must also have an actual intention to contract and that intention is to be viewed objectively. As is pointed out in Professors Seddon and Bigwood in *Cheshire & Fifoot Law of Contract* (11th Australian ed, 2017) at [5.1], an intention to enter into legal relations is unlikely to be an issue in the case of a commercial transaction (unless the parties indicate in such a transaction that they wish to defer creating legal relations). But the position is much less straightforward where there is a family relationship between the parties.

148 In support of their contention that the primary judge erred by placing the onus on them to prove that there was an intention to create legal relations, the appellants relied upon the primary judge's reasons at LJ[102(5)]–[102(6)] and [128]. I do not accept those contentions. The first two of the appellants' references were made in the context of the primary judge determining that the appellants carried the onus of proving that Mr Winner had carried out specific work personally and that that work was defective. Neither finding was directed to the question of whether these had any bearing on the central issue, namely whether there was a contract under which Mr Winner was retained as either builder or supervisor on the project as a whole.

149 Similarly, the reference at LJ[128] to the appellants bearing the onus of proof is directed to the question whether the appellants had established on the balance of probabilities the extent of the work personally performed by Mr Winner and whether that work was causative of any loss to the appellants. In any event, the appellants' suggestion that the respondent bore a legal onus to disprove an intention to create legal relations is incorrect: cf *Ermogenous* at [26]; *Cheshire & Fifoot Law of Contract* at [5.11]; and JD Heydon, *Heydon on Contract* (Thomson Reuters, 2019) at [4.180]–[4.190]. It is not necessary here to venture into the somewhat tricky territory of evidentiary burdens.

150 In any event, it is difficult to see how any error by the primary judge on this issue as claimed by the appellants would be a material error. Her Honour made a separate finding at LJ[130] that the parties did not turn their minds to a contract. The same finding was explicitly made by the primary judge at LJ[133], where she found that "there was no intention in my view to create legal relations **and no meeting of the minds** (ad idem)" (emphasis added). Her Honour's reference to there being no meeting of the minds indicated, consistently with what she said at the beginning of LJ[133], that she did not accept that the appellants "engaged Mr Winner to carry our building words as '*the builder*'". That was a matter of identifying the terms of the contract, being a matter on which the appellants (again) bore the burden. Further, it may reasonably be assumed that the primary judge's finding that the parties did not turn their minds to the legal aspect of their relationship was a finding which was made in the context of the family relationship between the parties. That does not deny, of course, that where family members are engaged in a business or commercial enterprise that an agreement between them may create legal relationships. Each case must necessarily turn on its own facts but there was ample evidence to support the primary judge's finding that the parties here did not turn their minds to the legal aspects of their relationship.

(g) Particular defective works (grounds 7 and 8)

151 Grounds 7 and 8 concern particular construction work which the appellants claim was carried out by Mr Winner and was defective. The amended notice of appeal purports to identify the relevant works by reference to a particular item in the Joint Expert Building Report and Schedule (which itself is split into two parts: Schedule #1 and Schedule #2), which was in evidence below and on the appeal. The Joint Expert Building Report was prepared by the experts retained by the parties respectively, namely Mr Bruce Frizzell of Tyrrells Property Inspections for the appellants and Mr Stephan Iskowicz of AXIOM Building Diagnosis for the respondent. As will shortly emerge, it is difficult to make complete sense of some parts of the Joint Expert Building Report, which cross-refers to other reports which have not been included in the appeal books.

(i) Ground 7: Floor framing

152 Ground 7 is said to relate to floor framing and item 2 in Schedule #1 to the Joint Expert Building Report. Regrettably, the item in ground 7 of the amended notice of appeal is expressed at a higher level of generality than the Joint Expert Building Report, which potentially creates confusion and uncertainty because of the following matters:

(1) In the first column to Schedule 1 of the Joint Expert Building Report, there are various references to items, such as item "2.3-3(a)". Evidently, this refers to items as identified in another report called the Joint Report on Structural Engineering Expert Conclave said to be dated 15 May 2020. The latter report is referred to in para 5(b) of the Introduction to the Joint Expert Building Report. Regrettably, however, a copy of the Joint Report on Structural Engineering Expert Conclave was not included in the evidence on appeal, which has the effect of depriving the Court of an opportunity of knowing with certainty the nature and scope of the particular item; and

(2) The same difficulty is presented by the appellants' aide memoire on defects (as distinct from their aide memoire on the "consideration of defects"). In the second column, the aide memoire on defects also makes reference to items such as "2.3-–3(a)". This must equally refer to the Joint Report on Structural Engineering Expert Conclave, which is not before this Court.

153 The appellants' failure to provide the Court with a copy of the Joint Report on Structural Engineering Expert Conclave dated 15 May 2020 does not advance their case.

154 The appellants claim that the primary judge erred in finding that Mr Winner was not responsible for, or involved in, the floor framing. They also claim that the primary judge erred in finding at LJ[102(3)] that, assuming that Mr Winner carried out any work on the floor framing, she was not satisfied whether that work was done in his own right or under the direct supervision of Mr Mick Robinson, a licensed carpenter. Her Honour noted there that there was no dispute that Mr Robinson and a labourer by the name of Kayne carried out the floor framing works either by themselves or with Mr Winner. Her Honour added that Mr Robinson held a carpenter's licence and that Kayne worked under his supervision.

155 Mr Winner stated in his written submissions that the alleged defect in respect of the first floor framing related to the flooring for two separate balconies on the

first floor. The appellants complained that the floor framing on the smaller of those balconies had been installed at the wrong level and had additional problems, including in relation to the cleats that attach the steel beams that support the balcony to the timber posts. The appellants' complaint with respect to the larger balcony is that it was built too wide.

