DISTRICT COURT OF QUEENSLAND

CITATION:	*Thallon Mole Group Pty Ltd v Morton* [2022] QDC 224.
PARTIES:	**THALLON MOLE GROUP PTY LTD** **ACN 104 671 801** (plaintiff) **v** **LOUISE MORTON** (defendant)
FILE NO/S:	2695/19
DIVISION:	Civil - Commercial List
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane District Court
DELIVERED ON:	7 October 2022
DELIVERED AT:	Brisbane
HEARING DATE:	25 - 28 May 2021; 1 - 4 June 2021; 6 - 10 September 2021; 13 - 16 September 2021; 10 & 11 February 2022; Final submissions in reply 14 February 2022
JUDGE:	Muir DCJ
ORDER:	By 4.00pm Thursday 26 October 2022, the parties are to: (a) Bring in Final Orders including relevant interest calculations and provision for the release of the Retention Monies consistent with my findings; and (b) Exchange and deliver written submissions as to costs (if necessary), no longer than four pages.
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PROGRESS PAYMENTS – where defendant entered into a contract with the plaintiff – where contract was for construction of a luxury residential property – where during the course of construction the contract was terminated by the defendant for breaches – where plaintiff claimed they were willing and able to continue performing the contract – where the defendant did not pay outstanding progress claims for works completed – where the plaintiff seeks payment for the

works completed.

PROCEDURE – CIVIL PROCEDURE IN STATE AND TERRITORY COURTS – COSTS – ISSUES AND COUNTERCLAIMS – where works performed under the contract were defective – where the defendant counterclaims for the cost of rectifying defective works – where there is dispute as to defects and the cost of rectification.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – OTHER MATTERS – where specifications of the contract were not able to be met – where the contract price must be reduced to account for failure to meet conditions of the contract.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – TIME – where performance of the contract was delayed – where the plaintiff claimed entitlement to an extension of time – where the defendant claimed no entitlement to extension of time exists – where the defendant argued that delays were caused by the plaintiff, were foreseeable and no notice of an extension was given.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – PERFORMANCE OF WORK – GENERAL – where the plaintiff claimed that works had reached practical completion – where the defendant argued that practical completion was not reached due to defective works.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SECURITY AND RETENTION FUNDS – where retention money was to be given to plaintiff after practical completion – where practical completion did not occur – where the contract stipulated that defendant had recourse to unpaid retention money if notice was given.

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY ON QUANTUM MERUIT – IN GENERAL – where plaintiff argued it performed works under agreed changes to the contract – where the defendant argued the variations were not approved and written approval was not obtained for the work subject to variation – where plaintiff refused to pay for the work subject to variation – where the plaintiff argued quantum meruit regarding works subject to variation.

CONTRACTS – PARTICULAR PARTIES – PRINCIPLE

AND AGENT – CREATION OF A RELATIONSHIP OF AGENCY – AGENCY BY ESTOPPEL – where the contract stipulated work be done in a particular way – where the plaintiff claimed that an agent for the defendant made a representation that work could be done in an alternate way – where no variation to the contract was made in writing – where the plaintiff claimed an absence of the written variation was overcome by estoppel – where the *QBCC Act* requires variations to be made in writing – whether estoppel stands in the face of a statute.

Uniform Civil Procedure Rules (UCPR) 1999 (Qld)
Queensland Building Services Authority Bill 1991 (Qld)
Sustainable Planning Act 2009 (Qld)
Building Act 1975 (Qld)
Queensland Building and Construction Commission Act 1991 (Qld)

CASES

Agricultural and Rural Finance Pty Limited v Atkinson [2010] NSWSC 1396
Allen v G Developments Pty Ltd & Ors [2019] QSC 107
Amricama Pty Ltd v Red Carpet Real Estate [2014] QSC 267
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99
Australian Development Corporation v White Constructions Pty Ltd (1996) 12 BCL 317
Bakker v Chambri Pty Limited (1986) 4 BPR 9234
Bannister & Hunter Pty Ltd v Transition Resort Holdings Pty Ltd (No. 2) [2013] NSWSC 1943
Bedrock Construction and Development Pty Ltd v Crea [2021] SASCA 66
Bellgrove v Eldridge (1954) 90 CLR 613
Birse Construction Ltd v Eastern Telegraph Co Ltd [2004] All ER (D) 92
BM Alliance Coal Operations Pty Ltd v *BGC Contracting Pty Ltd* [2016] QSC 05
Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (2008) 166 FCR 494
Brewarrina Shire Council v Beckhaus Civil Pty Ltd (2003) 56 NSWLR 576
Burns v MAN Automotive (Aust) Pty Ltd (1986) 161 CLR 653
Casbee Properties Pty Ltd v Patoka Pty Ltd [2003] NSWCA 361
Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2017] QSC 85
Clyde Contractors P/L v Northern Beaches Developments P/L [2001] QCA 314
CMA Assets Pty Ltd v John Holland Pty Ltd [No. 6] [2015] WASC 217
Cochrane v Lees [2021] QCATA 74
Codelfa Construction Pty Ltd v *State Rail Authority of NSW* (1982) 149 CLR 337

Day Ford Pty Ltd v Sciacca [1990] 2 Qd R 209
Danidale Pty Ltd v Abigroup Contractors Pty Ltd [2007] VSC 391
El Khoury v Harsany; Taouk v Assure (NSW) Pty Ltd [2018] NSWSC 1774
Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd (2014) 251 CLR 640
Fox v Percy (2003) 214 CLR 118
FPM Constructions Pty Ltd v Council of the City of Blue Mountains [2005] NSWCA 340
Grocon Constructions (Qld) Pty Ltd v Juniper Developer (No 2) Pty Ltd [2015] QCA 29
Hyder Consulting (Australia) Pty Ltd v Wilhelmsen Agency Pty Ltd [2001] NSWCA 313
Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3) [2003] 1 Qd R 26
JPA Finance Pty Ltd v Gordon Nominees Pty Ltd (2019) 58 VR 393
Karacominakis v Big Country Developments Pty Ltd [2000] NSWCA 313
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993
Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Construction) v Blanalko Pty Ltd [No 3] [2013] VSC 435
Maritime Electric Co v *General Dairies Ltd* [1937] AC 610
Metro Edgley Pty Limited v MK & JA Roche Pty Limited & Ors [2007] NSWCA 160
Morton v Elgin-Stuczynski [2008] VSCA 25.
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104
Murphy Corporation Ltd v Acumen Design & Development (Qld) Pty Ltd & Hooper (1995) 11 BCL 274
Onassis & Calogeropoulos v Vergottis [1968] 2 Lloyd's Report 403
Opat Decorating Services (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd (1994) 11 BCL 360
Oshlack v Richmond River Council (1998) 193 CLR 72
Owners – Strata Plan NO 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067
Pivovarova v Michelsen (2019) 2 QR 508
Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Aust) Pty Ltd (1978) 139 CLR 231
Roadshow Entertainment v *(ACN 053 006 269) Pty Ltd* (1997) NSWLR 462
Robinson v Harman (1848) 1 Exch 850,
Ruxley Electronics & Construction Ltd v Forsyth [1996] 1 AC 344
Saunders v Nash [1991] VR 63
Southern Cross Constructions (NSW) Pty Ltd (Administrators Appointed) v Bucasia Pty Ltd [2012] NSWSC 1419

Stein v Torella Holdings Pty Ltd [2009] NSWSC 971
Stone v Chappel (2017) 128 SASR 165
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272
TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd (1963) 180 CLR 130
TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130
Thornley v Tilley (1925) 36 CLR 1
Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603
Walter Construction Group Ltd v Walker Corporation Ltd [2001] NSWSC 283
Willshee v Westcourt Ltd [2009] WASCA 87
Woo Nam Lee v Surfers Paradise Beach Resort Pty Ltd [2008] 2 Qd R 249
Wyong Shire Council v Shirt (1980) 146 CLR 40

COUNSEL: C.C Heyworth-Smith KC with N.J Derrington for the plaintiff
T. Sullivan KC with L.M Campbell for the defendant

SOLICITORS: Robinson Locke Litigation Lawyers for the plaintiff
Thomas Greer for the defendant

Introduction

[2] This is a commercial dispute over the construction of a family home. The plaintiff, **Thallon Mole** Group Pty Ltd is a high-end residential property building company. On 20 December 2016, it entered into a written **Contract** with the defendant,

Louise **Morton**, to construct an architecturally designed **house** at 2 Otway Street, Holland Park for the lump sum **Contract Price** of $4,659,944.50.

[3] **Works** under the Contract commenced in early 2017 and things were (apparently) progressing reasonably well until September that year, when issues arose over the unavailability of two large "Schucco" sliding glass doors that were to be installed at the house.[1] From that point on, the relationship between the parties disintegrated. In early 2019, Thallon Mole claimed it was finalising the Works and was entitled to payment of outstanding progress claims. Mrs Morton refused to pay these claims due to her concerns about the incorrect reduction of the Contract Price arising from issues with the sliding doors and defective work (particularly with the external waterproofing and the installation of the pool balustrade) at the house.

[4] Matters came to a head on 3 April 2019, when Thallon Mole gave written notice anticipating the achievement of Practical Completion on 8 April 2019 and issued its final progress claim on that same date. On 10 April 2019, Mrs Morton terminated the Contract and subsequently engaged Hutchinson Builders to complete the work at the house.

[5] Against this background, Thallon Mole advanced three claims for payment of monies:[2]

(a) First, the sum of $638,634.35 as monies owing for unpaid works carried out pursuant to the Contract (comprising three unpaid progress claims totalling $381,292.76 (incl. GST), together with compounding monthly interest);

(b) Secondly, the sum of $21,770.65 (excl. GST) on a quantum meruit basis; and

(c) Thirdly, the sum of $17,300 for delay and disruption costs.

[6] Mrs Morton denied liability to pay these (or any amounts) to Thallon Mole. She claims the sum of $16,100 as liquidated damages and counterclaims for damages in the sum $540,428.52. (incl. GST) for the cost of completing the defective and incomplete works at the house.[3]

[7] What emerges from these Reasons is that this dispute morphed into an unnecessarily protracted, acrimonious and expensive personal battle between the parties. A battle surely not justified by the overall outcome.

Issues in Dispute

[8] The extent of the unfortunate deep-seated acrimony and irretractable positioning between the parties in this case is well reflected in their inability to resolve even the most inconsequential of issues between them. Unfortunately, this blinkered approach has resulted in a precious waste of court resources and judicial time and

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1 The spelling of these doors varies throughout the evidence and submissions from "Schucco", "schueco" (the spelling used on the company name) and "schuco". I have used the former - capitalised for convenience.

2 **Further amended statement of claim** (FASOC) at [63]-[72]; The third claim is not reflected in the Prayer for Relief.

3 **Second amended defence and counterclaim** (SADCC).

has served only to hinder the just and expeditious resolution of the real issues in the proceeding at a minimum of expense.[4]

[9] The parties eventually identified about 86 overall issues (although many of these raise a myriad of sub-issues) for the court's determination.[5] Many of these issues are interconnected.

[10] Ultimately, I have determined the issues in dispute under the following eight headings:[6]

(a) Adjusted Contract Price

(b) Progress Payment Claims

(c) External Waterproofing

(d) The Pool and Newbolt Street Balustrades

(e) Practical Completion

(f) Termination of The Contract

(g) Quantum Meruit Claim

(h) Defects and Omissions

[11] Before addressing the issues arising under these headings in turn, it is instructive to make some general observations about my approach to credit issues in this case.

Credit Issues

[12] During the trial, Mrs Morton's credit was identified by Senior Counsel for the plaintiff as a live issue. For example, the recording of the fiery exchange between Mrs Morton and Mr Bruce **Mole** (one of the directors of Thallon Mole) and others at the house on 10 April 2019, was said to be relevant to the issue of Thallon Mole being ready, willing and able to complete the Contract and to Mrs Morton's credit "because it speaks to her motivations with respect to non-payment and the continuation of this dispute."[7] But in closing submissions, Senior Counsel submitted that: "[y]our Honour does not need to make a credit finding against Louise Morton for the plaintiff to win";[8] and "[i]t is not our submission that your Honour should write a judgment, with respect, that casts Mrs Morton as the most awful person that ever litigated in these courts" or that "she has lied".[9] Although, Senior Counsel for Thallon Mole maintained that the court ought to look at Mrs Morton's motives to determine issues such as reasonableness of conduct and whether or not the court

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4 Uniform Civil Procedure Rules (UCPR) 1999 (Qld) r. 5.

5 Agreed List of Issues for Determination dated 2 September 2021 **(MFI Z).**

6 The extensive written submissions of the parties (570 pages) approached the resolution of the issues in different ways. My approach is a combination of both.

7 T2-40, ll 27-29. The recording was ultimately made Exhibit 71.

8 T18-51, ll 13-16.

9 T18-51.

should accept one version of events over another. My approach to resolving credit issues is set out in paragraphs 13 and 14 below. But in light of these submissions, it is relevant to observe at the outset, that the resolution of the myriad of issues in dispute in this case did not turn on some alleged vindictive motive on the part of Mrs Morton and that overall, I found her to be an honest and reliable witness. Although, as with many of the witnesses in this case, I have not accepted all of her evidence.

[13] On the other hand, Mrs Morton submitted that this court would have serious concerns about the evidence of a number of Thallon Mole's witnesses, most critically Mr Mole and the Project Manager on the job, Mr Rhys Cook. The submission about Mr Cook focused on his evidence about the installation of the Crystoflex waterproof membrane behind the rock wall along the Newbolt side of the house; and that this ought to be rejected as effectively a lie; and that his lack of credibility on this issue undermined all of his uncorroborated evidence in this case. I have dealt with Mr Cook and Mr Mole's evidence where it relevantly arises during the course of these Reasons. As will emerge, whilst I am not satisfied that the waterproofing in the rock wall area was applied as Mr Cook said it was, I am not prepared to find that he (or Mr Mole) deliberately lied, nor that all their contentious or uncorroborated evidence should be rejected. As can be seen, I have accepted many aspects of their evidence.

[14] Ultimately, the central issues for my determination in this case centre around a consideration of the obligations arising under the Contract. It follows that a careful consideration of that document is required although I accept that a careful assessment of the other evidence in this case is also necessary. This evidence includes the testimony of numerous lay and some expert witnesses. Ultimately, I am not satisfied that any of the witnesses in this case were dishonest or intentionally misrepresented the situation. They all told the truth as they saw it. But as these Reasons reveal and identify (where necessary), several witnesses' recollections were distorted by the passage of time or perhaps altered by "unconscious bias, wishful thinking or by over much discussion of it with others"[10]

[15] I have therefore assessed the evidence of the individual witnesses objectively having regard to all the evidence before the court – particularly the documentary evidence and upon a consideration of where the balance of probabilities lies based on that analysis.[11]

Adjusted Contract Price

[16] The starting point in determining the adjusted Contract Price is to determine how much the Contract must be reduced on account of the Schucco Doors. In addressing this issue, it is convenient to also deal with a number of other issues that emerge from the dispute over the Schucco Doors.

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10 *Onassis & Calogeropoulos* v *Vergottis* [1968] 2 Lloyd's Report 403, 431.
11 *Fox v Percy* (2003) 214 CLR 118, 129 [31].

The Schucco Sliding Doors and Related Issues

[17] It is uncontroversial that the Contract provided expressly for two bespoke sliding Schucco doors to be installed at the house. These doors (and the house) were designed by Tim Stewart Architects (**TSA**).

[18] The specification for the Schucco doors can be seen in the architect's drawings including Drawing No. 700-01 Issue H as follows:[12]

(a) Item D07 referred to: Aluminium framed sliding door with aluminium glazed doors (XXXX) – integrated drainage below sill; Specialist manufacturer hardware (TBC); Fully concealed frame with in-line drainage below sill and Schucco; and

(b) Item D08 referred to: Aluminium framed sliding door with aluminium glazed doors (XXXX) – integrated drainage below sill; Specialist manufacturer hardware (TBC); Fully concealed frame with in-line drainage below sill and Schucco.[13]

[19] Two other relevant references to the Schucco doors are made in the Contract as follows:

(a) At Item T1.15 of a document entitled "Otway Street Tender Clarification Action Register – TMG" under a heading "ALUMINIUM DOORS + WINDOWS" the clarification request from Mrs Rhodes on 9 November 2016 (referred to in paragraph 34) is recorded. This item is recorded as closed by receipt of Thallon Mole's response (referring to Schucco being the supplier) on 16 November 2016 (referred to in paragraph 35 below);[14] and

(b) Behind the cover sheet of the Contract there is "Section 2" of the "Finishes and Selection Schedule".15 The relevant excerpt of Section 2 provides for the Schucco doors as follows: GLZo1; Glazing; Glazing selection/ procurement to meet all performance requirements; Clear Glass – no tint to be read in conjunction with energy efficiency requirements; Performance criteria relates to the overall door and window suite and not only the glazing.[16]

[20] Thallon Mole's case is that it quoted to perform the Work under the Contract, based (in part), on a **final version quote** for the two Schucco doors and all other aluminium and glass windows of $179,054.55 (excl. GST) that it obtained from **Alliance Glass** & Glazing Pty Ltd. It contends that the component of that quote that was attributable to the doors was $48,000 (excl. GST), so that is the value that should be attributed to the two doors. This is either because that price was factually part of the Contract Price, or because it reflects the market rate of the Schucco doors.

[21] Mrs Morton's case is that there is no specific component of the final total quote that can be attributable to the Schucco doors. She submitted therefore that the accurate

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12 Exhibit 4 p. 220140; Exhibit 4 p. 220141, Drawing 700-02 Issue G, shows the doors.

13 The Contract contained a report from a company Q-BEARS Pty Ltd dated 19 April 2016, which set out the energy efficiency needed to be met (Exhibit 4 p. 220141).

14 Exhibit 4 p. 220053.

15 Ibid p. 220067.

16 Ibid p. 220072.

reduction to be made is one based on a determination of market prices for large glass doors generally and that this resulted in an appropriate reduction of $140,013 (excl. GST) for the doors, plus further reductions related to work associated with the doors, totalling $190,032 (excl. GST) or $209,035 (incl. GST).

[22] As the factual analysis below reveals, in April 2018, the two Schucco doors (D07) and (D08) were ultimately omitted from the contracted scope of works.

Relevant Facts

[23] Mr Stewart (or TSA) was not a party to the proceeding, but Mr Stewart was called by Mrs Morton and gave evidence at the trial. The specification for the house provided for a four and five panel (or leaf) sliding door system. The five leafed door faced the pool. The four leafed door faced the back yard.

[24] When the design of the house was being undertaken in October 2015, TSA communicated with Ian McFarlane, who was, at that time, a representative of **Schucco Australia** Pty Ltd (Schucco being a German brand) to obtain pricing for the two doors.[17]

[25] On 30 October 2015, Mr McFarlane wrote to Mr Rhodes at TSA, and provided an estimate of $140,013 (excl. GST) (excluding the drainage system, low E and tinted glass, cranage, as well as fly, barrier and security screens) from Central Glass and Aluminium, for a four and five panel (or leaf) door system.[18] At the time, Mr McFarlane added the following proviso: [19]

> "In order not to hold up cost estimating any further, we have also increased the number of panels by one for each set of doors – this is pending a request sent earlier this week to Schueco [sic] engineering to determine whether we can oversize the panels to 3.4m in width." [Emphasis added]

[26] Mr Rhode's evidence in chief was that after receiving the email dated 30 October 2015, he had confidence that the doors could be delivered in the required configuration.[20] It is difficult to understand what instilled such confidence in Mr Rhodes at this point in time given that there is no evidence that he ever received an answer from Mr McFarlane about this "pending request". But Mr Rhode's confidence may be explained by other evidence (which I accept as a matter of common sense) – that is, he discussed the project in detail with the suppliers of Schucco doors during the design phase of the project. In these circumstances it is reasonable to assume (as I do) that Mr McFarlane told Mr Rhodes at some point during this phase that the doors TSA wanted could be delivered.