156 The appellants challenged the primary judge's findings regarding the nature and extent of Mr Winner's involvement in the floor framing works on the following three grounds. First, they said that the primary judge failed to consider the significance of Mr Winner's text dated 7 September 2016 to Ms Muir, where he said:

> It's going good all the joists are in we have started the flooring but the truck hasn't turn up yet so we will keep going with the flooring and there will be no one here tomorrow cause I couldn't set them up

The appellants placed particular emphasis on the use of the pronoun "we".

157 Secondly, the appellants complained that the primary judge's finding at LJ[147] that, to the extent that Mr Winner was responsible for any of the defective work, the appellants' failure to mitigate and the consequential need for most of the work to be demolished negated any award for damages. More specifically, they complained that this reasoning effectively involved an acceptance by the primary judge of Mr Winner's argument raised for the first time in his closing written submissions, namely that if he was acting as supervisor he was not liable for any defective works because, under the *Home Building Act*, there was no liability for the supervision only of residential building work if all that work is being done or supervised by the holder or a contractor licence which authorised its holder to contract to do that work. The appellants contended that Mr Winner not only failed to plead this defence, but he also failed to adduce evidence to establish that any work he supervised was work done by licensed contractors.

158 Thirdly, the appellants contended that the primary judge may have misconceived their argument, which was to the effect that Mr Winner had carried out the supervision only of residential building work done by licensed contractors, with the consequence that whether Mr Winner was supervised

himself by licensed contractors was neither here nor there in the context of the work he carried out personally.

159 The appellants contended that if Mr Winner was responsible for the floor framing then, regardless of mitigation, the appellants were entitled to recover either $29,699.75 based on the appellants' expert evidence or $21,590.18 based on Mr Winner's expert evidence (plus preliminaries, margin and GST).

160 I will address below in relation to ground 9 the issue whether Mr Winner was entitled to rely upon the exemptions for residential building works under the *Home Building Act*. For the following reasons, I otherwise reject ground 7. As noted above, Ms Muir and Mr Winner gave conflicting evidence concerning his involvement in the floor framing. As has been emphasised, the primary judge did not find either witness to be particularly impressive. Having regard to the following matters, however, it was open to her Honour to conclude that she was not satisfied that any work done by Mr Winner on floor framing was work done in his own right or under Mr Robinson's direct supervision. First, the 7 September 2016 text message, upon which the appellants relied, is far from determinative. The reference in the text to "we have started the flooring" does not identify which of the three relevant persons the "we" refers to. Secondly, even if the "we" is taken to include a reference to Mr Winner himself, it fails to identify the nature and extent of his involvement. Moreover, as Mr Winner pointed out, the reference in the text to there being no-one on the site tomorrow because he "couldn't set them up" suggests that Mr Winner was arranging tradespeople, as opposed to him performing the work personally.

161 No appealable error has been established in relation to ground 7. Accordingly, the issue of mitigation does not arise.

(ii) Ground 8: First floor west wall

162 Ground 8 expressly relates to item 9 in Schedule #2 of the Expert Joint Building Report, which concerns the work carried out on the first floor west wall. The appellants' claim that this wall was not built in accordance with the approved plans, including because it comprised timber framing and not masonry; it was in an incorrect position; there were inadequate fastenings with the cantilevered beams which had been installed to support the first floor west

wall and that it was out of plumb to the extent of 10 millimetres to the south-west and north-west corners.

163 It is common ground that the primary judge failed to deal with this aspect of the appellants' case. Mr Winner acknowledged that he had physically carried out the relevant works, but he contended that he was not liable because the appellants had failed to establish any defect in the relevant works. Accordingly, the primary contest in the appeal is whether or not the appellants have established that the work was defective. The Court is in as good a position as the primary judge to determine this matter, which turns on an assessment of the evidence particularly, but not limited to, the evidence of the respective experts. The circumstances here are quite different from those in a case such as *Peric-Davies v Mazdo* [2004] NSWCA 20; (2004) 40 MVR 210 at [19]–[21] where Giles JA explained why a particular matter which had not been addressed below should be remitted.

164 In his first expert report dated 28 September 2017, Mr Frizzell opined that the first floor west wall had to be built in accordance with the approved drawings. He estimated the cost as $10,808.00 (exclusive of preliminaries, margin and GST). Mr Frizzell referred to photos numbered 26-28 in respect of this item, which were set out in Appendix H to his first report. Mr Frizzell described photo 26 as showing that "Cantilevered beams have been installed to support the 1st floor west wall with inadequate fastenings ie incorrect bolts and bolts with no washers". He described photo 27 as showing the same matter. He described photo 28 as showing that "Blocking installed to strengthen existing rafter over the west wall where wall has been moved".

165 Mr Frizzell provided a second report dated 29 January 2019 which stated that it should be read in conjunction with his earlier report dated 28 September 2017. In respect of item 9, Mr Frizzell repeated his opinions in his earlier report save that he provided an increased estimated cost of rectifying the problems with the first floor west wall, being $11,008.56 (excluding preliminaries, margin and GST).

166 Mr Winner's expert, Mr Iskowicz, provided an expert report in reply which is dated 25 March 2017. That report was originally filed in the NCAT proceeding.

It is evident that the report is incorrectly dated and should have been dated 25 March 2018 because it contains a reference to an inspection of the property on 10 January 2018. It also refers to Mr Frizzell's first report.

167 In a Scott Schedule attached to his report, Mr Iskowicz provided his comments on item 9, the key relevant points of which may be summarised as follows:

(1) He said that the item 9 description was "confusing & inaccurate" because the first floor west wall was the wall of the existing dwelling, street front.

(2) He described item 9 as appearing to relate to the supply and installation of masonry infills to the street front elevation of the existing building but then added that analysis of the structural design showed that the specification of suitable support lintels for the masonry claim did not form a part of the design documentation.

(3) For an accurate cost to be calculated, Mr Iskowicz said that it was necessary for a design to be provided.

(4) In response to Mr Frizzell's claims that the west walls of the first floor level were required to be brick veneer, Mr Frizzell said that the walls were nominated as 90mm walls, not 230mm cavity walls on the approved plans.

(5) He added that, in contrast, the elevations detailed the walls as rendered masonry and he said that the "dimensioned floor plan takes precedence over the elevation selection details as the building is constructed to the dimensions specified on the floor plans".

(6) Mr Iskowicz concluded that item 9 is "a matter for lay evidence as to what was required & by whom".

168 As noted above, the experts also provided below a Joint Expert Building Report dated 1 June 2020. It is convenient to set out the entirety of that Report relating to item 9 (emphasis in original):

	PARTICULARS OF CLAIM	**AMOUNT**	**MR FRIZZELL REVIEW**	**MR ISKOWICZ REVIEW**
9.	**1st floor west wall**, not installed with due care and skill and	$10,808	Maintain my position from Tyrells report dated 29 January	1. The report of Mr Frizzell relies upon photos 26

	not installed in accordance with approved plans including: • from timber framing, not masonry • in incorrect position • out of plumb to southwest corner and northwest corner (10mm) is in breach of AS1684.4 2010, Guide to Standards and Tolerances 2007 and HBA Warranties Part 2C Section 18(a), (b), (c)		2019 – **$11,008.56 excluding preliminaries, margin or GST.** Photos 26 to 28 in Appendix "H" of the Frizzell report, dated 28 September 2017, (inspection date of 3 April 2017) refer to the comment requesting an engineer inspect and certify the blocking and not the West wall. The cover photo clearly shows the missing	to 28 in regard to this item. 2. The report of 29 January 2019 does not include photo records of inspection. 3. Photos 26 to 28 exist in appendix "H" of the Frizzell report of 3 April 2017, however photos 26 to 28 refer to cantilever joists and blocking issues. 4. Analysis of the architectural floor plans shows that the

	and (f)		brickwork to the West elevation.	perimeter of the existing dwelling and the new addition were intended to be 90mm framed walls without a masonry veneer. 5. The work remains substantially incomplete, however the work constructed without a masonry veneer external wall detail does conform with the approved design

				plans. 6. A claim of non-compliant work has therefore not been demonstrated. 7. Matter for lay evidence as to what was required to be constructed.

169 Both experts were cross-examined on the question whether, in the case of such an inconsistency between the engineering plans and the elevations, priority should be given to the engineering plans, as opposed to the elevations.

170 Mr Frizzell confirmed that the source of his evidence that brickwork was required was derived from the elevations, copies of which were in evidence. He also confirmed that there was an inconsistency between the elevations and the first floor engineering plans regarding whether masonry or timber was required. He denied, however, the general proposition that was put to him that a builder should prioritise floor plans over elevations.

171 Mr Winner's expert, Mr Iskowicz, described the elevations as being merely "indicative". It is evident from the transcript below that the primary judge was inclined to agree with Mr Iskowicz that the elevations were merely indicative, but no significance attaches to that.

172 As the appellants pointed out in oral argument, Mr Iskowicz did not respond to Mr Frizzell's evidence in respect of item 9 that the wall was also defective because it was in an incorrect position and was out of plumb by 10 millimetres. That does not mean, however, that the appellants should succeed in relation to those items. As the Court pointed out in oral address on the appeal, there was no evidence that an alignment defect of only 10 millimetres is a matter of such materiality as to require rectification or demolition. The same may be said regarding the incorrect positioning of the wall.

173 In my view preference should be given to Mr Winner's expert opinion that on a matter such as this which relates to engineering, priority should be given to engineering designs as opposed to the elevations. Moreover, the appellants' expert candidly acknowledged in cross-examination that in circumstances where it was unknown whether the engineering plans or the architectural elevation plans were correct, "it would require instructions essentially to - which way around, which way to build it". To similar effect, the respondent's expert stated in the Joint Expert Building Report that it was a "[m]atter for lay evidence as to what was required to be constructed". The difficulty for the appellants is that the evidence remained uncertain as to which way the first floor west wall was to be built and whether timber framing or masonry was required.

174 For these reasons, I consider that the appellants have failed to make good their claims under ground 8. Accordingly, the issue of mitigation does not arise.

(iii) Wall framing and related issues

175 As previously noted, the primary judge found at LJ[102(2)] that Mr Winner was responsible for defects in the wall framing on the first floor. Her Honour added, however, this made little difference because the work had to be demolished as a result of exposure to the weather. This refers to her Honour's separate finding that the appellants had failed to mitigate their loss. That separate finding regarding mitigation is the subject of challenge in ground 6 of the amended notice of appeal (for reasons which I will give shortly, I consider that this ground should succeed).