[27] The tender process for the Contract closed on 31 October 2016. The Contract included a specification for two Schucco branded doors of four and five panels. On 5 October 2016, Scott Andrews (the Contracts Administrator of Thallon Mole), emailed Marc von Briel (the managing director of Schucco Australia), about the

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17 Exhibit 271.
18 Exhibit 278 p. 20013.
19 Ibid p. 20012.
20 T14-64, ll 42-45.

supply of the Schucco doors for the house.[21] Mr von Briel responded by email on the same day, stating that Schucco Australia had appointed **Capral** Aluminium as the exclusive distributor of the doors for Australia and that Mr McFarlane was now the Business Development Manager for Capral. In this email Mr von Briel also relevantly stated that:[22]

> "In general though we (and Capral) do not supply finished products but have a network of qualified fabricators that can give you peace of mind and a complete supply and install price." [Emphasis added]

[28] Subsequently, on Wednesday 5 October 2016,[23] Mr Andrews spoke to Mr McFarlane asking him to forward his recommended Capral suppliers that could "service & deliver this size of project with both the Schuco [sic] items as well as the other Windows and Doors".[24]

[29] On 6 October 2016, Mr Andrews emailed Shaun Pendall from Alliance Glass attaching a link to the Hightail folder for the construction of the house requesting amongst other things that the **quote for the Schucco doors** allow for the following:[25]

- "Allow for all Schucco Aluminium Windows & Doors **D07** & **D08** in **ALF01** – Powdercoat Dulux Duratec X15 'Zeus Black Matt – 9008870' Finish as per the Drawing Sets via the Hightail Link below and the Schedule of Finishes & Energy Efficiency Report attached above. As discussed if you provide a separate price for the Integrated Stainless Steel Drainage Below Sill that would be appreciated
- Allow for onsite glazing if applicable
- Allow for Crainage [sic] in your quote
- Provide flashings as required
- Include delivery in your quote"

[30] It follows that the quote for the two doors was not just the physical cost of the doors themselves, rather it included a number of items associated with their supply and installation.[26]

[31] On 17 October 2016, "Donna" from Alliance Glass sent an email to Mr McFarlane (following up on a call between Mr Pendall and Mr McFarlane that morning), requesting a quote "for schuco [sic] doors for the job we are quoting at 2 Otway Street Holland Park".[27] On 18 October 2016, Mr McFarlane attached a "quotation, glass schedule and unit overview" for the house to a reply email. That quote was

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21 Exhibit 50 p. 20991.
22 Ibid p. 20990.
23 Ibid. The email from Mr Andrews to Mr McFarlane on Friday 7 October 2016 refers to a conversation on "Wednesday". It is reasonable to assume (as I do) that this is a reference to 5 October 2016.
24 Ibid.
25 Exhibit 50 p. 20988.
26 This appeared to be relatively uncontroversial. See FASOC at [18]; **Second Amended Defence and Counter Claim** (SADCC) at [16].
27 Exhibit 175.

$35,420.04 (incl. GST).[28] Thallon Mole submitted (and I accept), that Schucco doors are a component door system (in that the componentry is supplied and then manufactured with the glass by a glazier) and the quote that Mr Pendall received from Mr McFarlane was for the componentry alone. At this time, Mr Pendall also handwrote on the quote that he obtained three prices for the glass required ($876, $1,320 and $2,786) and obtained a quotation for the drainage system for the doors (of $8,500).[29] He also wrote down a handwritten estimate which included prices as follows: windows and doors for $180,450; glass pool fencing and glass balustrades for $17,360; and a door drainage module for $8,500.[30] There is no explanation as to why this estimate was so much lower than the one of $140,013 Mr McFarlane provided to Mr Rhodes back in 2015.[31]

[32] Mr Pendall's evidence (which I accept) was that at the time of the pricing, Mr McFarlane told him that Capral had not tested the doors for certification in the four to five door configurations sought but that certification could be achieved by engaging a private engineer to certify and sign off on it.[32] As discussed below at paragraph 44 & 45 I am not satisfied that Mr Pendall passed this information on to Thallon Mole at the time he was providing the various quotes to Mr Andrews. But it is reasonable to assume that during the design phase, in assuring Mr Rhodes that the doors could be delivered in the required configuration, Mr McFarlane also told Mr Rhodes about the potential need for certification.

[33] Over the course of October to December 2016, Mr Pendall provided various revised versions of a quote numbered 00039310 to Thallon Mole for the supply of the Schucco doors (and the other aluminium windows and doors) at the house as follows:

(a) The first version of quote 00039310 was sent on 21 October 2016 and totalled $237,600 (incl. GST): comprising $198,550 (incl. GST) "for the supply and installation of aluminium window and doors including schuco [sic]"; $29,700 (incl. GST) for the supply and installation of the glass pool fencing; and $9,350 (incl. GST) for the supply and installation of drainage modules for the doors.[33]

(b) A revised version of quote 00039310, dated 21 October 2016 was sent on 24 October 2016.[34] This version did not change any of the prices but stated that the quote "included windows WO1-WO7H including any aneeta sashless windows and any flashings required" but "did not include DO3 as it is a timber frame".

(c) A request for additions to the quote (to include a Clerestorey Louvre Window above W06) was made by Mr Andrews on 24 October 2016. A revised version of quote 00039310 (still dated 21 October 2016) was then sent to him on 25 October 2016. That quote increased the total quote to $239,910 (incl. GST) because the component for the supply and installation of aluminium

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28 Ibid p. 20020.
29 Exhibit 176.
30 Exhibit 175 p. 20025.
31 Exhibit 278 p. 20012.
32 T5-85 ll, 18-22.
33 Exhibit 50 pp. 20993-20994.
34 Ibid pp. 20997-20998.

windows and doors including Schucco included a louvre window to WO6, meaning the sum of $198,550 (incl. GST) increased to $200,860 (incl. GST).[35]

(d) Some further changes were then requested, which resulted in quote 00039310 (again dated 21 October 2016) totalling $236,010 (incl. GST). Relevantly, the quote now provided that "the supply and installation of aluminium windows and doors including schüco [sic] including louvre windows and revised changes" was $179,054.55 (excl. GST).

(e) A **final version** of quote 00039310 dated 21 October 2016 was requested and delivered on 13 December 2016. This quote was for $222,654.55 (excl. GST) or $244,920.01 (incl. GST) and included an additional price of $8,100 (excl. GST) for some Aneeta sashless windows. The price of everything else (in particular, the $179,054.55 for the windows and doors including the Schucco doors) remained the same.[36]

[34] Thallon Mole submitted that "there cannot be any doubt" given the timeline, that Mr Pendall incorporated the quote for $35,420.04 (incl. GST)[37] into his total price for windows and doors of $179,054.55.[38] I reject this submission for three reasons. First, this "price" is obviously not for four and five panel doors. Secondly, even if I was to accept that it was subsumed in the total price figure, it does not cover each of the components required to be covered under the Schucco Doors Quote. Thirdly, Mr Pendall's evidence, (which I accept), is that he never used the document for pricing – he "just went off the square metreage of the overall door".[39] Consistent with this finding, the following points can be made from the evidence:[40]

(a) Even a plain reading of Exhibit 175 shows that the attached quote was not for the doors as specified in the Contract but for a "five and six panel door." [41]

(b) The figures of $876, $1,320 and $2,786 appear in pencil at pages 20021 and 20022 next to single glass panels. Mr Pendall's evidence was that this approximate amount of $5,000 was for the supply of glass. But it is clear that this price for the glass was not for glass which could actually be used in the size and configuration of doors which were contracted for.[42]

[35] There is no evidence that any of the above quotes were provided to Mrs Morton or Mr Rhodes by Thallon Mole during the tender process, but on 9 November 2016 Mr

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35 Ibid pp. 20999-21003.

36 Ibid pp. 21012-21016.

37 Exhibit 175 p. 20020.

38 Plaintiff's Trial Submission at [94](h).

39 T5-92, ll 37-38; T5-93 ll 1-25.

40 Defendant's Submission in Reply at [31]-[37].

41 At p. 20023 of Exhibit 175, it can be seen that what was being ordered was one two track frame and one three track frame – a total of five tracks, and then at p.20024 two three track frames for a total of six tracks. This can also be seen from p. 20022 of the quote where details of the glass panel composition are set out with a bottom width of 263.63cm and 278.10cm respectively, which can be compared for instance with the bottom widths in the later Barnes & Associates Report dated 6 October 2017 (Exhibit 37) which used a nominal 3,400mm width for the door panels. The glass thickness was 6mm as compared to the thicker glass which would have been necessary for a four and five panel array. An example of this can be seen in the 12mm needed for the Vitrocsa glass thickness.

42 The evidence (which I accept) as a matter of common sense is that as glass increases in terms of height, width and thickness, the price increases.

Rhodes emailed Thallon Mole a pre-contract tender clarification request. This request sought confirmation on whether the tender was based on nominated suppliers and a detailed trade breakdown to be edited and finalised. It was also advised that "ideally it would be good to see these as percentages based on the line item totals".[43]

[36] On 16 November 2016, Mr Andrews responded with several of the costings requested. But relevantly no individual costings, rate or breakdown was given for the two Schucco doors (Item T1.15). All that was said about this item was as follows:[44]

> "The Aluminium Window & Door Contractor has confirmed that they have allowed for DO7-DO8 are Schucco Doors including integrated Door Sill Drainage. They have also confirmed that they are using Aneeta Sashless Windows where specified."
>
> [Emphasis added]

[37] On 15 December 2016, Thallon Mole provided a construction quote to Mrs Morton.[45] Relevantly, on the second page of that construction quote, Item 4 refers to a "Detailed Trade Breakdown." Item 36 of that breakdown refers to "Windows Ext. Doors + Blinds" with a figure of $368,483.26 (inclusive of margin of 15 percent but excl. GST).[46] There is no individual breakdown of items.

[38] The Contract was executed by the parties on 16 December 2016.[47] In Item 1 of the Contract Schedule: the Fixed Price Component is $4,234,937.50 (incl. GST); the Prime Cost Items are $98,307 (incl. GST); and the Provisional Sums are $326,700 (incl. GST).[48] The Contract Price is the cumulative addition of those three sums and is $4,659,944.51 (incl. GST).

[39] The construction quote from Thallon Mole has been initialled by the parties and is part of the signed contractual documents that were tendered as being the relevant Contract.[49] I am satisfied and find that the construction quote is incorporated into the Contract. But as stated earlier, the figure of $368,483.26 (inclusive of margin of 15 percent but exclusive of GST) is not broken down to individual items in this quote – nor anywhere else in the Contract.

[40] Thallon Mole submitted that the final version of the Alliance Glass quote, which totalled $222,654.55 (excl. GST) formed a significant part of the $368,483.26 (excl. GST) **total cost** for Windows, Ext. Doors + Blinds. I accept that submission. The difference in these two figures (the sum of $145,828.71 (excl. GST)) relates to the blinds. But it is reasonable to infer (as I do) from the evidence, as to how the final version quote was elicited, that it contained an amount for the supply and installation of the Schucco doors and that it was used to calculate the total cost. It follows from this finding that I accept that an amount for the supply and installation

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43 Exhibit 26 p. 20088.
44 Ibid pp. 20086-20087.
45 A copy of this document is reproduced in the Contract at Exhibit 4 p. 220040 but was not tendered separately.
46 Exhibit 4 p. 220041.
47 Ibid.
48 Ibid p. 220020.
49 Ibid p. 220040.

of the Schucco doors forms part of the total cost for windows, external doors and blinds in the Contract.[50] But as per the analysis below under the heading "Applicable Rates or Prices in the Contract" - I am not satisfied what that amount was.

[41] On 2 June 2017 (around the time the structural slab was poured), Thallon Mole sent a Works Order for the installation of the aluminium windows and door works at the house to Alliance Glass.[51] The window and door site check at the house was scheduled for Monday 7 August 2017 and the exterior window and door install for Tuesday 5 September 2017.[52] It is instructive to observe that this letter referred to Thallon Mole being a few weeks ahead of the program with the potential to pick up more time.

[42] On 7 June 2017, Mr Mole and Mr Pendall signed a **subcontract agreement** dated 2 June 2017 for the "[s]upply & Installation of all Aluminium Windows and Doors including Schucco Doors, Aneeta Sashless Windows, Louvre Windows & Powered Clearstory Louvre Windows & any Flashings required" for a price of $179,054.55, (plus the Integrated Door Drainage Modules for all Doors Recessed into Floor) for a price of $8,500.[53] The total amount of this invoice was therefore $187,554.55 (excl. GST) or $206,310.01 (incl. GST). The version of this subcontract in evidence is initialled (apparently by Mr Pendall) at the bottom of each page including the appendix pages A to D. But most curiously, the version in evidence attaches an initialled version of the updated quotation (which itemised the Schucco doors as $48,000) which as discussed at paragraphs 87 to 93 below, was not created until 8 October 2017.[54] Mr Andrews accepted that the updated quote had at some date been electronically inserted into the subcontract agreement, and the original quote had been removed or written over.[55]

[43] On any view, the subcontract agreement was reproduced to convince Mrs Morton that the known costs of the Schucco doors at the time of the tender process (and when the Contract and the subcontract agreement were entered into), was $48,000.

[44] At the site check meeting in early September 2017, Mr Pendall and Mr McFarlane told Mr Mole that Capral could not supply a four and five panel door system, and that this had been explained to TSA previously. This was, according to Mr Mole, the first time Thallon Mole had any idea that there was an issue with the provision and installation of the two Schucco doors.[56] The written submissions on behalf of Mrs Morton suggest that Thallon Mole were aware of a potential issue and referred to some evidence of Mr Pendall to the effect that he told Mr Andrews (at the time the quotes were being prepared) that Capral or Schucco did not provide certification in Australia for the four and five door configurations.[57]

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50 MFI Z.

51 Exhibit 110; Exhibit 51.

52 Exhibit 51 p. 21017.

53 Exhibit 27.

54 When that updated quote was created on 8 October 2017 it did not bear the initials at the bottom of the page.

55 The original construction contract that contained the final version quote without the separate pricing for the Schucco doors was called for but not produced at trial as it was no longer in Thallon Mole's possession; T7-108, ll 25-46; T7-108, ll 20-26.

56 T1-56, ll 45-46.

57 T5-84, ll 20-25.

[45] I reject this submission and accept Mr Mole's evidence for three reasons:

(a) First, Mr Pendall's evidence on this point was vague. When the proposition (that he told Mr Andrews at the time the quotes were prepared that Capral or Schucco did not provide certification) was put to him he simply said, "we had a discussion about it yes". But he was not asked what that discussion was. For example, whether he spoke to Mr Andrews about the private certification.

(b) Secondly, later in his evidence Mr Pendall was adamant he could not remember exact dates, but he put the occasion he allegedly told Mr Andrews about the issue in the context of having had a conversation with Mr Stewart and Mr McFarlane at a site meeting when the slab went in.[58] That was well after the Contract was signed and the construction underway. This evidence is also supported by the (unchallenged) evidence in chief of Mr Mole (which I accept), that he first became aware that there was an issue with the use of Schucco doors being able to meet the design requirements in September 2017 when Thallon Mole went onsite with Mr McFarlane to measure.[59]

(c) Thirdly, there is no mention of there being any issue with the configuration (or for example as might be expected - of there being some additional certification costs associated with a private certification) in any of the correspondence between Mr Pendall, Mr Andrews and Thallon Mole at the time the quotes were being provided.

[46] It follows that I accept Mr Andrews' evidence that he was not told by Mr Pendall at the time he was liaising with him at the tender stage, that Capral did not have the ability to test or certify the four to five door configurations.[60] I therefore find that Thallon Mole was not aware of any potential issues with the two Schucco doors until early September 2017.

[47] Subsequently, on 8 September 2017 Mr McFarlane sent an email to Mr Pendall (which was forwarded to Thallon Mole) explaining that Capral would not supply the system as there were issues with design approval (lack of Australian testing) for the configuration.[61]

[48] Mr Rhodes' evidence was that he only learnt that Capral had some technical issues regarding the Schucco doors following a conversation with Mr McFarlane in early September 2017.[62] Around this time, Mr Rhodes also spoke to Mr Mole and confirmed that there were issues related to the design approval for the Schucco doors.[63] Mr Rhodes then sent the following email to Mr Andrews on 12 September 2017:[64]

> "I had a chat with Bruce regarding this yesterday.
>
> I spoke to Ian (Capral / Schucco rep) and voiced our disappointment that they are not able to meet the project requirements.

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58 T5-86, ll 33-35.
59 T1-56, ll 45-48; T1-57, ll 15-22.
60 T7-92, ll 26-46.
61 Exhibit 31.
62 T14-69, ll 12-15.
63 Exhibit 32.
64 Ibid.

> This is particularly disappointing considering we discussed the project in detail with them during the design phase. The design constraints seem to be changing weekly as well which is even more worrying.
>
> The original design constraint for the maximum door leaf sizes was 9m2, which we are comfortable we can achieve with 5 door panels. This latest email communication and subsequent discussion seems to be a u-turn on the original and latest site discussions and now requires 7 panels. As discussed with Bruce 5 door panels is really important to the overall design intent, not to mention the impacts that more door panels will have on the outrigger frames and glazing above.
>
> We are in the process of looking at alternative options for these doors as we believe that Schucco are now unable to provide a product fit for purpose and in line with the design intent."
>
> [Emphasis added]

[49] During his evidence in chief, Mr Rhodes emphasised (again) that his "immediate response was one of disappointment, having had spent so much time designing such a bespoke system for this house".[65] It is understandable, and I accept as a matter of common sense, that Mr Rhodes was genuinely disappointed particularly given his evidence about the importance of these doors in the design intent of the house.[66] It is surprising that there was no evidence from Mr Rhodes about the discussions referred to in this correspondence. But it is reasonable to assume (as I do) that Mr Rhodes had discussions with Mr McFarlane (during the design phase) about the ability of Schucco to deliver the doors in the four to five panel configurations. Such a conclusion is consistent with Mr Rhodes' acceptance of the proposition that it is reasonable to assume that if a product (such as the Schucco doors) is nominated in a tender and is expected to meet certain requirements - then the architect has worked through any necessary impediments during the design phase.[67] The necessity for discussions to have been had about the four and five door configuration is an obvious one given that Mr Rhodes knew in 2015 that Schucco had not tested such a configuration. That discussions were had is also consistent with Mr McFarlane's evidence that he had previously told TSA about the potential issues**.** Exactly what these discussions were is far more difficult to discern on the evidence.

[50] It is not apparent when the problem with the installation of the Schucco doors was first communicated to Mrs Morton. But there is evidence (which I accept) that it was at a site meeting on 28 September 2017. The progress report from Mr Mole following that meeting relevantly states as follows:[68]

> "Windows – there is an issue with the large windows. Sucho [sic] cannot do the large sliders. Currently we have a Sky Frame price which is substantially higher than the current quote for the entire metal window price. This would be a variation somewhere around

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65 T14-69, ll 35-45.
66 T14-61, ll 12-26.
67 T6-78, ll 45-48; T6-79, ll 1-7.
68 Exhibit 33.