176 Curiously, the amended notice of appeal does not contain any explicit challenge to the primary judge's findings with specific reference to the wall

framing issue. It is not easy to see how it is covered by either grounds 7 or 8, which are said to relate respectively to floor framing and the first floor west wall defect as particularised in item 9 of Schedule #2 to the Joint Expert Building Report. However, the issue is clearly raised in items 1 and 4 of both the appellants' aide memoires and Mr Winner did not take any pleading point. Nor did he contest the appellants' claim and the primary judge's finding that he was responsible for the wall framing (for which he was paid $800 by Ms Muir in cash). Furthermore, he did not challenge footnote 2 to the appellants' aide memoire on defects which related to rectification by way of constructing new wall framing and which stated:

> In closing submissions, the appellants submitted that they would be content with $4,110, being the difference between the two amounts calculated by the parties' experts: Black Book [347], para [87]. The respondent submitted below that $4,410.67 (sic: $4,110) should be allowed for this item (see Black Book [393]-[394]), but also that $4077.52 should be allowed on an "if found" basis, subject to any liability or mitigation findings (see Black Book [395] at para [8.19]).

177 Finally, it should be noted that in oral address on the appeal, Mr Winner's counsel said in respect of the wall framing issue that there was no contest that Mr Winner did the work. He added that: "[i]f we lose the mitigation argument, my client's up for about $4,000 odd". Mr Winner's counsel also accepted that item 4 was related to items 1 and 5, which relate respectively to demolition of the roof, wall and floor framing on the first floor and construction of the roof frame.

178 In my view, in these circumstances, it is appropriate that the appellants be awarded damages in the amount of $4,110 (excluding preliminaries, margin and GST) in respect of item 4.

179 This then leads to the question whether the appellants should also succeed in respect of items 1 and 5. On one view, it might intuitively be thought that because the wall framing was too short and did not accord with the plans there would be an inevitable effect on the roof pitch. But Mr Winner's counsel submitted in oral address on the appeal that any causal link needed to be established and that the appellants' evidence failed to do so. He correctly pointed out that the only person to give relevant evidence was a carpenter, Mr Murphy, and that no expert evidence was called on the issue of causation.

180 In my view, there was no need for the appellants to call evidence on the causal link between the inadequate height of the wall framing and the changed roof pitch. Common sense would indicate that there is a causal link between the wall framing being short by approximately 300 millimetres and the roof pitch.

181 As to item 5, it is consistent with the finding that the appellants are entitled to be granted damages in respect of that part of item 1 which relates to demolition of the roof, that they are also entitled to recover damages for the construction of the replacement roof frame. Mr Winner did not contend that such damages were too remote.

182 Accordingly, it is appropriate that the appellants be awarded damages as claimed under item 1 for demolition of the roof and wall framing and also for their claim under item 5 for constructing a replacement roof frame. The respective experts gave significantly different estimates of costs for the demolition of all the matters covered by item 1 (ie $23,491.38 by Mr Frizzell and $10,420 by Mr Iskowicz). The difference was said to lie in the extent to which demolition is done by mechanical, as opposed to physical labour, means. Moreover, the experts' estimates of costs include demolition of the floor framing as well as the other two matters. The experts could not agree the amount of damages for item 5 ($28,626.30 for Mr Frizzell and $15,610.00 for Mr Iskowicz).

183 The parties should be given an opportunity to agree appropriate damages for that part of item 1 which relates to demolition of the roof and wall framing and for item 5. If agreement cannot be reached, each should provide a brief submission in support of their respective positions. The parties will need to turn their minds to any allowance which needs to be made in respect of this item and items 4 and 5 for materials which are salvageable, noting, for example, that Mr Iskowicz opined that approximately 57% of the total construction cost for various items, including the wall frame, were salvageable.

(h) Mitigation (ground 6)

184 This ground challenges the primary judge's findings (at LJ[103]–[110]) that the appellants failed to mitigate their loss. The issue only has significance for items

1, 4 and 5 for which the appellants have established liability. For the following reasons, I would uphold ground 6.

185 The parties were agreed that Mr Winner carried the onus of demonstrating that the appellants acted unreasonably in not mitigating their loss. It is well established that the requirement of mitigation obliged the appellants to take steps which were reasonable in all the circumstances (see, for example, *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 193 CLR 603; [1998] HCA 38 at [134] per Hayne J and *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 at [187] per Giles JA, with whom Handley and Stein JJA agreed). And in ***Sacher Investments*** *Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5 at 9, Yeldham J stated the basic principle as follows (footnote omitted):

> Although a plaintiff cannot recover for loss consequent upon a defendant's breach of contract, where he could have avoided such loss by taking reasonable steps, nonetheless a defendant who seeks to rely upon a failure to mitigate must show that the plaintiff ought, as a reasonable man, to have taken certain steps for the purpose of doing so. The plaintiff is not under any obligation to do anything other than in the ordinary course of business, and the standard is not a high one, since the defendant is a wrongdoer. See generally *Chitty on Contracts*, 23rd ed., vol. 1, par. 1482 et seq., p. 691 et seq. See also *Banco de Portugal v. Waterlow & Sons Ltd*. : "The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

186 Justice Yeldham's reference to the standard not being a high one because the defendant is a wrongdoer was expressly approved in *Rockdale City Council v Micro Developments Pty Ltd* [2008] NSWCA 128 at [55] (per Giles JA, with whom Hodgson and Campbell JJA agreed):

> Whether Micro failed to take reasonable steps to mitigate its loss is a question of fact. However, mitigation of loss involves a plaintiff's obligation (in the sense above) to act in the interests of the defendant. As was succinctly said of what is required of a plaintiff in *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* (1976) 1 NSWLR 5 at 9 per Yeldham J, "the standard is not a high one, since the defendant is a wrongdoer". In the classic case of *Banco de Portugal v Waterlow & Sons Ltd* (1932) AC 452, in part concerned with recovery of the costs of remedial steps, Lord Macmillan said at 506 -
>
> > "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment, the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party

> whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

187 Briefly stated, the relevant issue on mitigation was whether Mr Winner discharged his obligation of demonstrating that it was unreasonable of the appellants not to protect the timber wall framing by, for example, covering the structure with tarpaulins.

188 The primary judge's findings and analysis on mitigation are summarised at [52]–[57] above. The primary judge expressly noted Ms Muir's evidence that she could not protect other timber elements "because it was dangerous and roof rafters were not attached to the walls" (at LJ[107]). Her Honour then said at LJ[108] that the "problem" with Ms Muir's evidence is that the site, including the roof, had been inspected by Mr Capaldi on 2 November 2016 and he had taken extensive photographs (the inference being that the site wasn't so unsafe as to prevent these actions). In addition, her Honour found that scaffolding was on the site until early December 2016. This finding is not challenged. Her Honour then made extensive reference to Mr Iskowicz's unchallenged evidence, as summarised at [56] above, which included evidence that canvas tarpaulins are commonly used in the building industry to minimise the effects of weather or exposure.

189 The appellants obtained a report in late 2016 from Tyrrells Property Inspections Pty Ltd. It was prepared by Mr Capaldi (who worked for the firm) and was based on Mr Capaldi's inspection of the site on 2 November 2016. The Report contained many photographs of the site taken on 2 November 2016 and it also included statements by Mr Capaldi relating to the stability of the structure. He opined that, because attempts at rectification had been inadequate, "the timber structure erected on site, ties, fixings and braces have been removed resulting in a structure which is not, in my opinion, considered safe in relation to the lateral movement or other loads that may be imposed on the structure". Significantly, however, because Mr Capaldi was not made available for cross-

examination, the Report was admitted into evidence below but limited only to the photographs it contained. The photographs primarily focused upon the defective works which were of concern to the appellants. The front page of the Report has a photograph of the building site as at 2 November 2016 and shows that the scaffolding was in place then. Part of the scaffolding also forms part of the background of some of the other photographs which focus on defective works. Contrary to Mr Winner's submission, these photographs do not provide an adequate evidentiary basis that the scaffolding provided convenient access to the timber elements (see respondent's written submissions at [57]). In support of his contention that there was scaffolding in place which provided safe access for the purposes of the appellants mitigating their loss, Mr Winner also pointed to several satellite photographs. The first and third of those photographs are dated 2 October 2016 and 2 December 2016 respectively, while the second photograph is undated and may simply be a zoomed in cut of the first photograph. These overhead satellite images lack a sufficient definition or precision to identify the location of any scaffolding, let alone make an assessment as to whether the scaffolding provided safe access as claimed by Mr Winner.

190 There was, however, evidence below from both Ms Muir and Mr Krolczyk that the structure was unsafe. Under cross-examination, Ms Muir said that the appellants' building consultants (and in particular Mr Capaldi) told them "that it was too dangerous to even be upstairs because nothing was secured and that's why there was no tarp over the top end because it was too dangerous". Ms Muir also gave evidence under cross-examination, when asked whether she thought that she ought to have taken steps to protect the timber work, that:

> If we had have (sic) engaged another builder, yes, I'm sure something would have been done but that didn't happen…

Ms Muir then repeated her evidence that she and Mr Krolczyk had been told by the building consultant (Mr Capaldi) not to go upstairs and that it was "too dangerous". No objection was taken to this aspect of Ms Muir's evidence. Accordingly, although Mr Capaldi's Report was admitted into evidence only on a limited basis, Ms Muir's evidence was to the effect that the appellants had been told by Mr Capaldi that the site was too dangerous.

191 Notably, the primary judge did not refer to Mr Krolczyk's evidence under cross-examination which was to the effect that he had considered covering the timber structure with tarpaulins, but concluded that it was not reasonably practicable to do so because:

(a) he had been told by a builder that, if a tarp of sufficient size could be installed "you'd see 150 square metres of housing in the next paddock 'cause we live in … the country";

(b) someone from Tyrrells had told him that "it was too unsafe" to go upstairs; and

(c) he did not "believe for one moment that there would have been enough tarps to protect that big structure".

192 This evidence accords with photographs of the structure which were in evidence which leave no doubt that the structure was substantial in size.

193 As the appellants point out, Mr Krolczyk was not challenged in cross-examination on this aspect of his evidence (although, as noted, he was unsure who from Tyrrells gave him the warning). His evidence was also supported by an email dated 13 November 2016 which he sent to Mr Winner. He described the structure as being "in a very shabby condition", that the new extension top floor structure "would most likely entirely collapse" and that Mr Winner's attempts at rectifying some of the defects resulted in "a very poorly constructed and unsafe structure". Mr Krolczyk was not cross-examined on this email, nor did the primary judge make any reference to it in her reasoning for finding that the appellants had failed to mitigate their loss.

194 Mr Winner submitted on the appeal that this evidence of Mr Krolczyk should be treated with caution. The same submission was made to the primary judge below. This was said to be because Mr Capaldi himself had accessed the site on 2 November 2016 and had climbed over the structure in order to take the photographs of the defective works and also that Mr Krolczyk was present during the cross-examination of Ms Muir and was alive to the issue of mitigation being raised. On the appeal, Mr Winner added that after Mr Krolczyk gave evidence to the effect that it was Mr Frizzell and not Mr Capaldi who had informed him that it was unsafe to go upstairs, he resiled from that evidence after observing Ms Muir say that this was incorrect. I do not accept that any particular weight should attach to Mr Krolczyk correcting his evidence on who it

was from Tyrrells who told him that the structure was unsafe. Mr Krolczyk was adamant that he could recall what he was told, even if he could not remember who it was from Tyrrells who warned him that the upstairs structure was unsafe.