> the vicinity of $180,000 + GST. Vitrocsa is pricing the window as well and I would expect that they will we substaincially [sic] more expensive than what we have allowed for. I cannot give you a figure of what this will be. [The next words are in red] Clients would like to see history from both architect and builder sides. Alliance Glass to provide history and info associated with the Sucho [sic] issue. Stating facts on what has happened, why and future costs. They would also like to understand what the actual costs of the original window was. Provide Vitrocsa price and the new Sucho [sic] cost."
>
> [Emphasis added]

[51] Again, on 28 September 2017, Mrs Morton emailed Mr Stewart (copying in Mr Wright and Mr Mole) asking for a quick drawing of what the seven sliders would look like compared with the five and for an outline of the advantages of the costlier Sky Frame (other than the sizing). She also requested a breakdown of the contract sum for the windows, showing what the sliding windows were costing.[69]

[52] At the same time various quotes for replacement doors were obtained by TSA.

[53] On 4 October 2017, Vitrocsa provided quotes of $152,599.26 (excl. GST) or $167,859.19 (incl. GST) and $286,166 (excl. GST) or $314,782.60 (incl. GST) plus a cost for tinting of around $11,000 (excl. GST).[70] But these quotes were not suitable, as they did not meet the performance requirements of UV-4.3/SHGC-0.53.[71] An updated quote of $325,706.96 (excl. GST) or $358,277.66 (incl. GST) which addressed this issue was obtained from Vitrocsa on 11 October 2017.[72] It is instructive that Mr Andrews expressly stated in the email attaching this quote, that the price did not include crane and glass suckers etc. which would be necessary due to the door's weight.

[54] On 6 October 2017, (I assume at the request of Mr Mole), Alliance Glass obtained a report from Ian Barnes, a consultant engineer, to assess the design mode and the glazing requirements for the large panels in doors D07 and D08. This report concluded that the glass that would be used in a system supported by mullions would be capable of withstanding the requisite wind pressures, provided it was situated in framing that was sufficiently strong.[73] A Form 15 Compliance Certificate for Building Design or Specification signed by Mr Barnes, also dated 6 October 2017, was tendered during the trial.[74] This document was not tendered for the truth of its contents but rather on the basis that as a matter of a fact Mrs Morton was provided a copy of this certificate by Mr Mole in November 2017.[75] Mrs Morton submitted (and I accept) that this was not a Form 15 Compliance Certificate in relation to the overall Quantum doors as a doors system. It was only a certificate in relation to Mr Barnes' report of 6 October 2017 which was limited to the glazing. No other Form 15 Compliance Certificate for Building Design or Specification, or

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69 Exhibit 34 p. 20166.
70 Exhibit 35.
71 Exhibit 36.
72 Exhibit 36.
73 Exhibit 37.
74 Exhibit 255.
75 T11-88 to T11-90.

individual report from Mr Barnes was produced in relation to the whole door system.[76]

[55] Subsequently, on 16 October 2017, Thallon Mole obtained a quote from Alliance Glass to reinforce the mullions on the Schucco sliding doors at a cost of $28,000 (excl. GST).[77] This amount (with a 15 percent mark-up) together with the updated quote of $48,000 became known as the **Quantum Door Quote.**[78] Thallon Mole contended that this proposal allowed the four and five panel Schucco doors to be used, provided they were reinforced.

[56] In the meantime, on 8 October 2017, Mr Andrews received an **updated quote** from Mr Pendall in response to his request for a breakdown of the amount for the Schucco doors in the final version quote, which was provided by Alliance Glass back in October 2016.[79] This document itemised the cost for the supply and installation of the doors at $48,000 plus GST.[80]

[57] Mr Mole accepted that at the time, he knew this updated quote was generated to be used as evidence to support Thallon Mole's claim for a credit of $55,200 being the $48,000 plus a 15 percent margin for the two doors.[81] He denied that he (personally) asked Mr Pendall to provide "a suitably low price for the Schuco [sic] doors" so Thallon Mole would not lose too much money.[82] I accept Mr Mole's evidence about this. The evidence was that it was Mr Andrews who dealt with Mr Pendall, and Mr Mole did not have any conversations with Mr Pendall about the Schucco doors either pre or post contract.[83]

[58] It is not entirely clear when, but it is reasonable to infer (as I do) that this updated quote was provided to Mrs Morton shortly afterwards.

[59] On 18 October 2017, two Vitrocsa quotes, as well as a quote from Skyframe, were provided to Mrs Morton.[84] The detail of that is set out in full in an email dated 18 October 2017 from Mr Mole to Mrs Morton and her father Greg Morton, which outlined all three options, but noted that there were potentially large lead times for both the Vitrocsa and Skyframe products.[85] That email proposed variations to the Contract for each proposed quote as follows:

(a) Variation No. V014, using Vitrocsa with an overall variation price of $351,299.30 (incl. GST); with an allowance for the previous Schucco doors of $55,200 (excl. GST), being the $48,000 (excl. GST) plus a 15 percent margin.

(b) Variation No. V015 using Skyframe with a price of $259,174.47 (incl. GST) with the same credit for the previous Schucco doors.

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76 It is instructive that the Plaintiff's Trial Submissions and oral submission do not make any reference to this exhibit.
77 Exhibit 38.
78 Exhibit 39 pp. 20160, 20167.
79 That is, a breakdown of the figures in Exhibit 50 p. 21016.
80 Exhibit 52.
81 T3-28, l 28. Note this calculation is exclusive of GST.
82 T3-45, ll 5-9.
83 T3-41, ll 39-46.
84 T2-7, ll 1-2.
85 Exhibit 39.

(c) Variation No. V016 using the Quantum doors with a price of $35,420 (incl. GST), based on the Alliance Glass proposal of 16 October 2017 for $32,200 (incl. GST).

[60] On 25 October 2017, Mr Stewart (as Mrs Morton's representative under the Contract) sent a response to Thallon Mole stating that Variation No. V016 was not accepted as a like for like solution under the Contract but Variation Nos. V014 and V015 were.[86]

[61] On 31 October 2017, a progress meeting was held at which the Quantum Door Quote was discussed.[87] Subsequently, on 2 November 2017, TSA sent a request for information.[88] On 14 November 2017, Thallon Mole provided Mrs Morton with a further engineering report from Ian Barnes (dated 13 November 2017), in respect of the Quantum Door Quote. This report gave an engineering assessment of the strength of the reinforced mullions against wind and assessed the vertical mullions as being sufficient to withstand the required wind loads.[89]

[62] On 15 November 2017, Mrs Morton directed TSA to direct Thallon Mole to proceed with the installation of the Vitrocsa doors at no additional cost, on the basis that the Quantum Door Quote was not a "like for like" solution.[90]

[63] On 19 December 2017, Thallon Mole sent Variation No. V025 for the Vitrocsa solution with a claimed variation in price of $154,873.02 (incl. GST) or $140,793.65 (excl. GST) to Mrs Morton.[91] This variation allowed a $55,200 (excl. GST) credit for the previous Schucco doors, comprising the updated quote amount of $48,000 (excl. GST) and a 15% percent markup. Additionally, costs were also given for craneage before building of $1,500 and for 3M Tinting of $16,330 (excl. GST).[92]

[64] On 21 December 2017, Mrs Morton (through her solicitor) sent an email disputing the costs of the variation. It stated that if Thallon Mole was unable to appropriately substantiate its variation claim, then she would use Condition 21.13 of the Contract to engage a Quantity Surveyor to make a binding determination on the value of the Schucco doors.[93]

[65] On 29 January 2018, Mrs Morton informed Thallon Mole that its refusal to comply with the instruction given in November 2017 to install the Vitrocsa doors would extend the construction period.[94]

[66] There was then a series of further communications in the new year. Most relevantly, on 13 February 2018, Mr Mole sent an email to Mr and Mrs Morton stating (among other things) as follows:[95]

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86 Exhibit 40. This letter also identified another acceptable Vitrocsa solution which would be deemed to be a like for like alternative and of a similar market value as the original specified door.

87 Exhibit 41.

88 Exhibit 42 p. 20190.

89 Ibid pp. 20192-20195.

90 Exhibit 43; Exhibit 44.

91 Exhibit 45.

92 This is as per Cooltone Tint Works Quote #10773 dated 20th October 2017 (before builder's markup).

93 Exhibit 46.

94 Exhibit 244; T11-4, l 44 to T11-5, l 9.

> "We have provided you with a cost of supply and installation of the newly selected Vitrosca [sic] doors. (I understand that this selection is a forced change). These doors were not part of the original contract scope and are substitution for what was specified. We have provided a number of options. We have no problem with your Vitrosca [sic] selection and supplying a Quantum door as an option was only provided as it was the most like for like. (actually identical). The fact that you do not agree with the value of our door quote is the problem. This was supplied during the tender phase is not up for debate. It is a quote, we have a contract for the supply and installation for this amount. The cost of these doors was spelled out during the VM stage, but nothing was raised when this suited that the price was reasonably cheap, and the overall cost of the bill was kept down.
>
> We disagree that we are failing to accommodate a resolution. We do not believe that Clause 21.13 is applicable to this dispute as the door credit is the point of contention. We have a quote and contract for the doors and therefore its value does not need to be valued. We already know its value. However, in an effort to resolve the situation we are optimistic about an opportunity to resolve this. We have a meeting Wednesday to discuss a resolution. This was discussed on Tuesday (7/2) and Wednesday (8/2) last week with the QS. This was a request by Louise to Duncan Ellis under clause 21.13…"
>
> [Emphasis added]

[67] This email contained a number of factual assertions that were not accurate because at the time he wrote the email, Mr Mole well knew that:

(a) No quote of $48,000 for the Schucco doors was provided to Mrs Morton during the tender phase.

(b) Thallon Mole was not given a quote for the Schucco doors as a discrete individual item before the Contract was entered into.

(c) The cost of the Schucco doors was not spelled out during the Value Management stage. Further details of costs were sought by TSA during the Value Management including for the doors, but those details were not provided. Rather, all that was provided by Thallon Mole in the contract clarification was that the subcontractor had confirmed that the doors would be supplied.

(d) The original pre-contractual quote Thallon Mole had obtained from Alliance Glass did not contain a quote of $48,000 for the doors.

(e) The updated quote and the Contract with Alliance Glass (dated 7 June 2017) had been manipulated by Thallon Mole.

[68] Subsequent discussions at Mr Stewart's office did not resolve the issue.

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[95] Exhibit 47.

[69] On 15 February 2018, Mr Mole sent Mrs Morton an email as follows: [96]

> "Louise, I am unsure if you are going to accept the meeting result yesterday, and in an attempt to be active pursuit of resolution we would be happy to use any of the guys from Mitchell Bradtman [sic]."

[70] In February 2018, Thallon Mole submitted an extension of time claim (EOT No. 015) for 5 days, which was rejected by Mrs Morton on 5 March 2018. The correspondence of 5 March stated relevantly as follows:[97]

> "If there is a critical delay, it has not been caused by us (the Owners). The lack of availability of the Schucco doors to be installed at DO7 and DO8 was not caused by either party. As there is no variation in place for the replacement of the Schucco doors at DO7 and DO8, TMG bears the risk to ensure that the critical path is not impacted by sourcing and installing the suitable replacement. TMG caused the delay through its conduct in the resolution of the dispute regarding DO7 and DO8. TMG has been aware of the lack of availability of the Schucco doors and our preference for the Vitrosca doors since at least October 2017." [Emphasis added]

[71] On 20 February 2018, Mrs Morton wrote to Gary Thompson at Mitchell Brandtman and requested that a valuation be provided of the proposed variation.[98]

[72] On 5 April 2019, Thallon Mole wrote to Mrs Morton alleging the cause of the delay was Mrs Morton's refusal to agree to the variation to the doors, ultimately removing those doors from Thallon Mole's scope of work.[99]

[73] On 6 April 2018, Mrs Morton formally appointed Mr Thompson to conduct a determination pursuant to condition 21 of the Contract.[100] Mr Thompson then produced a Condition 21.13 **Determination** in relation to Variation No. V025,[101] determining that the value of the Schucco doors should be treated as $140,013 (excl. GST). This sum did not take into account the tinting, or the lifting and craneage, as they were dealt with as separate items. If the work was to be undertaken by Thallon Mole, the determination was that Variation No. V025 ought to have been a net figure of $14,474.20 (excl. GST).

[74] On 13 April 2018, Thallon Mole declined to perform the work in accordance with the Determination.[102]

[75] On 16 April 2018, Mrs Morton deleted the scope of work from the Contract.[103]

[76] On 20 April 2018, Mr Mole sent an email to Mr Thompson, Mr Stewart and Mrs Morton rejecting the Determination and stating relevantly as follows:[104]

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96 Exhibit 242.
97 Exhibit 245.
98 Exhibit 115.
99 Exhibit 81.
100 Exhibit 116.
101 Ibid p. 20865.
102 Exhibit 118.
103 Exhibit 119.

> "We have attached the signed contract with alliance glass which reflects the quoted amount. This amount was used in the contract along with timber windows/doors and blinds. The total of these amounts were itemized in the signed contract with the client (item 36 of the trade breakdown) we would be happy to provide the other subcontractors and purchase orders so you understand that these figures match our trade breakdown. The Alliance glass contract is almost complete except the doors in question.
>
> As the clients have already agreed to the value of the specified doors in the Head contract, the value of these doors should be the nominated amount in the contract."
>
> [Emphasis added]

[77] Again, this email contained some assertions that were not accurate because at the time he wrote the email, Mr Mole well knew that:

(a) He was attaching the Contract with Alliance Glass that had been reconstructed or manipulated since its execution on 7 June 2017 to include the updated quote that only came into existence on 8 October 2017; and

(b) Mrs Morton had not contractually agreed the value of the Schucco doors to be $48,000.

Relevant Provisions of the Contract

[78] The following conditions of the Contract are relevant to the Schucco doors issue.[105]

> **GENERAL CONDITIONS OF QBCC New Home Construction Contract**
>
> **GENERAL CONDITIONS**
>
> 1 Definitions
>
> 1.1 In this Contract, unless the context otherwise requires, words and expressions used have the meaning defined or explained below:
>
> ...
>
> (cc) "**work under this contract"** means all that work necessary to build the Works in accordance with the Plans and Specifications and this Contract.
>
> (dd) "**Works"** means the work described in Schedule Item 3 to be built in accordance with this Contract, including variations authorised under the Contract,

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104 Exhibit 117.
105 Exhibit 4.

and which by the Contract is to be handed over to the Owner.

...

(e) "**Contract Price"** means the total price of the Works stated in Schedule Item 1. Including the Fixed Price Component and any allowances for Prime Costs Items and Provision Sums, as adjusted under this Contract.

(l) "**Fixed Price Component"** means the sum stated in Schedule Item 1(a) of the Contract Price being the sum for which the Contractor must supply, in accordance with this Contract, everything necessary for the proper completion of the Works other than the allowances (if any) for Prime Costs Items or Provisional Sum.

(w) **"Quantity Surveyor"** means [insert details of agreed QS here] or such other person as the parties agree in writing shall be the Quantity Surveyor.

...

3.2 The Contractor must, unless the Contract expressly provides otherwise, supply the Contractor's costs and expense, everything necessary for the proper completion of the **Works** and for the performance of the **work under this Contract.**

…

21 Variations

21.1 The **work under this Contract** may be varied by way of an increase, decrease or substitution of **work under this Contract** agreed between the Contractor and the Owner provided that, before work commences, the details of the variation are put in writing in a Variation Document signed by both parties and initialled as necessary by the Owner.

21.1A Notwithstanding Condition 21.1, the Owner may at any time direct a variation to omit any part of the **Works**. Such a variation will be documented in writing in a Variation Document signed by the Owner.

...

21.2 The Variation Document may be a QBCC Form 5 - *Variation Document*, or other similar appropriate document, with the particulars completed in accordance with the requirements of Schedule 1B of the *QBCC Act*, signed by both parties and initialled as necessary by the Owner.

21.3 The Variation Document complies with the requirements of Schedule 1B of the *QBCC Act* if it:

(a) is readily legible; and

(b) describes the variation, and

(c) states the date of the request for the variation; and

(d) if the variation will result in a delay affecting the subject work – states the Contractor's reasonable estimate for the period of delay; and

(e) states the change to the **Contract Price** because of the variation, or the method for calculating the change to the **Contract Price** because of the variation; and

(f) if the variation results in an increase in the **Contract Price** – states when the increase is to be paid; and

(g) if the variation results in a decrease in the **Contract Price** – states when the decrease is to be accounted for.

21.3A In addition to the information required by Condition 21.3, the Variation Document must also include a detailed breakdown of the value of the variation calculated in accordance with Condition 21.12.

…

PRICING FOR VARIATION

21.12 All variations must be valued using the following order of precedence:

(a) prior agreement of the parties;

(b) applicable rates or prices in the Contract;

(c) reasonable rates or prices, which shall include a reasonable amount for profit and overheads, and any deduction shall include a reasonable amount for profit but not overheads."

21.13 Disputes

(a) Any disputes regarding the value of a variation will be determined by the Quantity Surveyor (whom may take into account quotes for the work from reputable contractors provided by the Owner).

(b) Within 2 business days of receiving the Quantity Surveyor's determination of the value of the variation, the Contractor must notify the Owner if it is willing to perform the variation for the amount determined by the Quantity Surveyor.

(c) If the Contractor does not provide such notice within 2 Business Days, or indicates it is unwilling to perform the

variation, the Owner may engage a third party to perform the variation (with not liability to compensate the Contractor). The Contractor is not responsible for work performed by any third party engaged by the Owner.

25 Dispute resolution

25.1 If a dispute under the Contract arises between the parties, either party may give the other party a written notice of dispute adequately identifying and providing details of the dispute.

25.2 …Subject to Condition 25.2A, if a dispute is not resolved within 10 **business days** of the receipt of the notice of dispute, either party may refer the matter to a dispute resolution process administered by the Queensland Building and Construction Commission.

25.2A If the dispute is in relation to a progress claim submitted by the Contractor, either party may (instead of referring the matter to the dispute resolution process administered by the Queensland Building and Construction Commission, or following a determination under the dispute resolution process administered by the Queensland Building and Construction Commission) refer the matter to the **Quantity Surveyor** for a determination. Unless otherwise agreed by the parties, the cost of engaging the **Quantity Surveyor** will be borne by the Owner.

25.2B The process referred to in Condition 25.2A may be used prior to or following the dispute resolution process administered by the Queensland Building and Construction Commission.

25.2C The determination of the **Quantity Surveyor** will be binding upon the parties unless and until overturned by a decision of a court or tribunal of competent jurisdiction.

25.2D If the Quantity **Surveyor** has made a determination on a disputed matter under subclause 25.2A, neither party shall be entitled to refer that matter to the dispute resolution process administered by the Queensland Building and Construction Commission unless both parties agree in writing to do so.

25.3 A party will not commence any proceedings in respect of the dispute in any court or tribunal of competent jurisdiction until the dispute resolution process referred to in Condition 25.2 is at an end or **the Quantity Surveyor** has made a determination under subclause 25.2A.

25.4 Where a dispute has arisen under or in connection with this Contract, including Condition 23.4, the Contractor

> must proceed diligently with the **work under this Contract** notwithstanding the existence of the dispute.

Analysis

[79] As the factual overview above reveals, by 16 April 2018, the parties had utilised the Condition 21.13 mechanism in the Contract. Under Condition 21.13(c), Thallon Mole was entitled to opt out of the performance of the variation the subject of the Determination as it chose to do. Under Condition 21.13(c), Mrs Morton was entitled to engage a third party to perform the variation as she chose to do.

[80] To value a variation made under Condition 21, Condition 21.12 provides as follows:

> All variations must be valued using the following order of precedence:
>
> (a) Prior agreement of the parties;
>
> (b) Applicable rates or prices in the Contract; and
>
> (c) Reasonable rates or prices, which shall include a reasonable amount for profit but not overheads.

[81] There was no prior agreement between the parties, so the next question is whether there were any applicable rates or prices in the Contract.

Applicable Rates or Prices in the Contract

[82] Thallon Mole submitted that the applicable rate or price in the Contract for the Schucco doors is $48,000 plus its 15 percent margin.