195 Having regard to the evidence of the appellants below to the effect that the site was unsafe and it was not practicable to cover the large structure with tarpaulins (and putting to one side the fact that there was no evidence of the cost of covering the structure with tarpaulins to protect the timber wall framing), the primary judge ought to have found that Mr Winner had not discharged his onus of establishing that the appellants acted unreasonably in not mitigating their loss. I would uphold ground 6.

196 Having regard to my rejection of all the appellants' claims, save in respect of and related to wall framing, their success on ground 6 has limited practical significance.

(i) Did the primary judge err in finding that Mr Winner had the benefit of an exclusion in the Home Building Act 1989? (ground 9)

197 In ground 9 the appellants claim that the primary judge erred in her approach to the finding that even if Mr Winner was supervising the works it was not residential building works because of the operation of Sch 1 cl 2(3)(i)(iii) of the *Home Building Act*. That provision reads as follows:

> 2 Definition of "residential building work"
>
> …
>
> (3) Each of the following is excluded from the definition of ***residential building work–***
>
> …
>
> (i) the supervision only of residential building work–
>
> …
>
> (iii) by any other person, if all the residential building work is being done or supervised by the holder of a contractor licence authorising its holder to contract to do that work,

198 The appellants emphasise that this statutory provision was not pleaded by Mr Winner in his defence and, moreover, Mr Winner called no evidence in support of his reliance upon the provision.

199 There is little doubt that the issue should have been pleaded, having regard to UCPR r 14.10. However, ground 9 must fail. Ground 9 is directed to the primary judge's finding at LJ[146] (see [60] above). The primary judge's reference there to "to the extent that [Mr Winner] was engaged as supervisor …", must be read in context of her Honour's reasons as a whole. It is notable that the primary judge made express findings at LJ[128] and [137] that Mr Winner was **not** engaged as a supervisor. For reasons given above, I am not persuaded that this conclusion was wrong. Accordingly, the primary judge was simply saying that, if contrary to her earlier findings, Mr Winner was supervising works, he would have the benefit of the exemption because any such supervision would relate to licensed contractors. Ground 9 is rejected.

(j) Failure to consider appellants' reliance upon the Design and Building Practitioners Act 2020 (ground 10)

200 It is common ground that the primary judge did not address the appellants' submission below regarding their reliance of s 37(1) of the *Design and Building Practitioners Act*. The appellants frankly acknowledge that this was not pleaded in their amended statement of claim, but they emphasise that Mr Winner did not take issue when it was raised by them below.

201 Section 37(1) of that legislation provides that a person who carries out "construction work" has a duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done and arising from such work. The duty is owed to each owner of the relevant land, who are entitled to damages for breach as if the duty were one at common law (ss 37(2)–(3)).

202 "Construction work" is defined in s 36 to include:

(a) "building work", including "residential building work" within the meaning of the *Home Building Act*;

(b) "the preparation of regulated designs and other designs for building work";

(c) "the manufacture or supply of a building product used for building work"; and

(d) "supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to" in sub-ss (a)-(c).

203 The appellants emphasise that, unlike the position in Schedule 1 of the *Home Building Act*, there is no carve-out under the *Design and Building Practitioners Act* for supervisory work. Accordingly, the appellants submit that Mr Winner was liable to them under s 37 of this statutory regime and the primary judge failed to consider the matter completely.

204 In brief, while acknowledging that this matter was not addressed by the primary judge, Mr Winner contended that, given her Honour's factual findings, it was not necessary for her to address the appellants' claim relying upon the *Design and Building Practitioners Act*. Mr Winner contended that the appellants failed to identify the specific risks which they claim he was required to manage and the precautions which should have been taken to manage those risks. Perhaps more significantly, however, Mr Winner also submitted that "where all work was carried out or supervised by appropriately licensed contractors, it is difficult to see how the Appellants establish any negligence on behalf of the Respondent to the requisite standard". Moreover, even if this was overcome, he contended that the claim would be apportionable.

205 As noted above, this legislation, while retrospective, had only just come into force before closing addresses below. The meaning and operation of the legislation is complex (see, for example, *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659 per Stevenson J). The complexities of the legislation were not developed by either party on the appeal. The appellants appear to rely upon the proposition that Mr Winner supervised the project, hence their emphasis on the fact that there was no carve-out for supervisory work in contrast with the position under the *Home Building Act*.

206 On the appeal, the appellants did not clearly identify how the legislation would apply to Mr Winner other than on the basis of their claim that he supervised work. The short answer to this ground of appeal lies in the fact that the primary judge made express findings that Mr Winner did **not** supervise the project and the appellants have failed to establish any appealable error in those findings. Accordingly, the legislation can have no application to him based on a claim that he was supervising the work.

207 For these reasons, ground 10 is rejected.

(k) Indemnity costs (ground 11)

208 The appellants contend that the primary judge erred in holding that they were liable to pay Mr Winner's costs on an indemnity basis from 7 March 2018 having regard to Mr Winner's offer of compromise set out in the letter dated 6 March 2018 (which was emailed on 7 March 2018). They contended that the primary judge should have found that the offer did not constitute a genuine compromise of the proceeding because:

(1) It was nothing more than a walkaway offer;

(2) It did not explain why it would be unreasonable for the appellants not to accept the offer or why their claims were weak;

(3) It was made at a time prior to the respondent pleading his defence in the District Court; and

(4) The appellants' claim was not weak.

209 Relevantly, Mr Winner's offer to compromise the NCAT proceeding as set out in his solicitor's letter dated 6 March 2018 stated as follows:

> We are instructed by the First Respondent to make the following offer of settlement:
>
> 1. The Applicants to withdraw the proceedings against the First Respondent.
>
> 2. That each party pay their own costs of the Tribunal proceedings.
>
> 3. The parties enter into a Deed of Release which would include a term whereby the Applicants release the First Respondent in relation to all claims the subject of the NCAT proceedings.

210 The offer was said to be open for acceptance until 5:00pm on 11 April 2018.

211 The primary judge's reasons for judgment on costs are summarised at [62] ff above.

212 It is well-established that for an offer of compromise to constitute a *Calderbank* letter, it must be a genuine offer of compromise in the sense that the party must give something away (see, for example, *Nutrient Water Pty Ltd v Baco Pty Ltd (No 2)* [2010] FCA 304 at [31] per Kenny J; and *Fabre v Lui (No 2)* [2015] NSWCA 312 at [6]).

213 It is equally well-established that an offer that contains no real element of compromise and which is designed merely to trigger costs sanctions will not be regarded as a genuine offer of compromise (see, for example, *Leichhardt*

Municipal Council v Green [2004] NSWCA 341 at [23] per Santow JA). It is desirable to set out what Justice Santow also said there at [25] and [30]–[31] regarding the distinction between a plaintiff making an offer of compromise as opposed to one made by a defendant:

> 25 … The position of a defendant without a cross-claim is analytically quite distinct. First, a defendant by definition is not the claiming party, and thus is not before the Court voluntarily. If it reasonably disputes liability and has a firm belief in the strength of its case, the best solution it can hope for – that the claim is dismissed – is not a monetary one. It will in economic terms be no better or worse off for its victory by way of successful defence, costs aside. Thus, unlike a plaintiff, it cannot discount its optimum return by way of compromise. It does not need the same sorts of incentive as a plaintiff does to compromise. It cannot, in the expectation of receiving $100,000, offer to compromise proceedings for $75,000 to reflect the vicissitudes and expenses of litigation.
>
> …
>
> 30 That much would be true of almost all 'walk-away' offers where a defendant offers a plaintiff the opportunity to walk away from litigation without penalty as to costs. It cannot be denied that the offer was from the Council's (subjective) point of view a substantial offer, convinced as it was of the strength of its case. But that does not, in itself, answer the question of whether the offer contains an element of "compromise", as referred to above. The fact of the matter is that the Council was not really compromising its position at all – it maintained it was not liable and that the law clearly justified the rightness of its cause. Its attitude was not one of compromise in the sense of strict give and take, but it was made in a bona fide attitude designed to reach settlement, which accords with the policy of the law in encouraging early termination of litigation. It is certainly arguable that its letter was not a mere demand for capitulation; it was a reasoned suggestion of capitulation which alerted the plaintiff to what the Council saw as the deficiencies in the plaintiff's case. Given the position in which the Council as defendant found itself (see above), it is difficult in the circumstances to conceive what it otherwise could have done by way of affirmative step towards ending litigation (aside from 'buying off' the plaintiff). It is submitted that there are compelling reasons for treating a defendant's 'walk-away' offer such as this in these circumstances as different from a plaintiff's offer to settle for the full sum claimed. However, it does not follow from this that costs sanctions should follow as a matter of course.
>
> 31 There is, however, authority apparently to the contrary. In *Singh v Singh (No 2)* [2004] NSWSC 225, Barrett J held that a 'walk-away' offer was not a genuine compromise which could found the basis for an indemnity costs order. *Singh* is clearly distinguishable from the present case since the 'offer' in that case in addition required the plaintiff to bear the defendant's costs to date. It was a true situation of a demand to capitulate.

214 The appellants did not challenge the correctness of the primary judge's identification of the relevant principles applying to a *Calderbank* offer. Rather, their complaint was directed to the application of those principles in the particular circumstances here. In particular, the appellants contended that the

primary judge erred in not concluding that the offer was not a genuine offer of compromise in circumstances where the letter did not explain why the appellants' case was weak. Moreover, they claim that they were not in a position as at 6 March 2018 to make an informed assessment of Mr Winner's defence because he had not fully pleaded his case and the offer was made at an early stage.

215 In contrast, Mr Winner contended that when the offer was made a substantial amount of work had been carried out in the NCAT. He pointed out that Ms Muir's "voluminous first Affidavit" had been served and responded to by Mr Winner (and two other lay witnesses called by him). Accordingly, Mr Winner claimed that the appellants were able properly to consider the terms of the offer and that it constituted a real element of compromise because the offer was to forego substantive costs incurred by Mr Winner which was of some real benefit to the appellants. Mr Winner also contended in his outline of written submissions that when the first offer was made, the proceedings had been transferred to the District Court. That is incorrect, but nothing turns on that factual error.

216 The transfer occurred on 13 April 2018, which was two days after the date upon which the offer ceased to be open. By that time the appellants had each filed a witness statement dated 25 September 2017 in the NCAT proceeding and Mr Winner had filed three lay witness statements in response, including one by himself dated 16 February 2018. Mr Winner's witness statement made clear that he strongly denied that he had been engaged to undertake any building or supervisory work.