[83] Thallon Mole's reasoning in maintaining this submission is underpinned by two overlapping propositions:

(a) First, "there cannot be any serious contention that the plaintiff (Thallon Mole) quoted on the basis of any price for the Schüco [sic] doors, other than the $48,000 priced by Alliance Glass".

(b) Secondly, the evidence "is clear" that the final version quote which totalled $222,654.55 (excl. GST), that was provided by Alliance Glass pre-contract, was formulated on the basis that it would charge Thallon Mole $48,000 plus GST for the doors.

[84] Neither proposition is supported by the evidence.

[85] The starting point is uncontroversial. A costing of $48,000 for the Schucco doors is not itemised in any pre-contract quote from Alliance Glass or in the Contract.

[86] There is no evidence that a specific cost allowance for the Schucco doors of $48,000 was made by Thallon Mole during the tender process. Indeed, a breakdown of the costs of the Schucco doors (as they were specified in the Contract) was never mentioned, itemised or separately quoted by or to Thallon Mole during the tender process. Mr Andrews' evidence, (which I accept), is that he did not ask and was not

given a separate price for the two Schucco doors.[106] Although, he clarified that these doors had been included in the final version quote.

[87] Mr Mole's evidence (which I also accept), is that Thallon Mole were not privy to the cost of the Schucco doors at this time.[107] He explained that he did not know the individual price of any door or window because with a "lump price" it was unnecessary to pull it all apart and price it individually.[108] Mr Mole agreed that TSA and Mrs Morton were not told at the time that Thallon Mole did not know what the cost of the doors were. He commented under cross examination that "they didn't ask me".[109] The latter is not correct of course, as prior to the Contract being executed, Mr Andrews was asked for a breakdown of individual items, but one was not given.[110]

[88] The figure of $48,000 first emerged after the Contract was signed when the updated quote was provided by Mr Pendall in October 2017. Thallon Mole submitted that "factually speaking" that is the amount which it allowed under the Contract for the supply and installation of the Schucco doors. I reject this submission. As the above analysis reveals, no one from Thallon Mole knew what amount had been allowed. Even when working backwards in an attempt to work out what the balance is after invoices for other works are paid, the remaining balance is not $48,000.

[89] Mrs Morton's written submissions referred to the updated quote as the "fabricated quote".[111] In other words, this is a suggestion that it was created to deceive. At first blush, there is some force to such a submission as the quote bears the same date, quote number and total amount as the final version quote of $244,920.01 (incl. GST), which was created over a year earlier in late October 2016, but with two material differences:

(a) First, it contains a critical detail that does not appear in the final version quote - namely the inclusion of a separate line item for the two Schucco doors with an individual cost of $48,000 (excl. GST); and

(b) Secondly, whilst the total amount has not been changed, the figure of $179,054.55 (excl. GST) for the "Quotation for the supply and installation of aluminium windows and doors including schucco including louvre windows and revised changes" in the final version quote, has been changed to $131,054.55 to allow for the Schucco doors cost of $48,000 to be individually identified.

[90] It follows that it is necessary at this point to carefully consider the evidence about the updated quote, in particular its identification of a specific amount for the Schucco doors of $48,000.

[91] The covering email dated 8 October 2017 (from Mr Pendall to Mr Andrews) attaching the updated quote (as follows) is a good starting point. It is most

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106 T7-98, ll 46-47; T7-99, ll 1-10.
107 T3-28, ll 1-15.
108 T3-28, ll 32-34.
109 T3-28, ll 1-15,
110 Exhibit 26 pp. 20086-20088.
111 Defendant's Trial Submissions at [39].

suggestive of there being a reconstruction and lends further credence to the description of fabrication proffered on behalf of Mrs Morton:[112]

> "Mate this is a cut and paste quote, the girls won't let me near MYOB!!!! [don't know why it's not like I will stuff it up] so to get you this for Monday morning. i had to slice and dice, but I will get Julie to fix it in the system for you on Monday." [Emphasis added]

[92] There was no evidence from Mr Pendall that at the time of the tender process or pre-contract, that he had actually formulated the costings for the supply and installation of the two Schucco doors at $48,000. Further, Mr Pendall's evidence about how he came to the figure of $48,000 (in October 2017) was unconvincing for the following reasons:

(a) First, he accepted that prior to October 2017 he had never provided Thallon Mole a quote that was broken up into elements that showed the Schucco doors specifically.[113] The first time he "derived" the figure of $48,000 for the two Schucco doors was in October 2017;[114]

(b) Secondly, he referred to having to go back through his file to see what he quoted for the Schucco products – and that he had it on hand and on file.[115] But, it is not at all clear on the evidence what documents he was referring to or how he then came up with the figure of $48,000;

(c) Thirdly, the total of the invoices paid to Alliance Glass by Thallon Mole was $56,039 (excl. GST).[116] Mr Pendall was then asked to assume that the amount paid to other subcontractors to complete the Alliance Glass scope of work was $69,500 and the only outstanding work related to the Schucco doors.[117] Given that the component of the final version quote that included the doors (including the Aneeta sashless windows) was $187,154.55 (excl. GST), the balance of the quote not accounted for is $61,614.81 (not $48,000); and

(d) Fourthly, Mr Pendall's evidence that he provided the Schucco doors to Thallon Mole "virtually at cost"[118] and that he was "virtually giving them (the doors) away"[119] because he was seeking to be a market leader in the supply of the doors was a retrospective reflection and difficult to accept as a matter of common sense, because:[120]

    (i) There is no evidence of what the "cost price" of the four and five panel Schucco doors were;

    (ii) This evidence does not adequately address that the initial request for the quote for the Schucco doors was to include other things such as onsite glazing (if applicable), cranage, flashing and delivery; and

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112 Exhibit 52 p. 21027.
113 T5-77, ll 36-40; T5-86, ll 19-21.
114 T5-77, ll 42-43.
115 T5-108, ll 40-45.
116 This is the total of invoices (Exhibits 177, 178 &179) (excl. GST).
117 It was not clear, but I assume for consistency this figure was excluding GST.
118 T5-77, l 43.
119 T5-96, ll 35-36.
120 T5-96, ll 15-36.

(iii) It is reasonable to assume (as I do) that if Mr Pendall was offering such a good deal, he would have told someone from Thallon Mole at the time. There is no evidence that he did.

[93] Given the circumstances and the way in which it was created (as I have outlined above), I am not satisfied that the updated quote for $48,000 is a reliable quote for the Schucco doors.

[94] I also find on the above analysis that:

(a) The updated quote itemising the costs for the supply of the Schucco doors at $48,000 was a retrospective reconstruction and is not the applicable rate or price in the Contract for the Schucco doors; and

(b) There is no individual or identifiable amount that can be identified as the applicable rate or price in the Contract for the purpose of Condition 21.12.

Reasonable Rates or Prices under the Contract

[95] It is clear on a plain reading of Condition 21.12 that what is called for is a valuation process that uses "reasonable rates or prices".

[96] In *Civil Mining Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85, Flanagan J considered a similar valuation clause to the present, making the following relevant observations: [121]

> "…a reasonable rate is assessed by having regard to what a party would have had to pay under a normal commercial arrangement and to the cost of the work actually performed." [Emphasis added]

[97] The cost of the work actually performed has been said to be relevant to the assessment of the reasonable rate but not necessarily determinative.[122]

[98] It follows that it is relevant but not determinative to observe at this point that the work actually performed for D07 and D08 was the supply and installation of Vitrocsa doors - not Schucco doors. The price for the Vitrocsa doors installed was $152,599.26 (excl. GST) which became $175,489.15 (excl. GST) with a 15 percent profit markup. While the Vitrocsa cost gives some idea of the cost of the doors with these four and five leaf configurations, it cannot be overlooked that the evidence was that whilst both are luxury doors, Vitrocsa doors are considered more so, and therefore are more expensive than Schucco doors. However, Mrs Morton does not seek to claim the extra cost of the Vitrocsa doors over what she says is the reasonable rate or price for the Schucco doors.

[99] Thallon Mole submitted that the reasonable rate or price for the doors is the sum of $48,000, or in the alternative the Quantum Door Quote of $76,000 (being $48,000 plus the $28,000), plus a margin. It did not call any expert opinion on this issue and submitted that the Brandtman Determination of a reasonable rate or price of $140,013 was either irrelevant or wrong. Mrs Morton relies on the Determination

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121 *Civil Mining & Construction Pty Ltd* v *Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85, 67 [226]; referring with approval to the observations of Habersberger J in *Danidale Pty Ltd* v *Abigroup Contractors Pty Ltd* [2007] VSC 391, [127].

122 Danidale Pty Ltd v Abigroup Contractors Pty Ltd [2007] VSC 391, [127].

figure as being a reasonable rate or price but submitted that the Contract Price should be further reduced on account of other works which were not within the scope of what was contained in that valuation.

[100] Mrs Morton called Michael Gilligan, a certified Quantity Surveyor with the Australian Institute of Quantity Surveyors as an expert witness at trial. He had over 35 years' experience in the construction industry and 15 years acting in the role of an expert witness at trial. Mr Gilligan produced a written report about the valuation process provided in Condition 21.12 of the Contract.[123] His ultimate conclusion was that the 2015 quote from Schucco of $140,013 (excl. GST) was a fair and reasonable price for the door component but that this amount did not include tinted glass or craneage as it ought.[124]

The $48,000 Quote or the Quantum Door Quote

[101] Given my earlier findings, both options submitted by Thallon Mole fail at inception. The first because it relies on a quote I have found to be unreliable. The second because it is underpinned by that quote.

[102] Even if I am wrong and regard is to be had to the $48,000, the following evidence of Mr Pendall during his examination in chief is most apposite:[125]

> "And how did you derive the figure $48,000 for the two Schucco Doors? –
>
> I – I basically did the doors – the Schucco components at – virtually at cost, because they were brand new to the market and I could see they were going to be a really bigger seller with the high-end clients. So I thought from a marketing point of view I'd make my money virtually 100-fold just with the exposure just from the fir – the very first – I believe that Otway was the very first residential property Schüco [sic] was going to be installed in in Queensland." [Emphasis added]

[103] It follows from this evidence that the rate or price of $48,000 being quoted by Mr Pendall was clearly not a normal commercial rate or price. It would, as Mrs Morton submitted, have been an unreasonable one given in the hope of "getting profit 100-fold" on future jobs.[126]

[104] Mr Gilligan's evidence (which I accept) is that preferential prices and deals between suppliers in the building industry are relatively common. I also accept his evidence that these prices may be relevant to determining what the reasonable market price of a particular product is. But whether such a price is relevant will depend on the facts.[127] On the facts of this case, I share Mr Gilligan's scepticism in "struggling to accept" that the amount of $48,000 (excl. GST) could be categorised as a genuine

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123 Report dated 29 March 2021; Exhibit 281.
124 Exhibit 281 [101]-[103].
125 T5-77, l 42 to T5-78, l 2.
126 Defendant's Trial Submissions at [120].
127 It follows that I do not accept Mr Thompson's evidence (T14-98, l 23-46) that preferential pricing is always excluded as a factor under the Condition 21.12 assessment. But I accept the $48,000 price in this case should be.

preferential price. It was in effect a 67 percent discount - such a discount Mr Gilligan had never seen before.[128]

[105] It also follows from my findings at paragraph 100 above that it is irrelevant that Mr Gilligan did not take the Quantum Door Quote into account in his assessment.[129]

Reasonable Rate or Price for the Two Doors

[106] Mr Gilligan reviewed historical data sources for luxury glass and large moveable glass doors and panels. His report identified the following historical data for such doors:

(a) Mitchell Brandtman's historical cost data rates for luxury style glass doors were at a rate in the vicinity of $1,327/m2;[130]

(b) The Rider Levett Bucknall's (Mr Gilligan's employer) historical costs data rate of $1,400 - $1,600/m2 was for large moveable glass doors / panels; and

(c) Rawlinsons' Australian Construction Handbook 2017 (with pricing as at December 2016) costs rate was $1,750 - $2,050/m2 for "fully glazed operable wall with 10/12mm clear toughened glass in panels 800/1300mm wide x 3000mm maximum height, hung on overhead track, including pass door and hardware."[131]

[107] Based on the uncontroversial fact that the two Schucco doors measure a total area of approximately 86m2, Mr Gilligan then set out the overall costs of glazed doors based on the three benchmarks set out above. They can be summarized as follows:

(a) Mitchell Brandtman's historical data rate $111,468 (excl. GST);

(b) The Rider Levett Buckhall's historical data rate $120,400 - $137,600 (excl. GST); and

(c) Rawlinsons' Australian Construction Handbook 2017 - $150,500 - $176,300 (excl. GST).

[108] Mr Gilligan identified that these benchmark price ranges included: the supply and installation of the doors; the supply of the toughened glass; craneage and other lifting devices; and the supply and installation of a safety decal across all glass panels.[132] He also identified that these benchmark price ranges did not include: the supply and installation of a solar film for energy efficiency requirements; the supply and installation of a supporting frame for the head track to the doors and panels; the creation of a recess in the floor finish for the door sill track and subsill including waterproofing; integrated drainage modules; and drainage pipework from the door sill.[133]

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128 T15-20, ll 25-31; See also Exhibit 281 p. 280360 [100]. Mr Gilligan noted that the quote of $48,000 (excl. GST) equated to a rate of $558.14/$m^2$ and this cost and rate was significantly below the range of the above benchmark rates and costs so was not a fair and reasonable rate and cost.

129 Although for different reasons - Mr Gilligan identified that he had seen material which identified that the Quantum Door Quote was not a like for like solution and on that basis, he had not taken them into account.

130 Exhibit 116 (Determination) [10].

131 The relevant pages from the Rawlinson Handbook are at Exhibit 281, Appendix N pp. 130-131.

132 Exhibit 281 p. 280360 [95].

133 Ibid p. 280360 [97].

[109] Using the benchmark figures he had calculated; Mr Gilligan assessed the rates applicable to some of the relevant quotes as follows:

(a) The Vitrocsa Quote of $152,599.26 (excl. GST) equated to a rate of $1,774.41/m2.[134]

(b) The Alliance Glass Quote of $48,000 (excl. GST) equated to a rate of $558.14/m2.[135]

(c) The 2015 Schucco Doors Quote of $140,013 (excl. GST) which equated to a rate of $1,628.06/m2.[136]

[110] Mr Gilligan then concluded that the Alliance Glass Quote was significantly below the range of the above benchmark rates and costs and therefore not a "fair and reasonable" rate. It is instructive at this point to observe that the evidence of Mr Thompson was that he would average out quotes, excluding an exceptionally high or low price as part of that process.[137]

[111] Mr Gilligan also concluded that options (a) and (c) in paragraph 107 above, fell within the range of benchmark rates and costs and were a "fair and reasonable" rate and cost.[138]

[112] Thallon Mole criticised the approaches of Mr Gilligan and Mr Thompson on two bases:

(a) First, they looked at benchmark prices for the purposes of assessing a reasonable rate and they did not give any weight to the range of quotations that were in fact received by the parties for the Schucco doors;[139] and

(b) Secondly, the range of pricing they used was not specific to a particular panel size (i.e., the pricing history was not specific to door systems with exactly the same number of panels - it was just for large glass doors).

[113] There is some force to aspects of this submission by Thallon Mole.

[114] The starting point is that under Condition 21.13(a) of the Contract, a Quantity Surveyor conducting the valuation assessment under Condition 21.12 is expressly empowered to take into account quotes received from reputable contractors provided by the Owner. Thallon Mole relied on the following quotes for the Schucco doors as being relevant to the assessment of reasonable rates or prices:[140]

(a) What it described as the "original Alliance price" of $48,000;

(b) The price of those doors, reinforced by the additional engineering work of $76,000 (but which Thallon Mole was willing to provide for $48,000);

(c) A price of around $85,000 (plus a cost for tinting compliant glass);[141]

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134 Ibid p. 280360 [99].
135 Ibid p. 280360 [100].
136 Ibid p. 280361 [101].
137 T14-92, ll 26-40.
138 Exhibit 281 p. 280361 [99], [101].
139 Plaintiff's Trial Submissions at [133].
140 Plaintiff's Trial Submissions at [130].
141 Exhibit 272 p. 20206.

(d) A price of $115,740 (with compliant glass);[142] and

(e) A price of $140,013 from Central Glass and Aluminium (exclusive of energy efficient glass).[143]

[115] The first two quotes were not obtained by Mrs Morton and in any event are not reliable for the reasons I have discussed earlier. But I accept that the other three quotes need to be considered.

[116] On 2 November 2017, Central Glass and Aluminium sent Mr Rhodes two quotes in relation to a six and seven leaf Schucco door. Prices of $85,082 (excl. GST) and $89,755 (excl. GST) were given. These prices excluded cranage and tinting to meet the energy requirements.

[117] The second quote from Central Glass and Aluminium is dated 16 November 2017 and is for $115,740 (excl. GST). Again, this quote is for a six and seven leaf set of Schucco doors but with increased height measurements than the quote from a few weeks earlier. The glass on this quote is Glazed HL11 E 10.38 comfort plus neutral with different efficiency ratings. Under cross examination Mr Gilligan said the comfort plus glass quoted, was not a 12mm toughened glass necessary for the four leaf and five leaf panel; and did not meet the energy efficiency requirements.[144] The quote expressly excluded cranage, and engineering. The latter, was expressly flagged as necessary "to verify the product and its suitability before we can move ahead any further with this solution."[145]

[118] Under cross examination Mr Gilligan rejected these quotes as being a reasonable comparison (in terms of being treated as like for like solutions) because he considered them to be "outside of the benchmark range that – that [SIC] are based on lots and lots of projects."[146] It is correct that the two quotes of 2 November 2017 are outside the benchmarks, but I do not accept Mr Gilligan's rejection of the 16 November 2017 quote for $115,740 on that basis. It is less than the range in paragraph 106(a) above and not too far off the range in 107(a), both of which are relevant to observe included cranage which this quote does not.[147]

[119] The price that Mr Gilligan ultimately accepted as reasonable was the price of $140,013 (excl. GST). This being the indicative budget from the Central Glass and Aluminium quote of 30 October for a five and six leaf door. It is instructive to observe that this quote was for a 10mm standard clear glass (not the 12mm glass Mr Gilligan said was necessary for four to five panelled doors), and that it does not include cranage or meet energy requirements. This quote too was relevantly qualified by a pending request to Schucco engineering.

[120] The main difference between the quotes for $140,013 and $115,740 (apart from their dates) appears to be that the former is a quote for doors with one less leaf on each door. One explanation for the price difference may be the difference in leaf panel numbers. This is potentially relevant, as the evidence (which I accept) is that

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142 Ibid p. 20205.
143 Exhibit 278 p. 20013.
144 T15-9, ll 29-33; T15-9, ll 38-46.
145 Exhibit 272 p. 20204.
146 T15-10, ll 38-46; T15-11, ll 1-2.
147 Exhibit 281 p. 280360 [94].

as glass moves to fewer leafed doors, thicker glass is required and this increases the price.[148] But Mr Gilligan did not make any investigations about this in relation to the $115,740 quote and regardless, the $140,013 quote does not use 12mm glass but rather 10mm glass. It follows that there appears to be no discernible difference in these quotes apart from their point in time.

[121] The valuation under the Contract requires an assessment of reasonable rates or prices (it does not use the word fair), it is not clear why Mr Gilligan used this language on occasions, as it is not necessary or relevant to the valuation.[149] Such a process is not an exact science and reasonable minds may differ as to what is a reasonable rate or price for the doors. But in my view, more weight should have been given to the more recent quotes for the Schucco doors – particularly the $115,740 quote of 16 November 2017, given this quote was just slightly above the $111,468 (excl. GST) price drawn from the Brandtman's historical cost data rates for luxury style glass doors.