217 It is important not to lose sight of the requirement that, for an offer to constitute a *Calderbank* offer, the offer must not only constitute a real and genuine compromise, but rejection of the offer must be unreasonable in all the circumstances, with the issue of reasonableness of rejection being assessed **at the time the offer is made and not with the benefit of hindsight** (see, for example, *Miwa Pty Ltd v Siantan Properties Pte Ltd (No 2)* [2011] NSWCA 344 at [11] per Basten JA, with whom McColl and Campbell JJA agreed).

218 As to her Honour's conclusion that the first offer was a genuine offer of compromise, it is important to note that the offer was made at a time when the appellants were aware of the respondent's response to their NCAT application and Mr Winner had filed and served all his lay evidence in response, including his own witness statement which put squarely into contest the appellants' claims that he had been retained as either builder or supervisor. As the primary judge observed at CJ[33], the walkaway offer that was made was effectively the only offer that could have been made given that Mr Winner was the respondent to the proceeding and his compromise was to forego his NCAT legal costs up until that date. Although there was no evidence below or on the appeal as to the quantum of those legal costs, it may reasonably be inferred that those costs were not insubstantial, particularly in circumstances where Mr Winner was legally represented in the NCAT and his lawyers must have been involved in preparing and settling his three lay witness statements and he also had incurred costs in obtaining Mr Iskowicz's report in reply dated 10 March 2018. It may equally be inferred that he incurred substantial legal costs in having his solicitors review the appellants' respective witness statements dated 25 September 2017 filed in the NCAT which totalled 414 and 273 pages (and which included a copy of Mr Frizzell's first report, which itself totalled approximately 80 pages).

219 The appellants have not challenged the correctness of the primary judge's summary of the relevant principles as to whether an offer has been unreasonably rejected as set out in CJ[29]. In oral address, Mr Winner's counsel accepted that if the appellants were to succeed on some aspects of the appeal, "the costs decision may need to be revisited". It is well established that the onus of demonstrating unreasonableness is on the party who seeks indemnity costs (see *Miwa* at [16]) and that unreasonableness is judged by reference to the circumstances facing the offeree at the time of the offer and not with the benefit of hindsight resulting from a known outcome as recorded in a subsequent judgment (see *Miwa* at [11]). Among the factors which may be taken into account in determining whether the refusal or lapse of an offer was unreasonable are the offeree's prospects of success assessed as at the date

of the offer (see *Miwa* at [12]). Each case must necessarily turn on its own facts.

220 The primary judge found at CJ[32] that the appellants had had an opportunity to review the respondent's lay and expert engineering evidence (a copy of which apparently was not included in the appeal books) and the appellants either knew or ought to have known that their prospects turned upon evidence and claims which were strongly contested by the respondent. They also had the benefit of Mr Winner's formal response in NCAT (it appears from CJ[31] that copies of these materials were in evidence below but they were not put into evidence on the appeal, presumably because the appellants did not challenge the primary judge's finding that those materials contained lucid denials that Mr Winner was the builder).

221 It is evident from CJ[32] that the primary judge found that the appellants should have appreciated, as at 15 February 2018, that their case was weak because its success turned on a series of informal text messages, conversations and the two BoQs. In my respectful view, the matter was not so clear. Although many issues were joined, by 15 February 2018 Mr Winner had accepted responsibility for the wall framing, which had potential ramifications for the appellants' claims under items 1 and 5. Moreover, the appellants were entitled to take into account that Mr Winner carried the onus of establishing a failure to mitigate. These matters were not taken into account by the primary judge. Accordingly, I consider that the appellants have established an appealable error in respect of the primary judge's decision to award indemnity costs for the period after 7 March 2018.

222 The issue of costs below will need to be revisited by the parties having regard to the appellants' limited success on the appeal and the issue of indemnity costs.

223 There is one final matter which deserves mention, although it was not raised by any party. It relates to the fact that the relevant offer of compromise was made in the context of extant proceedings in the NCAT and before the proceedings were transferred to the District Court. In assessing whether or not the offer of compromise was reasonable, it is relevant to take into account any principles

concerning the award of costs in the NCAT which are different from those which arise under s 98(1) of the *Civil Procedure Act* and related provisions. Generally, each party in NCAT proceedings pays its own costs as provided for in s 60(1) of the *Civil and Administrative Tribunal Act 2013* (NSW). The NCAT may award costs where there are special circumstances (see s 60(2)). Importantly, however, where a matter is in the Consumer and Commercial Division of NCAT and the amount claimed is more than $30,000, the NCAT may award costs in the absence of special circumstances (see r 38 of the Civil and Administrative Tribunal Rules 2014 (NSW)). This provision would have applied here if the proceeding had remained in the NCAT rather than being transferred to the District Court. Accordingly, no particular significance attaches to the fact that the offer was made in the context of the NCAT proceedings and prior to the transfer to the District Court.

224 However, the primary judge's costs determination was premised on her Honour's finding that the appellants' claim failed. Having regard to my findings at [178], [183], and [195] that the appellants' claim has not wholly failed, the correctness of the primary judge's costs order made on the basis of her Honour's contrary finding must be revisited.

Conclusion and Orders

225 The parties should seek to agree proposed short minutes of order which give effect to these reasons, including as to the costs of the appeal and the costs below.

226 If they are unable to reach agreement, each should within 21 days file and serve written submissions not exceeding eight pages in length in support of their respective positions.

227 Final orders will then be made on the papers and without a further oral hearing.

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