[122] I therefore find that both Mr Thompson and Mr Gilligan erred in concluding that the reasonable rate price for the deletion of the Schucco doors was the highest of the quotes – namely $140,013. In doing so, they overlooked a proper consideration of the more recent quote.[150]

[123] In the circumstances of this case, I find that the price amount of $115,740 (excl. GST) is a reasonable rate or price for the D07 and D08 Schucco doors in terms of a negative variation.

Additional Claimed Reductions in the Contract Price

[124] In addition to the cost of the doors, Mrs Morton claims that further deductions should be made in valuing the variation.

Window Tinting

[125] First, Mrs Morton claims that there should be a reduction on account of window tinting, in the sum of $16,330.[151]

[126] I reject this submission. Mrs Morton submitted that the Schucco doors would always have been obliged to meet energy efficiency. That is correct, but there was no cogent evidence that that Schucco door system needed a film to achieve those requirements. Both Mr Thompson and Mr Gilligan assumed that tinting was required,[152] but Mr Gilligan accepted under cross examination that he did not know

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148 T15-9, ll 29-33.

149 See Exhibit 281 pp. 280360-280361 [99]-[101]. For example, I expect that Thallon Mole might not consider it "fair" that ultimately in this case the reasonable price for the Schucco doors has been found to be a figure not much less than the total figure it quoted of $179,054.55 (excl. GST) for "the supply and installation of aluminium window and doors including schuco [sic]". But that is not the relevant test or process under Clause 21.12 of the Contract.

150 In reaching this view, I have considered that Scott Harris Constructions' tender submission of 31 October 2016 had a provisional sum figure of $140,000 (Exhibit 279) and that Mr Rhodes understood this to be their provisional sum tender amount for the Schucco Doors four and five leaf configuration (T14-67, l 1-26). But this is a stand-alone figure without any relevant detail or breakdown and so I have afforded it little weight.

151 SADCC at [16](a)(ii).

152 Exhibit 116 pp. 20864-20865 [18]-[25]; Exhibit 281 p. 280361 [108]-[113].

whether or not the glass that was going to be supplied with the original doors met the energy efficiency requirements.

[127] Mrs Morton also pointed to the fact that Thallon Mole included an amount for window tinting in Variation No. V025. But that submission overlooks that such an allowance was made because the Vitrocsa doors required a film to meet the energy efficiency requirements, and so the proposal was to vary the contract to include that additional item.

[128] For the purposes of deciding on the value of a variation which involves omitting items from the Contract, I accept Thallon Mole's submission that what must be removed is what was in fact required to be installed. The instructions from TSA upon which Thallon Mole elicited a quote for the Schucco doors from Alliance Glass on 6 October 2016, reveal that it was not envisaged that tinting was necessary for the Schucco doors. It was only envisaged that the glass needed to comply with the energy efficient report. As can be seen from the instructions, there was no separate request for an allowance for tinting to be made (whereas it was expressly requested that allowances for other things be included).[153] In other words, had the Schucco system been used, no tinting to the windows was required, because the Schucco door, together with the specified glass, met the energy efficiency requirements of the Contract.

[129] I am therefore not satisfied that Thallon Mole was under an obligation to install window tinting. This finding is consistent with the evidence of Mr Mole, Mr Andrews and Mr Pendall.[154]

[130] Overall, I am not satisfied that a claim for a further reduction on account of window tinting has been made out by Mrs Morton.

Lift and Cranage

[131] Mrs Morton claimed an entitlement to a reduction in the Contract price of $1,500 on account of crane costs.[155]

[132] I reject this claim. Again, the issue turns on the value of the item being removed from the Contract. Contrary to the assumption made by Mr Gilligan, the evidence was that the final version quote included any necessary cranage costs. Accordingly, this cost is already included.[156]

Decal, Waterproofing and Drainage

[133] Mrs Morton claims an entitlement to a reduction in the Contract price of three categories of other work related to the installation of the doors, namely:

(a) $1,816 on account of the safety decals;

(b) $1,513 in relation to waterproofing; and

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153 Exhibit 50 p. 20988.
154 T2-10, l 41 to T2-11, l 3; T5-113, ll 14-28; T7-96, ll 14-28.
155 SADCC at [16](a)(iii).
156 Exhibit 281 p. 280361 [106].

(c) $8,500 on account of the integrated drainage modules (which were priced separately to the doors).

[134] Thallon Mole accepted that an amount for each of these items needs to be deducted in properly assessing the value of the variation. In doing so, they accept the prices adopted by Mrs Morton for the integrated drainage module of $8,500, but dispute that the prices adopted for the safety decals and the waterproofing are reasonable.

[135] There is conflicting evidence in relation to the decals. This issue is an example of the parties inability to agree on the smallest of items.

[136] Mr Gilligan's evidence was that a rate of $60 per metre for the product and installation was a reasonable price or rate. He identified the meterage required of 13.26m plus 16.9m. On that basis he estimated a reasonable price or rate to be $1,816.[157] But Mr Gilligan did not obtain a quote or source these figures. Mrs Morton submitted that the rate quoted by Mr Gilligan is indirectly corroborated by the Cooltone quote obtained by Hutchinson Builders in 2019 which combines the solar film with the decal.[158] The total cost in the quote is $18,110 (excl. GST), although the items are not individually marked. When the solar film amount of $16,330. is taken off that sum, the remainder of the price is $1,780 for Dusted Crystal. This is a figure very close to Mr Gilligan's $1,816 estimate.

[137] On the other hand, Thallon Mole rely on the evidence from Steve Brennan the Chief Financial Officer of Thallon Mole. His evidence was that he obtained a verbal quote of $360 (excl. GST) for the supply and installation of 24 lineal metres of safety decal, or $115 (excl. of GST) for the supply only.[159] There is also an email quote from Belinda Bartley at Cooltone for the supply and install of 75mm Haze Vision Strips to 24 lineal metres at a price of $360 (excl. GST).[160] In their submissions in reply Thallon Mole conceded that this figure could be increased by 20 percent to allow for the 6 metre difference in calculation.[161]

[138] Ultimately, I am satisfied that is it reasonable to assess this variation on the cheaper option in accordance with the quote obtained from Thallon Mole (with an uplift of 20 percent). Mrs Morton also submitted that the quote that Thallon Mole obtained was for Haze Vision Strip, a different product to the Dusted Crystal Safety decal and that there was no evidence that this product was of the equivalent quality to that being supplied for this "high-end residential premises".[162] That is true, but there is also no evidence that the cheaper Haze Vision Strip product was not suitable.

[139] I therefore find that the sum of $432 is a reasonable price for the reduction for the decal.

Waterproofing

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157 Ibid p. 280362.

158 Exhibit 296 p. 250863. This can be seen in the affidavit of Mr Dean White the Site Manager of Hutchinson Builders.

159 Exhibit 200.

160 Exhibit 199.

161 The meterage required as identified by Mr Gilligan was approximately 30m whereas the quote obtained from Thallon Mole was for 24m.

162 Defendant's Submission's in Reply at [137].

[140] Mrs Morton had the waterproofing installed for $985 (being the amount claimed for by way of damages in Appendix 3 at item 56).[163]

[141] In those circumstances, I accept Thallon Mole's submission that the reasonable rates or prices, that should be adopted, are the actual costs. This approach is consistent with that of Mr Gilligan.[164]

[142] I therefore find the sum of $985 is a reasonable price for the reduction for waterproofing.

Margin

[143] Thallon Mole accept that in accordance with the Contract, a margin (not taking into account overheads) must be calculated and included in the reduction to the Contract price, and that the 12 percent claimed by Mrs Morton is reasonable.[165]

Reductions in the Contract Price

[144] For these reasons, the proper amount to deduct from the Contract price pursuant to condition 21.12 in relation to the Schucco doors variation is **$140,735.84** (excl. GST)[166] calculated as follows:

Item	**Amount allowed**
Doors D07 and D08	$115,740.00
Window Tinting	$0
Lift and Cranage	$0
Safety Decals	$432.00
Waterproofing	$985.00
Drainage Module	$8,500.00
Subtotal	$125,657.00
Margin (12%)	$15,078.84
Total	**$140,735.84**

The Cost of the Brandtman Determination

[145] Mrs Morton claims the sum of $2,244.38 in damages or as a debt, for half of the cost of engaging Mr Thompson from Mitchell Brandtman.

[146] Thallon Mole deny any obligation to pay this sum.

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163 See Appendix 3, Item 56, Blake's Waterproofing Invoice for $985.
164 Exhibit 281 p. 280363 [130].
165 SADCC at [16](a)(viii).
166 This is $154,809.42 (incl. GST).

[147] Originally, Mrs Morton's pleaded case was that there was an oral agreement that those costs would be shared.[167] Then she amended the Rejoinder in the second tranche of the trial, and introduced a new contention, that by the act of agreeing to the appointment of Mitchell Brandtman for the purposes of Clause 21.13 of the Contract, Thallon Mole also agreed to pay 50 percent of the fees for that valuation and is therefore liable to pay that fee.[168]

[148] Given the basis of Mrs Morton's claim, it is necessary to consider the relevant background and correspondence.

[149] After Mr Mole sent through Variation No. V025 on 19 December 2017, Mrs Morton disputed the costs (through her solicitor) and advised that if Thallon Mole was unable to appropriately substantiate its variation claim, then she would use Condition 21.13 of the Contract to engage a Quantity Surveyor to make a binding determination.[169]

[150] On 5 February 2018, Mrs Morton wrote to Mr Mole proposing a panel of seven quantity surveyors to replace the Quantity Surveyor who had been appointed under the Contract, (Duncan Ellis), for the purpose of determining the variation for the Schucco doors.[170]

[151] On 13 February 2018, Mr Mole emailed Mrs Morton maintaining a reliance on the value of the doors as being the $48,000 quote and denying (as he had always) that Condition 21.13 was applicable.[171]

[152] On 15 February 2018, Mr Mole wrote again as follows:[172]

> "Louise,
>
> I am unsure if you are going to accept the meeting result yesterday, and in an attempt to be active pursuit of resolution we would be happy to use any of the guys from Mitchell Bradtnam
>
> Thank you."

[153] On 6 April 2018, Mr Thompson produced a written Condition 21.13 Determination referring to having "been engaged by Mrs Morton".[173] Mrs Morton accepted that she contracted directly with Gary Thompson of Mitchell Brandtman (and paid this fee) but submitted as follows:[174]

> "the cost of his work was implicitly to be borne by both parties. The clause 21.13 process was part of the Contract for the benefit of both parties. The implicit shared cost is contextually supported by the absence of a similar term found in the last sentence of Condition 25.2A of the Contract."

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167 SADCC at [14](o). But this defence was struck out after subsequent amendments inconsistent with such an oral agreement were made; T9-47, ll 20-26.
168 Rejoinder [7A].
169 Exhibit 46.
170 Exhibit 242 p. 20268.
171 Exhibit 47.
172 Exhibit 242 p. 20267.
173 Exhibit 116.
174 Defendant's Trial Submissions p. 46.

[154] Mrs Morton developed this argument as follows:[175]

(a) The process under Clause 21.13 was a process contemplated for the benefit of both parties and was engaged by the agreement of both parties; and

(b) Where there was a necessary cost arising from a process under the Contract for both parties, it would be an implied term of the Contract that both parties would be liable for one half of the costs. The implication of that term, benefits from the contractual context that Condition 25.2A (which refers to a different task for the Quantity Surveyor to engage) has an express term. This express term stated that, "unless otherwise agreed by the parties, the cost of engaging the Quantity Surveyor will be borne by the Owner." The presence of that statement in respect of the Condition 25.2A task, and its absence in respect of Clause 21.13 points to the necessary implication of the submitted term.

[155] This submission introduces a new allegation that is not pleaded - namely that there was in fact an implied term arising under the Contract that the costs of any necessary process would be shared by the parties. There is a tension between this and the newly pleaded allegation that (factually speaking), by agreeing to someone from Mitchell Brandtman being appointed, Thallon Mole had agreed to pay half of the fee. But regardless, I reject both arguments for the following reasons:

(a) As to the pleaded case: I am not satisfied that the determination process was agreed by the parties. All Mr Mole agreed to was who might carry out the Determination. On the face of the emails there is no agreement about Thallon Mole paying half of the Quantity Surveyor's fees. But, even if I am wrong and by agreeing to the appointment of a particular person Thallon Mole was agreeing to the process - it does not follow that they were agreeing to pay half the fee.

(b) As to the unpleaded case: Mrs Morton has not sought leave to amend its pleadings. But, assuming leave was sought and granted, I reject such a case as the proposed implied term does not satisfy the five requirements of the implication of a term in fact.[176] For a start, the term is not necessary to give business efficacy to the Contract. The Contract will operate without it. Mrs Morton was entitled to direct a negative variation, but it was a matter for her to bear the cost of valuing it. For that reason, it does not go without saying. Further, and as Thallon Mole submitted, this reading contradicts an express term (being Condition 25.2A) which provides (albeit in the context of a dispute over a progress claim) that Mrs Morton should bear the cost of the quantity surveyor's determination unless otherwise agreed.[177]

[156] Mrs Morton's claim in damages or debt in respect of the Brandtman costs, is therefore rejected.

Extension of Time Claims

[157] Most of the extension of time issues arise from the delay following the removal of the Schucco Doors so it is convenient to address this issue now.

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175 Defendant's Trial Submissions at [151]-[152].

176 See Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337, 346-347.

177 Plaintiff's Submissions in Reply at [33].

[158] Thallon Mole claims $17,300 for delay and disruption costs.[178] This claim is made pursuant to Condition 23A.1 of the Contract on the following two bases:

(a) 21 days for approved extensions of time;[179] and

(b) 152 days for delays to the installation of doors D07 and D08.[180]

[159] On the other hand, Mrs Morton submitted that she is entitled to liquidated damages in the amount of $16,100.

Approved Extension of Time Claim

[160] Mrs Morton accepts that Thallon Mole is entitled to delay damages of $1,900 for approved extensions of time, totalling 19 days. She denies that Thallon Mole is entitled to the two-day extension of time for Variation No. V060 on the basis that whilst she approved a two-day extension at the time, this work related to the defective and incomplete driveway. As discussed under the Item H: Driveway section of these Reasons, I have found the driveway work to be defective and incomplete. Thallon Mole's submission that there was no delay in completion of the Stage 2 part of the driveway and that therefore this claim for extension should be approved was difficult to follow on the evidence. On balance, I am not satisfied that this claim should be allowed.

Delay Claim

[161] Thallon Mole's pleaded case (consistent with the agreed list of issues for determination) is premised on a claim for 152 days for delays arising from the Schucco doors being removed from the Contract. In support of this claim, Thallon Mole pleaded that it "claimed multiple extensions of time during the period between September 2017 and 16 April 2018, which were regularly given orally in the course of regular site meetings that were conducted on a fortnightly basis."[181] Further particulars as to the facts in support of this contention were subsequently provided by Thallon Mole as follows:[182]

> "(a) The extensions of time in relation to the doors were discussed on a fortnightly basis at the regular site meetings. In particular, approval of the extension of time was confirmed in Tim Stewart site meeting notes held on 23 October 2018
>
> (b) The door installation was programmed for November 2017. DO7 and DO8 did not get installed until December 2018."

[162] By its written submissions, Thallon Mole submitted that it is entitled to "the extension of time of 110 days that it claims."[183]

[163] Mrs Morton accepted that the change in the selection of the D07 and D08 doors affected and delayed progress of the works "to some extent".[184] Despite this, she

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178 FASOC at [59].
179 Ibid at [10].
180 Ibid at [21].
181 FASOC at [20].
182 Plaintiff's Further and Better Particulars dated 29 August 2019 at [10].
183 Plaintiff's Trial Submissions at [178].
184 Though to what extent was not clear. Defendant's Trial Submissions at [414].

submitted that Thallon Mole is not entitled to any extensions of time in relation to these doors for the following four reasons:[185]

(a) First, it did not comply with the notice provisions in the Contract that would entitle it to an extension of time;

(b) Secondly, any such delay was not the result of a variation or caused by Mrs Morton. In particular, Thallon Mole was already six weeks delayed in June 2018, for which it was responsible;

(c) Thirdly, the delay was reasonably foreseeable and was not beyond the reasonable control of Thallon Mole; and

(d) Fourthly, Thallon Mole failed to take all reasonable steps to mitigate the effect and duration of the delay.

[164] Before addressing the respective arguments, it is necessary to consider the relevant provisions of the Contract.

Relevant Contract Provisions

[165] The basis for any entitlement to delay damages is found in Condition 23A of the Contract which provides relevantly as follows:

> "23A. Delay or disruption costs
>
> 23A.1 If the Contractor has been granted an extension of time under Condition 23 for a cause of delay listed in Condition 23.1(a)(ii), the Contract Price will be adjusted by the amount calculated by multiplying the rate for delay damages (AUD$100) by the number of days for which the extension of time is granted.
>
> 23A.2 The amount payable by the Owner to the Contractor under this Condition 23A is the agreed and sole damages payable by the Owner to the Contractor (and is in full satisfaction of all claims, demands, actions, proceedings or suits for damages which the Contractor may make or bring against the Owner).
>
> 23A.3 The Owner shall not be obliged to pay any costs under this Condition 23A which have already been included in a variation or any other payment under the Contract."

[166] Condition 23.6 provides that an entitlement to an extension of time only arises upon all requirements in Condition 23 being satisfied:

> "23 Extension of time
>
> 23.1 Subject to complying with Condition 23.2, the Contractor may only claim and is entitled to a reasonable extension of the Date for Practical Completion if:

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185 Defendant's Trial Submissions at [406].

(a) the need for the extension of time arises because of one or more of the following causes of delay prevents the Contractor from achieving Practical Completion by the Date for Practical Completion:

(i) a variation complying with Condition 21; or

(ii) a delay caused by the Owner or the Owner's Authorised Representative; or

(iii) a delay event stated in Schedule Item 6B which exceeds the stated allowance; and

(b) the delay is not reasonably foreseeable and is beyond the reasonable control of the Contractor; and

(c) the claim is made to the Owner in writing using a QBCC Form 2 – *Extension of Time Claim and Owner's Response to Claim* or similar appropriate document with particulars, including the cause of the delay and the extension of the Date for Practical Completion claimed, completed; and

(d) the claim is given to the Owner within 10 20 business days of the earlier of the Contractor becoming aware of the cause and extent of the delay and when the Contractor reasonably ought to have become aware of the cause and extent of the delay; and

(e) the Owner approves the claim in writing using the QBCC Form 2 – *Extension of Time Claim and Owner's Response to Claim* or similar appropriate document.

23.2 The Contractor must take all reasonable steps to lessen mitigate the effect and duration of the delay.

23.3 The Contractor must give the Owner a signed copy of the claim for an extension of time within **5 business days** of the Owner approving the claim.

23.4 The Owner must, within **10 business days** of receiving the Contractor's claim, reasonably assess and return to the Contractor the said QBCC Form 2 – *Extension of Time Claim and Owner's Response to Claim* or similar appropriate document either agreeing to the extension of time claimed or giving reasons for the rejection of the whole or part of the said claim, failing which the said extension of time claim will be deemed to be disputed by the Owner.

23.5 Delay or failure by the Owner to agree to an extension of time does not cause the **Date for Practical Completion** to be set at large, but the Contractor shall be entitled to damages arising from the unreasonable rejection of all or part of a claim for an extension of the **Date for Practical Completion**.

23.6 Notwithstanding any other provisions of this Contract, the Contractor shall only be entitled to an extension of time under Condition 23 if it has complied with all requirements (including time periods) of Condition 23."

[167] It follows that Thallon Mole is entitled to an extension of time if:

(a) The delay arose from a variation complying with Condition 21, or was caused by Mrs Morton; and

(b) The delay was not reasonably foreseeable and was beyond the reasonable control of Thallon Mole; and

(c) A claim was made in writing within 20 business days of Thallon Mole becoming aware of the cause and the extent of the delay: and

(d) The claim was approved.

[168] It is apparent from a plain reading of the Contract that if a claim for an extension of time is said to be based on a variation, that claim for an extension of time must be for an approved variation.[186] If the claim is unreasonably rejected, the extension of time is not "approved", but Thallon and Mole is entitled to damages. In this case, that is said by Thallon Mole to simply offset Mrs Morton's claim for liquidated damages in the amount of $16,100, consequent on the delay in achieving Practical Completion.

[169] Each of these matters and whether Thallon Mole took all reasonable steps to mitigate the effect and duration of the delay are addressed under the relevant headings below.

Analysis

[170] To be a qualifying cause of delay, the delay must be caused by Mrs Morton (or her authorised representative TSA).

[171] Mrs Morton submitted that the omission of the works was not causative of the delay. Rather, she submitted that the cause of the delay was the unavailability of the doors and "that was not caused by Mrs Morton or the architect".[187] On the other hand, Thallon Mole submitted that the need for the extension of time arose in the following two ways:[188]

(a) First, from TSA specifying a type of door for the Contract, and insisting that it be used, without confirming that the door was in fact capable of being engineered in a way that could be;[189] and

(b) Secondly, despite being presented with an engineering solution that allowed the doors specified by the architect to be modified so that they could meet the design intent, Mrs Morton refused to accept performance being tendered in that way and demanded that a different (non-contractual) product be installed.

[172] I reject that the second of the alleged causes lead to a delay attributable to Mrs Morton. As discussed earlier, the Quantum Door Quote was not a satisfactory (or a like for like) solution as required under the Contract. Therefore, Mrs Morton was entitled to refuse it and require a different product to be installed.

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186 It is not in dispute that the proposed Variation No. V014, Variation No. V015, and Variation No. V016 were not accepted by Mrs Morton. It follows that these variations were not a qualifying cause of delay as variations; T2-8, ll 10-11.

187 Defendant's Trial Submissions at [427].

188 Plaintiff's Trial Submissions at [160].

189 Plaintiff's Trial Submission at [158(a)], [161]. There is a tension in the written submissions on behalf of Thallon Mole. On the one hand it is submitted TSA were not at fault, but on the other that it was TSA's specification that was the cause of the delay.

[173] But I am satisfied that there is some force to Thallon Mole's first point. Although, whether the unavailability of these doors was causative of all of the delay claimed by Thallon Mole is another question dealt with under the heading "Extent of the Delay Claim" below.

[174] Condition 3.2 of the Contract relevantly states as follows:

> 3.2 The Contractor must, unless the Contract expressly provides otherwise, supply at the Contractor's cost and expense, everything necessary for the proper completion of the **Works** and for the performance of the **work under this Contract**.

[175] The General Notes to the architectural drawings in the Contract relevantly provide that the Builder ensure all nominated products and finishes are fit for purpose and application.[190]

[176] It follows that Thallon Mole had the contractual responsibility to supply the D07 and D08 doors, which by the plans and specifications prepared by TSA required the doors to be the Schucco brand.

[177] The design specification was an important design feature of the house.[191] Mr Mole accepted that he knew that the Schucco doors were not an "off the rack item" but rather a bespoke design for a high-end product.[192] Mr Mole's evidence (which I accept) was that in quoting for the Schucco doors he had assumed that the architect had ensured the doors would work for their intended application and that all necessary work had gone into making them work for their intent.[193] This is a fair assumption and consistent with Mr Rhodes' evidence that if a product (such as the Schucco doors) was nominated in a tender, it was reasonable to assume that the architect had worked through any specific requirements during the design phase.[194]

[178] The evidence is that during the tender process, Thallon Mole emailed Alliance Glass the hightail folder which included TSA's drawings for the house (as the suppliers of the Schucco brand doors in Australia). It also requested a quote for the D07 and D08 doors, which by those drawings were specified to be four and five panels. There is no evidence that Thallon Mole were privy to the exchanges between Mr Pendall and Mr McFarlane about the lack of testing of such doors. As discussed earlier in these Reasons, I am satisfied that Thallon Mole was not aware of any potential issues with the Schucco doors until early September 2017.

[179] It is clear on the evidence, that after receiving the initial quote for the five and six panels in October 2015, Mr Rhodes from TSA subsequently discussed the project in detail with Mr McFarlane – to such an extent that he was 'very confident' the doors could be delivered in the required configuration. Subsequently, he was "particularly disappointed" when he found out in early September 2017 that Schucco were 'now' unable to provide a product fit for purpose and in line with the design intent.

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190 Exhibit 4 p. 220066.
191 T6-61, ll 12-26.
192 T2-80, ll 18-41; T2-81, l 1–3.
193 T1-48, ll 42 to T1-49, l 10.
194 T6-78, ll 45-48; T6-79, ll 1-7.

[180] What is not clear is the basis of the confidence that was instilled in Mr Rhodes. For example (and again as discussed earlier in these Reasons):

(a) There is no evidence about the content of the extensive conversations Mr Rhodes had with Mr McFarlane; and

(b) There is no evidence Mr Rhodes followed up Mr McFarlane about the "pending request" (in October 2015); and

(c) Mr Rhodes' evidence (which I accept), was that he never obtained engineering confirmation from Schucco that the panels could be oversized to a four and five door system.[195]

[181] On balance, I am satisfied on the evidence that Mr Rhodes knew or ought to have known that the manufacturer may not have been able to certify the Schucco doors in the designed configuration. It follows that TSA knew or ought to have known that by stipulating D07 and D08 were to be four and five panelled Schucco doors, there was a real risk that these doors would not be available, and that unavailability could result in delays in the construction of the house.

[182] Mrs Morton submitted that Thallon Mole is not entitled to an extension of time because the delays were reasonably foreseeable and not beyond Thallon Mole's reasonable control.

[183] A risk is reasonably foreseeable if it is not far-fetched or fanciful.[196] This is a low bar and for the following reasons, it is one that has not been reached on the facts of this case:

(a) First, Mrs Morton's argument is underpinned by facts which I have found not to have been established. This being that Mr Andrews was told pre-contractually that the doors had not been tested so that he knew the manufacturer was advising they would likely not certify the Schucco doors.

(b) Secondly, I do not accept that Thallon Mole failed to act with reasonable diligence to determine whether the Schucco doors as stipulated could be supplied. To the contrary, they did all that could be expected in the circumstances - they sent the stipulated details to Allied Glass and obtained a quote that included an (unknown) allowance for these doors.

(c) Thirdly, the Schucco doors were a key feature of the design of the house, and it was reasonable for Thallon Mole to assume that TSA had undertaken extensive work in the pre-tender phase to ensure the "bespoke" doors chosen were able to be delivered in the configuration stipulated.

[184] I therefore find that the unavailability of the Schucco Doors was not reasonably foreseeable to Thallon Mole. I also find that the delay caused by the unavailability of the Schucco doors was a matter beyond Thallon Mole's reasonable control.

[185] The parties' submissions do not engage responsively on the notice requirement issue. For example, Mrs Morton submitted that Thallon Mole is time barred from obtaining any entitlement to the extension of time claimed by Variation No. V025

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195 T14-80, ll 1-24; Plaintiff's Trial Submissions at [94](c).

196 *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 (per Mason J).

because it failed to comply with the Contract's notice provision under Condition 23.1(d) by a period of four days. But Thallon Mole do not expressly refer to a reliance on the 40-day extension made under Variation No. V025 in their pleadings, or in any of the written or oral submissions made on its behalf. It is therefore not clear to what if any extent they rely on this request as part of their extension claim and it is reasonable to assume as I do that they do not.

[186] But, in case I am wrong about that I will deal with this issue briefly.

[187] Non-compliance with strict notice provisions can lead to severe consequences for contractors such as Thallon Mole, but Courts have held provisions such as Condition 23.1(d) should be enforced according to their terms.[197] Thallon Mole did not submit that there is some flexibility to the applicability of this statement as a general principle or on the facts of this case. Regardless, I am satisfied that there is no reason why Condition 23.1 should not be construed according to its natural and ordinary meaning, so as to give effect to the bargain struck between the parties.[198]

[188] I therefore find that in relation to Variation No. V025, Thallon Mole failed to comply with the notice requirement set out in Condition 23.1(d) of the Contract and is not entitled to the 40-day extension of time of claimed.

[189] The question of whether Thallon Mole failed to comply with the notice requirements under Condition 23.1(d) (in relation to the delay arising from the installation of the Vitrocsa doors) turns on a determination of when Thallon Mole became aware of the cause and extent of the delay. The cause of the delay became known to Thallon Mole in September 2017 when it discovered that the specified Schucco doors could not be delivered. Assessing when the extent of the delay that would flow from this fact ought to have been known and understood by Thallon Mole is a more difficult question.

[190] The evidence reveals that Thallon Mole knew from at least 15 November 2017, that the lead time for the Vitrocsa doors was a minimum of 22 weeks. This information was contained in the quote from Vitrocsa dated 4 October 2017 which was attached to Variation No. V025. This finding is consistent with Mr Mole's evidence that he knew (around that time) that the lead time on the Vitrocsa doors was at least 20 weeks.[199] Of course this meant there would be a significant delay between when the doors were originally scheduled to be installed and when the doors could be installed. But the actual extent of the impact on practical completion was not apparent at that point and indeed as the evidence reveals, changed over the course of 2018. For example, on 16 April 2018, Mrs Morton gave written notice of the lead times for the Vitrocsa doors (of 20 weeks) but that lead time was substantially exceeded because the doors were not installed until sometime in December 2018 or January 2019. It is instructive that this letter also stated that "[w]e will continue to keep you informed of any updates regarding the installation of the doors so that TMG may effectively plan its works."

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197 *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231, 238 (per Barwick CJ); *Opat Decorating Services (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd* (1994) 11 BCL 360, 364 (per Bollen CJ, with whom Prior & Duggan JJ agreed); *Australian Development Corporation v White Constructions Pty Ltd* (1996) 12 BCL 317, 339 (per Giles CJ).

198 *CMA Assets Pty Ltd v John Holland Pty Ltd* [No 6] [2015] WASC 217, [375] (per Allanson J).

199 T2-14, ll 31-36.

[191] Overall and on balance, I accept that the planning of some of the works being undertaken by Thallon Mole was dependant on the timing of the installation of the D07 and D08 doors. This finding is consistent with the following evidence of Mr Mole's which I accept as a matter of common sense:[200]

> "The trades – because they're such large doors – the trades in and around those doors couldn't complete their work. That would include kitchen cabinetry, wall cladding, tiling, electrical works and all those works associated with the electrical works, the silicon seal, the sealers. All those works could not be completed as a result of the doors not enclosing the property and allowing water to ingress."

[192] On 27 August 2018 (within 20 days), Thallon Mole submitted a request for an extension of time EOT No. 017 claiming an extension from 3 September 2018 until the installation of doors D07 and D08.[201] The correspondence to this request refers to the project having 5 to 6 weeks left – but notes that if the doors were not completely installed 6 weeks before Christmas, the completion date would be effected by the Christmas period (a 3-week period starting from 21 December).[202]

[193] Around 21 January 2019, Thallon Mole made a final request for an extension of time. The claim was made for an extension from 3 September 2018 to 14 January 2019 (with a projected completion date of 13 February 2019). This totalled 110 days.[203] On 22 January 2019, Mrs Morton rejected Thallon Mole's suggestion that there had been an agreement regarding the submission of EOT No. 17.[204] Mrs Morton does not make any submission about this request being out of time. Even if it was, I am otherwise satisfied that the request of 27 August was not out of time.

[194] Mrs Morton submitted there was no "programming analysis" of how the figure of 110 days (or 22 weeks) was derived. That is true, but on balance I am satisfied for the following four reasons that there is sufficient other evidence to sustain Thallon Mole's claim for 110 days.

(a) First, the progress notes of 12 June 2018 refer to uncertainty with the installation date of the Vitrocsa doors and the cabinetry being delayed at that point by about 4 weeks (which in turn would push the painter and associated trades back).[205]

(b) Secondly, Mr Mole's unchallenged evidence (which I accept and as set out in his email dated 27 August 2018 to TSA referred to in paragraph 191 above), was that there were "5 to 6 weeks' worth of work left" and that the late installation of the Vitrocsa doors would delay the completion of that work by a number of months, particularly if the doors were not installed 6 weeks before Christmas.[206]

(c) Thirdly, the domino effect of delaying some works so that the installation of doors D07 and D08 could be undertaken was also recognised by TSA. On 6

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200 T2-17, ll 38-43.
201 Exhibit 55.
202 Ibid.
203 Exhibit 57.
204 Ibid.
205 Exhibit 133 p. 120052.
206 Exhibit 55; Exhibit 56.

August 2018, TSA wrote to Thallon Mole asking for some of the work to be ceased (while the doors were getting installed). In this letter they accepted that this would "effect some other trades" and requested a summary of the other works which could not be completed as a result."[207]

(d) Fourthly, the overall claim of 110 days (22 weeks) is reasonable given that the lead time for the supply and installation of the delivery of the Vitrocsa doors was flagged to be one of at least 20 weeks – and as things transpired the actual supply and installation of these doors did not occur until December 2018 (some 32 weeks later).

[195] Mrs Morton submitted that if there is any entitlement to an extension, it is to be reduced by the six weeks delay for which Thallon Mole was responsible as of June 2018. Thallon Mole did not directly respond to this submission, but it is reasonable to assume as I do (given the contents of the progress notes and the various requests for extension of time by this point) that it does not accept responsibility for this delay. Regardless, I do not accept it is an accurate characterisation of the notes to suggest that Thallon Mole was accepting responsibility for this delay. It is correct to say the progress notes of 12 June 2018 refer to the job being "6 weeks behind", but even a cursory review of the notes reveal that Thallon Mole were complaining at this point about the impact that the delay in installing the Vitrocsa doors was having on other trades. It is apparent on the evidence that this is exactly what happened. Such an outcome was recognised by TSA in its direction to Thallon Mole of 6 August 2018 (referred to in paragraph 193(c) above).

[196] Mrs Morton also submitted that Thallon Mole failed to mitigate any claim for delay by contracting with Alliance Glass too late; and failing to have shop drawings prepared earlier. I am not satisfied on the evidence that Mrs Morton has established any causative link between either of these matters and the overall delay which I have found to have been established.

[197] Mrs Morton also contends that Thallon Mole refused to comply with her directions to install the Vitrocsa doors, and to cooperate in the Condition 21.13 determination. She submitted that this was causative of the delay, but I reject this submission for three reasons:

(a) First, Thallon Mole did not have a contractual obligation to comply with a direction to vary the scope of work under the Contract (by changing the type of door) without the requirements of Condition 21 being complied with.

(b) Secondly, it is not entirely clear what is meant by Thallon Mole's alleged failure to cooperate, but it appears to be an allegation it refused to perform the variation. But I am not satisfied that Thallon Mole was contractually obliged to do so. Rather, I am satisfied that it was specifically empowered by the Contract to refuse to do it.

(c) Thirdly and most crucially, it is unclear how that refusal extended the time for the installation of the Vitrocsa doors. I am satisfied that the delay between April 2018 (when the Determination was made) and the time the doors were ultimately installed was caused in large part by the long lead time required.

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207 Exhibit 54.

There was no cogent evidence that if Thallon Mole had performed the variation, the installation would have occurred any faster.

Thallon Mole's Liquidated Damages Claim

[198] As stated at the outset of this section of the Reasons, Mrs Morton accepts that the change in the selection of the D07 and D08 doors affected and delayed progress of the works "to some extent" but denied any obligation to grant a time extension because of Thallon Mole's failure to comply with the mandatory provisions of Condition 23 of the Contract. For the reasons discussed above, I am satisfied that Thallon Mole complied with all of the relevant preconditions and that Mrs Morton's refusal of the request for extensions (both in August 2018 and January 2019) was unreasonable.

[199] It follows that Thallon Mole is entitled to the sum of $11,000 for 110 days of delay damages arising from the substitution of the Schucco doors.

Resolution of the Respective Liquidated Damages Claims

[200] It is uncontroversial that Mrs Morton's claim for $16,100 takes into account the approved delays of 19 days. Given my findings above, Thallon Mole is entitled to set-off a further 110 days.

[201] I therefore find that Mrs Morton is entitled to payment of liquidated damages in the amount of $5,100.[208]

Additional Reductions - Omitted Items

[202] Mrs Morton submitted that the Contract Price must also be adjusted to reflect the removal of three items that were required to be supplied by Thallon Mole under the Contract but were not.

[203] Those items are: a Miele washing machine and dryer; bike racks; and D08 curtain and blinds.[209] Each of these items are addressed in turn.

Omission of Washing Machine and Dryer

[204] Although they were specified in the Contract and captured in the Contract Price, it is uncontroversial that the Miele washing machine and dryer were not supplied by Thallon Mole.[210] Thallon Mole obtained quotes for these items but did not end up purchasing or supplying them. Mr Cook specifically recalled discussions with Mrs Morton about keeping her existing equipment. Consistent with this evidence, Mrs Morton "brought her own from the old house into the new house."[211]

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208 GST is not payable on liquidated damages as it is not a supply of goods or services by Mrs Morton.

209 Although Mrs Morton's pleaded case at [46A](b) of the Defence was that the three items which should be deducted in addition to the value of the Schucco Doors were; the entry ramp balustrade, the bike racks and the curtains and blinds

210 These items were pleaded by a late amendment; and evidence about this issue was adduced without any objection (T11-24, ll 15-26); Mrs Morton was also cross examined on this issue (T11-36, l 26-T11-37, l 2).

211 This was said in the cross examination of Mr Mole (T9-109, l 34-42).

[205] Thallon Mole conceded that the value of these items was $3,398.46 (excl. GST)[212] but submitted that as Mrs Morton did comply with Condition 21.1A to direct a written variation for removal of these items, she is unable to claim a reduction for them.[213] Mrs Morton's evidence (which I accept) is that she did not request a written variation because she had forgotten that these items were included in the Contract Price.

[206] In these circumstances I am satisfied that Thallon Mole waived the requirement for strict compliance with Condition 21.1A.[214]

[207] I therefore find that the Contract Price must be reduced by $3,738.30 (incl. GST) on account of the Miele washing machine and dryer.

Bike Racks

[208] Mrs Morton submitted that the bike racks specified and captured in the Contract Price were not supplied by Thallon Mole. Thallon Mole submitted they were.

[209] Mrs Morton's evidence was that she knew that some bike racks were to be supplied, but there were no bike racks left on the premises. Mr Cook was fairly sure they were, but not "a 100% sure."[215] On balance, I prefer Mrs Morton's evidence on this issue. This finding is consistent with the fact that there are no photographs of any bike racks at the house or any evidence that the bike racks were in fact purchased by Thallon Mole. Although Mrs Morton was cross examined about a quote from Pushy's Online dated 11 June 2018 for $283.96 (incl. GST).[216]

[210] Again, there is no written direction for a variation of the Contract Price from Mrs Morton. Nor was there an explanation for this. But given the small quantum involved I am satisfied that this requirement ought to be waived.

[211] I therefore find that the Contract Price must be reduced by $283.96 (incl. GST) on account of the bike racks.

D08 Curtain and Blinds

[212] Both parties accept and I find that the Contract Price should be reduced by $18,083 (incl. GST) in respect of the D08 Curtains and Blinds.[217]

[213] I therefore allow the total amount of $22,105.26 (incl. GST) for the additional reductions claimed by Mrs Morton.

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212 Exhibit 307.

213 Mrs Morton's Trial Submissions did not engage at all on this issue.

214 Whilst it is not pleaded by Mrs Morton, I am satisfied on the facts as I have found them to be, a valid claim of waiver operates in favour of Mrs Morton on this issue. Given the small quantum involved I did not request further submissions from the parties. I have endeavoured to act fairly to both sides by taking a similar approach (under the heading V059) where I also found a waiver (not pleaded) operated in favour of Thallon Mole and I allowed a claim for $2,390.85 (incl. GST).

215 T9-110, ll 6-24.

216 Exhibit 306; T11-40, ll 1-12.

217 Exhibit 154. Plaintiff's Trial Submissions at [642](b).

Overall Conclusion re the Adjusted Contract Price

[214] I therefore find that the Adjusted Contract price is $4,375,372.16 (incl. GST) leaving an unpaid balance under the Contract of $276,515.40 (incl. GST). This has been calculated as follows:

Quantification of Damages	
	Figures from Court Findings
Contract Price after agreed Variations (incl. GST)	$4,828,802.04[218]
Less D7/D8 (excl. GST)	$140,735.84
Less GST	$14,073.58
Less Additional Reductions Claimed (incl. GST)	$22,105.26
Subtotal - Adjusted Contract Price	$4,651,887.50
Total Paid (incl. Retention Amount)	$4,375,372.16[219]
Unpaid Balance of Contract Price	**$276,515.40**

[215] Thallon Mole's claims for the outstanding progress claims must now be considered in light of these findings.

Outstanding Progress Claims

[216] The bulk of Thallon Mole's claim is premised on the following three progress claims not being paid by Mrs Morton:

(a) **Progress Claim 24** dated 15 February 2019 for $164,535.95 (incl. GST);[220]

(b) **Progress Claim 25** dated 15 March 2019 for $170,976.76 (incl. GST);[221] and

(c) **Final Progress Claim 26** dated 8 April 2019 for $45,780.05 (incl. GST).[222]

[217] Mrs Morton submitted that she is not liable to pay these claims for a myriad of reasons - each of which is addressed throughout these Reasons.

[218] The starting point in resolving the issues that emerge from this impasse is to consider the relevant contractual provisions governing the payment regime under the Contract.

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218 The parties agreed on this figure.

219 The parties agreed on this figure. The amount paid into the joint bank account was $216,629 (with accruing interest). At the end of the trial this amount was stated to be $220,992.94.

220 Exhibit 73.

221 Exhibit 77.

222 Exhibit 82. Note: this exhibit actually contains the sum $41,618.23 which is this figure excluding GST, but the figure including GST is contained in the pleadings.

Relevant Contractual Provisions

[219] The provisions of the Contract relevant to the outstanding progress claims are as follows:

> **GENERAL CONDITIONS OF QBCC New Home Construction Contract**
>
> GENERAL CONDITIONS
>
> 1 Definitions
>
> 1.1 In this Contract, unless the context otherwise requires, words and expressions used have the meaning defined or explained below:
>
> …
>
> (c) **"business day"** means a day that is not:
>
> (i) a Saturday or Sunday; or
>
> (ii) a public holiday, special holiday, or bank holiday in Queensland.
>
> ...
>
> (i) **"Date of Practical Completion"** means the date certified in the QBCC Form 7 – *Certificate of Practical Completion* in accordance with Condition 28.
>
> ...
>
> (s) "Practical Completion" means the date upon which the Works are completed in accordance with the requirements of this Contract, including condition 3 and Condition 28, apart from minor omissions or minor defects.
>
> (t) "Practical Completion Stage" means that stage of the Works in which Practical Completion will be attained in accordance with this Contract.
>
> …
>
> 19 Payment
>
> 19.1 The Owner must pay the Contractor the Contract Price for the Works calculated and adjusted as provided by this Contract in accordance with the following provisions:
>
> (a) The Owner must pay the Contractor the deposit (if any) stated in Schedule Item 2 upon the signing of this Contract.
>
> (b) At the times provided for in Condition 19.2, the Contractor is entitled to submit a progress claim. The progress claim must:
>
> (i) be in the form set out in QBCC Form 3 – *Progress Claim;*
>
> (ii) be supported by evidence of the amount due to the Contractor;

(iii) identify:

(A) the value of the Works carried out by the Contractor under the Contract at the time of submission of the progress claim;

(B) any moneys due to the Contractor under any other provision of the Contract; and

(C) the cumulative total values of all previous progress claims and amounts already paid under the Contract; and

(iv) include such other information as the Owner may reasonably require (which may include invoices from subcontractors and evidence those invoices have been paid).

(c) Such adjustments referred to in Condition 19.1(b) shall be recorded by the Contractor on the Form 3 - *Progress Claim* or similar appropriate document and the relevant progress claim shall be adjusted accordingly.

(d) The QBCC Form 3 – *Progress Claim* or similar appropriate document must be accompanied by a QBCC Form 4 – *Notice of Dispute of Progress Claim* or similar appropriate written notice and any certificates of inspection relevant to the payment stage.

(e) The progress claim for the Practical Completion Stage must in addition to the requirements specified for any other progress claim, be accompanied by a completed and signed QBCC Form 6- Defects Document and QBCC Form 7- *Certificate of Practical Completion,* or similar appropriate documents.

…

(g) The Owner must pay the Contractor the Progress Payment as is not disputed by the Owner within 5 business days of receipt of the relevant claim.

(h) If the Owner disputes the relevant claim for Progress Payment or any part of it, the Owner must, within 5 business days of receipt of the relevant claim, give to the Contractor a completed and signed QBCC Form 4 – *Notice of Dispute of Progress Claim* or similar appropriate written notice stating the reasons for so disputing the claim or part of it.

(i) If the dispute is not resolved by the parties within 5 business days of the receipt by the Contractor of the notice of the dispute, the dispute must be referred for resolution in accordance with Condition 25.

19.2 The times for delivery of progress claims are:

(a) the 15th day of each month during performance of the Contract until the issuing of the Certificate of **Practical Completion**; and

(b) **5 business days** after the issue of a Certificate of **Practical Completion**.

…

19.4 In making a progress claim, the Contractor warrants to the Owner that:

(a) it has completed the part of the Works the subject of the progress claim in accordance with the Contract;

(b) there are no defects in the Works the subject of the progress claim that are known to the Contractor;

(c) the figures appearing in the progress claim are accurate;

(d) all subcontractors have been paid all moneys due and payable to them in respect of the part of the Works described in the progress claim; and

(e) the part of the Works described in the progress claim and all previous progress claims are free and clear of liens (other than any liens extinguished upon receipt of payment in respect of that progress claim).

…

25 Dispute resolution

25.1 If a dispute under the Contract arises between the parties, either party may give the other party a written notice of dispute adequately identifying and providing details of the dispute.

25.2 …

Subject to Condition 25.2A, if a dispute is not resolved within 10 business days of the receipt of the notice of dispute, either party may refer the matter to a dispute resolution process administered by the Queensland Building and Construction Commission.

25.2A If the dispute is in relation to a progress claim submitted by the Contractor, either party may (instead of referring the matter to the dispute resolution process administered by the Queensland Building and Construction Commission or following a determination under the dispute resolution process administered by the Queensland Building and Construction Commission) refer the matter to the Quantity Surveyor for a determination. Unless otherwise agreed by the parties, the cost of engaging the **Quantity Surveyor** will be borne by the Owner.

25.2B The process referred to in Condition 25.2A may be used prior to or following the dispute resolution process administered by the Queensland Building and Construction Commission.

25.2C The determination of the Quantity Surveyor will be binding upon the parties unless and until overturned by a decision of a court or tribunal of competent jurisdiction.

25.2D If the Quantity Surveyor has made a determination on a disputed matter under subclause 25.2A, neither party shall be entitled to

refer that matter to the dispute resolution process administered by the Queensland Building and Construction Commission unless both parties agree in writing to do so.

25.3 A party will not commence any proceedings in respect of the dispute in any court or tribunal of competent jurisdiction until the dispute resolution process referred to in Condition 25.2 is at an end or the Quantity Surveyor has made a determination under subclause 25.2A.

25.4 Where a dispute has arisen under or in connection with this Contract, including Condition 23.4, the Contractor must proceed diligently with the work under this Contract notwithstanding the existence of the dispute.…

28 Practical Completion

28.1 The Contractor must:

(a) give the Owner both:

(i) not less than 10 business days prior written notice; and

(ii) not less than 3 business days prior written notice of the date upon which the Contractor anticipates that the Works will reach Practical Completion;

(b) promptly notify the Owner in writing if Practical Completion will not be reached by the anticipated date; and

(c) notify the Owner in writing when it considers that the Works have reached Practical Completion.

28.2 Within 2 business days following the notification by the Contractor pursuant to Condition 38.1(c) the Owner or the Owner's Representative will inspect the Works and if satisfied that the Works have reached Practical Completion, and if the Contractor produces to the Owner satisfactory written evidence that all relevant inspections and approvals required by the *Sustainable Planning Act 2009* and the *Building Act 1975* and by any body having the relevant jurisdiction have been satisfactorily completed, the Contractor must:

(a) complete and sign the QBCC Form 6 – *Defects Document* or similar appropriate document identifying agreed and non-agreed minor defects and minor omissions, and when the Contractor will remedy the agreed matters, and give a copy to the Owner; and

(b) give the Owner a completed and signed QBCC Form 7 – *Certificate of Practical Completion* stating that date as the Date of Practical Completion ; and

(c) hand over the Works to the Owner.

28.3 If the Owner considers that the Works have not reached Practical Completion the Owner must give the Contractor written notice of those matters which are required to be done for the Works to reach Practical Completion. The Contractor

must carry out such matters as may be necessary for the Works to reach Practical Completion and must otherwise proceed in accordance with the preceding paragraph.

28.4 The issue of a Certificate of Practical Completion does not constitute approval of any work under this Contract nor does it prejudice any claim by the Owner in respect of the work under this Contract.

28.5 When the Contractor has satisfied all of its obligations under Condition 28.2, the Owner must within 5 business days pay the Contractor the progress claim for the Practical Completion Stage (as adjusted under Condition 24, if applicable).

[Underlined Emphasis added]

[220] The Contract provided for the parties to appoint a Quantity Surveyor, but did not name anyone.[223] However, it is uncontroversial that Mr Duncan Ellis from Abacus Quantity Surveying Pty Ltd, acted as the Quantity Surveyor for the purpose of the assessment of interim progress claim recommendations under the Contract.[224]

[221] There is no evidence (nor was it submitted by either party) that Mr Ellis made a determination under Condition 25.2A of the Contract. The current proceedings were commenced in August 2019. There is no issue before me that these proceedings were wrongfully or prematurely commenced. It was not entirely clear on the evidence, but it is reasonable to infer (as I do) that this was after the dispute resolution process referred to in Condition 25.2 ended.[225]

Progress Claims 24 and 25

[222] Mr Brennan emailed Progress Claim 24 (dated 15 February 2019) in the sum of $164,535.95 (incl. GST), together with copies of the variation documents, Mr Ellis' recommendation and a tax invoice for Mr Ellis' fees, to Mrs Morton at 5.38pm on 19 February 2019.[226] Under Condition 30.4 of the Contract, service was therefore effected on 20 February 2019.

[223] On 25 February 2019 (within the five business days required under the Contract) Mrs Morton sent an email to Mr Mole and Mr Brennan attaching a QBCC Form 4 Notice of Dispute as to the amount claimed in Progress Claim 24.[227] At this time, payment of the entirety of the claim was withheld by Mrs Morton on the basis of the

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223 Exhibit 4 p. 220006.

224 Exhibit 240 is a letter from Mr Ellis to Mrs Morton (cc'd to Mr Mole) which refers to "our agreement" dated 23 January 2017 for Mr Ellis to undertake this assessment. Mrs Morton paid Mr Ellis' fee but denied that he was her agent as Thallon Mole alleged. Agreed Issue 39 (in MFI Z) is whether the service of Progress Claim 24 and 25 by Thallon Mole on Mr Ellis was as Mrs Morton's agent. Thallon Mole do not press this point; See Plaintiff's Trial Submissions at [352].

225 In accordance with Condition 25.3 of the Contract. It was not clear whether the dispute resolution process administered by the Queensland Building and Construction Commission was engaged by the parties.

226 The evidence was that Mr Brennan sent a draft Progress Claim 24, dated 8 February 2019 for $200,489.76 (incl. GST). Mr Ellis' subsequent recommendation (which he emailed to Mrs Morton together with an invoice for his professional fees at 4.58 pm on 19 February 2019) was for $164,535.95 (incl. GST).

227 Exhibit 140.

disputed sliding doors valuation, liquidated damages, and various defective works, including the waterproofing and pool balustrades.

[224] On 20 March 2019, Mr Brennan sent an email to Mrs Morton attaching a document labelled "Progress Claim 25", dated 15 March 2019, in the sum of $170,976.76 (incl. GST). This was sent together with copies of the relevant variations, Mr Ellis' recommendation and his tax invoice.[228] Again no Form 4 was attached. On 27 March 2019 (within five business days), Mrs Morton sent an email to Mr Mole (copying in Mr Brennan) attaching a document labelled "Form 4 – Notice of Dispute of Progress Claim No 25".[229] By this notice of dispute, Mrs Morton disputed all but the sum of $55,517.74. Mrs Morton has not (to this day) paid this undisputed sum. The notice of dispute over the balance owed under Progress Claim 25 raised issues about: the need for a reduction of the Contract Price; an entitlement to liquidated damages; and a right to reduce the amount claimed on account of defective work for amongst other things, the pool balustrade, Newbolt Street balustrade and waterproofing.

[225] In addition to the matters identified as a basis for refusing to pay both progress claims in full at the time, Mrs Morton now maintained a technical argument that Progress Claim 24 and 25 are "ineffective" and not payable because they did not attach a Form 4 as required under Condition 19.1(c) of the Contract;[230] and this was a "condition precedent" to there being an obligation to respond to each of the claims, and consequently, to pay money.[231]

Consequences of there being no Form 4 Attached to Progress Claims 24 & 25

[226] The Form 4 attached to the Contract relevantly provides as follows:

> **NOTE TO CONTRACTOR:** This blank form may be copied for multiple use and must accompany a QBCC Form 3.
>
> **NOTE TO OWNER**: If you intend to dispute a progress claim, this form must be returned to the Contractor within 5 business days of receipt of the disputed progress claim.

[227] I accept that a Form 4 was not attached to either progress claim. But I reject Mrs Morton's submission about the consequences that flow from this fact for three reasons: [232]

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228 Exhibit 77. The evidence was that on 15 March 2019 Mr Brennan sent Mr Ellis a draft Progress Claim 25 for $178,773.40 (incl. GST) but Mr Ellis' subsequent recommendation (which he emailed to Mrs Morton together with an invoice for his professional fees at 8.06 am on 20 March 2019) was for $170,976.76 (incl. GST).

229 Exhibit 142.

230 The Form 4 is found in Exhibit 4 p. 220033. It is the standard QBCC Form 4 - Notice of Dispute of Progress Claim. This use of the QBCC Form 4 is unsurprising as the Contract expressly incorporates the "QBCC New Home Construction Contract". See Exhibit 4 p. 220001.

231 With particular emphasis on *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576, 582 [20]-[22], 586 [42] (per Mason P and Ipp JA); But the obligation in *Brewarrina* concerned quite a different obligation to the present at case. *Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Construction) v Blanalko Pty Ltd* [No 3] [2013] VSC 435, [43]; *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340, [7].

232 See the discussion in *JPA Finance Pty Ltd v Gordon Nominees Pty Ltd* (2019) 58 VR 393, 410 (McLeish JA, Beach JA and Niall JJA agreeing). The proper construction being that the term must be

(a) First, Mrs Morton's submission is not consistent with the commercial and contextual construction of the Contract.

(b) Secondly, the fundamental requirements of making a progress claim are set out in Condition 19.1(b). When Condition 19.1(d) is considered in this context, it is plain that its purpose is to provide a procedural process for the dispute of claims - to put the Owner on notice that the progress claim must be disputed within five business days of receipt.[233]

(c) Thirdly, it is as Thallon Mole submitted, "an entirely uncommercial construction of the Contract" for the procedural requirements in Condition 19.1(d) to affect the validity of a claim (assuming it is otherwise properly made).[234]

[228] Regardless of this finding, I am otherwise satisfied that Mrs Morton waived the requirement for a Form 4 to have been attached to Progress Claims 24 and 25. The evidence (which I accept), is that Mrs Morton disputed both claims by serving a Form 4 within the required time. She was clearly aware of her rights. To the extent there was a breach by Thallon Mole in not providing the form, I am satisfied Mrs Morton made an election not to rely on the breach and to respond to the Notice and Dispute upon which Thallon Mole relied. In that sense the purpose or function of the Form 4 was achieved. To find otherwise would be inconsistent with the conduct of the parties in this case and would result in an uncommercial and absurd outcome.[235]

[229] It follows that the absence of a Form 4 attached to Progress Claims 24 and 25 does not mean that these claims were ineffective to give rise to an obligation upon Mrs Morton to make a payment of these claims under the Contract.

[230] I therefore find that Progress Claim 24 and Progress Claim 25 were valid progress claims. But of course, Thallon Mole's entitlement to payment of these claims (and to Progress Claim 26) is:

(a) capped at $276,514.40 – being the balance (as I have found it to be) remaining unpaid under the Contract; and

(b) subject to my findings about the disputes underpinning Mrs Morton's refusal to pay.

Effect of the Notices of Dispute

[231] Mrs Morton otherwise submitted that the effect of the notice of dispute for both claims is that there was "then" no present obligation to make payment of the

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construed having regard to text, context and purpose; see *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46]-[48].

233 This finding is consistent with Mrs Morton's submission that: the progress claim form (Form 3) under the Contract does not contain any warning to the Owner that the progress claim must be disputed within five business days of receipt; and that warning is only found in the Form 4 document, "so that warning is a self-evident critical function of Form 4".

234 Plaintiff's Trial Submissions at [360].

235 There was no evidence that the earlier progress claims were accompanied by a Form 4.

disputed amounts under Condition 19.1(g).[236] On the other hand, Thallon Mole submitted that "the broad sweeping deductions to the progress claims" made by Mrs Morton, did not entitle her to refuse payment of these claims for a number of reasons including that:

(a) The Contract contemplated minor defects and omissions to be completed as part of the finishing period (which were being attended to); and

(b) Mrs Morton "simply" decided that she was entitled to withhold payment because of these matters and the substantiated alleged defects with the balustrades and waterproofing.

[232] Ultimately, however, Thallon Mole submitted that given the course of the proceeding, the resolution of whether Mrs Morton was entitled to withhold payment on account of these defects is only critical to the question of interest.[237] I accept this submission. Assuming that Mrs Morton was entitled to withhold payment until such time as the dispute was resolved, Thallon Mole submitted that on the proper construction of the Contract, Mrs Morton remained liable to pay interest on the amounts claimed that are ultimately found to be due and payable. It further submitted that interest accrues on any such amount from the date the obligation to make payment under the Contract arose – even though that liability will only crystalise upon the delivery of judgment in this case.[238]

[233] I also accept this submission for two reasons:

(a) First, it is consistent with a plain reading of the relevant provisions set out in paragraph 218 above.

(b) Secondly, and as a matter of common sense, an alternative construction would be uncommercial because it would, as Thallon Mole submitted, "allow a party to delay payment under the Contract without penalty, just because they have deep pockets and so are able to prolong the period of time in which payment must be made through litigation".[239]

[234] Thallon Mole also submitted that it is entitled to interest on any such amount on a compound basis. I reject this submission for the reasons discussed under the next heading.

Compound or Simple Interest under the Contract?

[235] Interest under the Contract is provided for by Condition 20.1 as follows:[240]

> "The Owner must pay the Contractor interest on overdue payments at the rate set out in the Schedule Item 11 or at the Commonwealth Bank of Australia Standard Variable Rate applicable to home loans at the time the payment becomes overdue plus 5% per annum (the 'default rate'), whichever is the lesser rate. If no amount is entered in Schedule Item 11 the default rate shall apply."

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236 Defendant's Trial Submissions at [30].
237 Plaintiff's Trial Submissions at [368].
238 Plaintiff's Submissions in Reply at [9].
239 Plaintiff's Trial Submissions at [9].
240 Exhibit 4 p. 220013.

[236] The subject column for Item 11 of the Contract is headed "Interest rate on overdue payments" and underneath is a reference to Condition 20. The particulars column provides a space for the percentage "per annum" to be inserted, but that space is blank. Underneath, it states that the rate will not exceed the Commonwealth Bank of Australia Variable rate for home loans plus five percent.

[237] It follows that the default rate applies. That rate is one of the few matters agreed between the parties in this case.

[238] As neither Schedule Item 11 nor Condition 20.1 make any reference to the method by which interest is calculated, (whether on a simple or compounding basis), the parties are in dispute about the method of calculation:

(a) Thallon Mole submitted that on a proper construction of Condition 20 of the Contract it is entitled to claim monthly compound interest on any overdue payment.

(b) On the other hand, Mrs Morton submitted that the proper construction of the Contract requires that simple interest be applied.

[239] It is instructive at the outset to understand the relevant legal principles that guide the determination of this issue.

Relevant Legal Principles

[240] The legal principles applicable to contractual provisions such as the present (which prescribe the rate of interest but not the method of calculation) emerge from the relevant authorities and can be summarised as follows:[241]

(a) The question of whether interest payable is to be calculated on a simple or compound basis is purely one of contractual interpretation. It is to be approached without reference to any predisposition the Courts may have demonstrated in favour of simple interest as against compound interest. The Contract is to be interpreted so as to give effect to the meaning intended by the parties.[242]

(b) A contractual provision which on its face merely prescribes that interest is to be payable at a particular percentage rate per annum, imposes an obligation to pay simple and not compound interest.[243]

(c) Unless there is a clear agreement to pay compound interest, interest is taken to be simple interest.[244]

(d) For there to be the necessary "clear agreement" making compound interest payable, it is essential that there also be "clear agreement" as to the basis upon which the interest is to be compounded: i.e. annually, monthly, daily,

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241 As usefully summarised by Sackar J in *El Khoury v Harsany; Taouk v Assure (NSW) Pty Ltd* [2018] NSWSC 1774, [48]–[49] after a review of the relevant authorities.

242 *Stein v Torella Holdings Pty Ltd* [2009] NSWSC 971, [30]-[33] & [42]-[44] (per McLaughlin AsJ)

243 *Agricultural and Rural Finance Pty Limited* v *Atkinson* [2010] NSWSC 1396, [129]-[134] (per Einstein J).

244 *Bakker v Chambri Pty Limited*, (1986) 4 BPR 9234, 9236 (per Young J).

etc.[245] That is, there must be clear agreement as to the rests at which interest is to accrue.[246]

(e) Exceptionally, by reason of a recognised custom or practice on the part of banks, compound interest is payable on bank overdrafts. A contract with a non-bank, which requires interest to be payable at the rates or on the conditions imposed by a bank may be construed as requiring the payment of compound interest.[247]

(f) The existence of the alleged usage is a question of fact. Like all other customs, it must be strictly proved. It must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself.[248]

Analysis

[241] With these principles in mind, I reject the notion that either of the pillars of the argument mounted by Thallon Mole support an entitlement to compound interest for the reasons that follow.

[242] The first pillar fails both on the ordinary and natural meaning of the words as they appear in Condition 20.1 and in the context of reading the Contract as a whole.

(a) As to the first: the unambiguous express words of the condition provide for "interest" to be paid on "overdue payments"; and that the obligation to pay interest only arises when that payment becomes overdue. Such a reading does not contemplate that the overdue payment includes interest upon which further interest then accrues.

(b) As to the second: payments under the Contract are dealt with under "Condition 19 Payment." Under 19.1(g), any claim for Progress Payment which is not disputed is to be paid by the Owner within 5 business days of receipt of the claim.[249] It follows that at this time the payment of the Progress Payment becomes overdue, and interest accrues. Again, interest on interest is not contemplated.

[243] The second pillar fails in the following four ways:

(a) First, because it overlooks that Condition 20.1 provides expressly for the rate of payment but not the method of that calculation; and that the authorities establish that there must be clear agreement for the payment of compound interest – and the basis upon which the interest is to be compounded (i.e. annually, monthly, daily);

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245 Agricultural and Rural Finance Pty Limited v Atkinson [2010] NSWSC 1396, [138].

246 *Allen v G Developments Pty Ltd & Ors* [2019] QSC 107, [39] (per Bradley J)

247 See again Einstein J in *Agricultural and Rural Finance Pty Limited* v *Atkinson* [2010] NSWSC 1396, [133] - with reference to Weaver & Craigie's, The Law Relating to Banker and Customer in Australia, 3rd ed, [3.2010-2080]; *Saunders v Nash* [1991] VR 63; and *Morton v Elgin-Stuczynski* [2008] VSCA 25.

248 *Stein v Torella Holdings* [2009] NSWSC 971, [40] - citing *Thornley v Tilley* (1925) 36 CLR 1.

249 Exhibit 4 p. 220012.

(b) Secondly, the CBA Mortgage Conditions are not referred to in Condition 20.1. Therefore, they are not incorporated into the Contract by reference; do not form part of the Contract; and have no bearing on Mrs Morton and Thallon Mole's contractual obligations under the Contract;

(c) Thirdly, the "notoriety" of mortgage contracts requiring payment of interest on a compound basis is irrelevant to the construction of the current provision contained in a Domestic Building Contract; and

(d) Fourthly, there is no evidence that there is a "custom" in contracts (such as the present) for interest to be charged on a compound basis.

Conclusion re: Interest

[244] I therefore find that interest under Condition 20.1 on any outstanding payments under the Contract is to be calculated on the simple basis at the Commonwealth Bank Australia Standard Variable Rate agreed by the parties.

Final Progress Claim 26

[245] It is necessary to consider Final Progress Claim 26 separately from the other two contentious progress claims because it is the last progress claim issued by Thallon Mole to Mrs Morton. The relevant background surrounding the issuing of this final progress claim is as follows.

Relevant Background

[246] On 13 February 2019, Mr Brennan sent an email to Mrs Morton stating that Thallon Mole expected to reach Practical Completion of the house on Friday 22 February 2019 and that he would confirm again early next week and "provide official notification the actual day we reach practical completion".[250]

[247] On 14 March 2019, Thallon Mole obtained a Quality Assurance Report dated 13 March 2019 prepared by Mr Alan Parker of "handovers.com" which concluded that the house had achieved Practical Completion. [251]

[248] On 21 and 24 March 2019, the **Issman** Internal and External Defects reports were prepared at the request of Mrs Morton.[252] These reports were relied upon by Mrs Morton (at the time and at trial) as showing that the Works had not reached Practical Completion. Part of Mrs Morton's case in relation to the Alleged Defects and Omissions at the house (which are dealt with later in these Reasons under that heading) is that these reports were not provided to Thallon Mole until 4 April 2019,[253] meaning Thallon Mole did not have time to rectify many of the defects and omissions identified before they were asked to leave the house on 10 April. In support of this contention Mrs Morton relies on the date on Exhibit 147 (2 April 2019), and the email correspondence exhibited to Mrs Morton's affidavit which attached a copy of Exhibit 147. That email correspondence records a request on 4

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250 Exhibit 78. This email was also sent to Mr Stewart, Mr Cook and Mr Andrews.

251 Exhibit 201.

252 Exhibits 147-148 are versions dated 2 April. As the name suggests, these reports identified a number of internal and external defects at the house.

253 Defendant's Trial Submissions [656](b), referring to Mrs Morton's affidavit (Exhibit 247 p. 251257 [8]-[12]).

April 2019 for two attachments to an email sent by Mrs Morton that morning. But this submission overlooks that in response, Mrs Morton sent an email stating "[p]lease find the two attachments as per our letter. They cover the defects register which I believe you have already received." It is therefore reasonable to assume (as I do) that Mrs Morton is referring to the Issman Reports that had been sent earlier.

[249] Thallon Mole submitted they received the reports around the dates in March that they were prepared. On balance, I accept Thallon Mole's submission for the following reasons:

(a) First, it is not pleaded by Mrs Morton; nor was it put to Mr Cook or Mr Mole that the Internal Issman Report was not received until 4 April;[254] nor was it suggested to Mr Hall that he did not have time to complete the work because he was only given a few days; and

(b) Secondly, the copy of the External Issman Report exhibited to Mr Cook's affidavit is dated 26 March 2019 with the photographs taken on 22 March 2019.[255] It is logical and makes common sense and therefore more likely, that both reports would have been provided to Thallon Mole around the time they were generated.

[250] In the meantime, the expected date of Practical Completion (22 February 2019) came and went without any further notification from Thallon Mole. But then, on 3 April 2019, Mr Brennan sent an email to Mrs Morton stating that Thallon Mole were expecting to reach Practical Completion for the house on Monday 8 April 2019.[256]

[251] The following day, Mrs Morton emailed a letter to Mr Mole referring (incorrectly) to the notice of 4 April 2019, but otherwise relevantly rejecting the nomination of Monday 8 April 2019 as the date for Practical Completion as follows:[257]

> "Under Clause 28 of the Contract, you are required to provide us with two written notices. One not less than 10 business days prior of [sic] the date which you anticipate to reach Practical Completion and another not less than 3 business days prior to Practical Completion. Both of these notices are conditions precedent to Practical Completion. Therefore the earliest date you can nominate for Practical Completion is at least 10 business days from the date of your notice.
>
> Regardless of the deficiencies with you [sic] notice, clause 28.3 allows us to reject your position that the Works have reached Practical Completion. We are of the opinion that the Works have not reached Practical Completion. We rely upon and **enclosed** with this letter, two documents listing the defects which must be rectified for the Works to reach Practical Completion. These defects are separate to and do not include the waterproofing issue that is in dispute

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254 T4-29, ll 35-37. It was expressly put to Mr Mole that the External Issman Report (Exhibit 148) was received by Mr Mole around 24 March.

255 Exhibit 216 pp. 260341-260342.

256 Exhibit 79: This email was sent at 4.49pm and also went to Mr Stewart, Mr Cook and Mr Andrews and Mr Mole.

257 Exhibit 80. Letter from Mrs Morton to Mr Mole dated 4 April 2019 without attachments.

> between us. It is obviously the case that waterproofing needs to be rectified before Practical Completion can be achieved."[258]

[252] On 5 April 2019, Mr Brennan sent an email to Mrs Morton stating that "the time for dealing with defects is at the time of practical completion and during the retention period; and not before" and attached a document labelled "Progress Claim OTW000-C026" dated 8 April 2019 which claimed the amount of $45,780.05 (incl. GST).[259] No Form 4, 6 or 7[260] was attached to Progress Claim 26, but it is instructive that the accompanying letter provided that on 8 April 2019 Thallon Mole will be giving you "this" notice (of Practical Completion). No such notice of Practical Completion was ever given.

[253] On 7 April 2019, a document prepared by TSA entitled the "TSA Major Defects List" was served on Thallon Mole.[261]

[254] Thallon Mole submitted that it carried out certain defect rectification work after receiving the Issman Reports and TSA Major Defects List. The issue of defective work is dealt with under the heading "Alleged Defects and Omissions" later in these Reasons. But it is otherwise uncontroversial that Thallon Mole refused to rectify certain alleged defects, for example the external waterproofing defect .

[255] On 10 April 2019, Mrs Morton purported to terminate the Contract (effective immediately), relying on her Notice of Default dated 26 March 2019.[262] She immediately excluded Thallon Mole from the Site.[263]

[256] Following termination, site inspections by TSA and the builders engaged by Mrs Morton to complete the house (Hutchinson Builders) alleged many defects set out in the Issman Reports and the TSA Major Defects List had not been addressed.[264] Other defects such as the passenger lift and a leak in the Level 1 ensuite were also identified as allegedly being incomplete.[265]

[257] Hutchinson Builders commenced rectification works at the house on about 18 April 2019. At the time Mr Dean White, the Site Manager employed by Hutchinson

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258 It is reasonable to infer (as I do) that this was a reference to the waterproofing of the external concrete slabs using waterproof membrane.

259 Exhibit 81. This letter was sent to Mr Mole, Mr Morton, Mr Asplin, Mr Stewart and Mr Wright. It purported to address notice of Practical Completion, the final payment claim, the amount unpaid by Mrs Morton and respond to a Notice to rectify alleged breaches dated 26 March 2019, respond to offsetting claims and propose a way forward. Progress Claim 26 is Exhibit 82.

260 Where the claim is for the Practical Completion Stage (which I accept is what Progress Claim 26 purported to be) there is an additional mandatory requirement imposed by Condition 19.1(e). It provides that the Progress Claim for the Practical Completion Stage must, in addition to the requirements specified for any other progress claim, be accompanied by a completed and signed QBCC Form 6 – Defects Document and QBCC Form 7 – Certificate of Practical Completion, or similar appropriate documents.

261 Exhibit 149. The Defendant's Trial Submissions at [656](c) refer to this report being provided to Thallon Mole on 10 April 2019, but this submission is contrary to Mr Stewart's affidavit evidence that it was provided around 7 April (Exhibit 269 [15](h)); and Mr Mole recalled under cross examination receiving this report on about 7 April 2019 as per T4-30, l 28.

262 Exhibit 138. This notice was underpinned by the notice of dispute - waterproofing served on Thallon Mole on 5 February 2019 (Exhibit 136).

263 Exhibit 152 p. 70152.

264 Exhibit 296 [18]-[27].

265 Exhibit 296 [32], [47], [73], [208], [258]-[260].

prepared the "Hutchies Defects List" which identified defects he considered were present when Hutchinson's took over the construction.

[258] The broad effect of Mr White's evidence (generally denied by Thallon Mole) is that Hutchinson's provided Thallon Mole and its subcontractors with the opportunity to return to site to carry out some rectification work, but they refused.[266] Again, this contested issue is resolved (where relevant and necessary) under the heading "The Alleged Defects and Omissions."

[259] Hutchinson's completed its work (around 31 March 2020) at a cost of $296,575.77.[267] Mrs Morton and her family moved into the house sometime after this date.

[260] The issues surrounding alleged Defects and Omissions and their rectification and whether Mrs Morton was entitled to terminate the Contract are dealt with in some detail under those headings later in these Reasons. But at this point, it is necessary to identity the four main matters raised by Mrs Morton in support of her submission that Progress Claim 26 was invalid, namely: its timing; that no Forms 4, 6 or 7 were attached; that the requisite notice of the anticipated date for Practical Completion was not given; and that Practical Completion had not in fact been reached.[268]

[261] The first three matters are procedural matters and are addressed briefly together in this section of my Reasons. The fourth issue lies at the heart of much of the dispute between the parties and is discussed in far more detail under the section "Practical Completion".

Invalidity of Progress Claim 26 – Procedural Matters

[262] Thallon Mole claims that the Works were at the stage of Practical Completion by 3 April 2019 (not 13 February 2019 as pleaded)[269] and that Practical Completion was reached (I assume on 8 April 2019), "triggering an entitlement to payment of the final progress claim".[270] It is therefore reasonable to assume (as I do) that Final Progress Claim 26 was issued by Thallon Mole as the progress claim for the Practical Completion Stage[271] of the Works as contemplated by Conditions 19.1(e) and 19.2 of the Contract.[272]

[263] Relevantly, Condition 19.2 provides two different timings for the delivery of progress claims. The first, by the fifteenth day of each month during performance

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266 Exhibit 296 [38]-[70].

267 This is the date of the Hutchinson Cost to Date Report (as noted in the Expert Building Condition Report by Mr Carpenter. See Exhibit 309 pp. 280533-280534.

268 Mrs Morton also contended (without particularisation) that the notices of Practical Completion were not valid because they were not given by an authorised representative of Thallon Mole, but the evidence (which I accept) is that Mr Brennan was authorised. See T1-25, ll 16-30.

269 FASOC at [45]-[46]. The pleaded contention in the **Fifth Amended Reply and Answer** (FARA) at [33](aa)] that works had reached that stage by 13 February 2019 is not pressed by Thallon Mole. See Plaintiff's Trial Submissions at [15].

270 Plaintiff's Trial Submissions at [16(a)].

271 Which by definition in the Contract (Exhibit 4 p. 220006) means the stage of the Works in which Practical Completion will be attained in accordance with this Contract.

272 It is pleaded this way - see FASOC at [47]. The covering email of 5 April 2019 (Exhibit 81) referred to the attached Progress Claim as the "Final Payment Claim".

of the Contract until the issuing of the Certificate of Practical Completion; and the second, five business days after the issue of a Certificate of Practical Completion.

[264] The delivery of Final Progress Claim 26 does not fit within either of these timings:

(a) First, because a certificate of Practical Completion had not been issued at the time, so 19.2(b) was not invoked; and

(b) Secondly, even if it is assumed that Final Progress Claim 26 is not the claim for the Practical Completion stage, it is also not a progress claim under 19.2 (a) because Progress Claim 25 (which I have found to be a valid claim) was delivered on 15 March 2019, so the next progress claim was not due until 15 April 2019.

[265] Further, where the claim is for the Practical Completion Stage, there is an additional mandatory requirement imposed by Condition 19.1(e): that in addition to attaching a Form 4, a completed and signed QBCC Form 6 – Defects Document and QBCC Form 7 – Certificate of Practical Completion, (or similar appropriate documents) must be attached. No such documentation was attached to Final Progress Claim 26. However, for the reasons discussed above (in relation to Form 4), I am satisfied that Forms 6 and 7 are procedural in nature and the failure to attach them does not of itself make the claim ineffective.

[266] Finally, Mrs Morton raised the issue of Thallon Mole's failure to provide the notices of the anticipated date of Practical Completion as required under Condition 28.1.

[267] Thallon Mole relied on the notice of 13 February 2019 (in which Mr Brennan advised that Thallon Mole were expecting to reach Practical Completion on 22 February 2019)[273] as meeting the requirement for 10 days' Notice of anticipated Practical Completion (under Condition 28.1). This submission was undermined by the proposition that Mrs Morton was subsequently informed (by notice on Wednesday 3 April 2019) that Practical Completion would be met on Monday 8 April 2019. I reject Thallon Mole's submission on this issue. I am not satisfied that the requirements of Condition 28.1 were met by Thallon Mole for the following five reasons:

(a) First, the 13 February Notice anticipated Practical Completion at a date within the ten days required;

(b) Secondly, the 13 February Notice stated that Thallon Mole would confirm "next week" and provide sufficient notification of the actual date of Practical Completion. But no such confirmation or notification of Practical Completion was given.

(c) Thirdly, the 13 February Notice cannot stand as the first notice under Condition 28.1(a)(i), because Condition 28.1(b) contemplates that the Contractor must notify the Owner in writing if Practical Completion will not be reached by the anticipated date. And in this case, that date (22 February) came and went.

(d) Fourthly, the first notice that Thallon Mole was expecting to reach Practical Completion on Monday 8 April 2019 was given on 3 April 2019. That notice

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273 Exhibit 78.

could not be a notice in compliance with Condition 28.1(a)(i) or (ii) because it was less than ten business days prior to 8 April 2019 and less than three business days prior to 8 April 2019.[274]

(e) Fifthly, there was also a failure to give a notice under Condition 28.1(c) which requires the Owner to notify in writing when it considers the works have reached Practical Completion. The 3 April Notice does not provide that notice, but rather says that it anticipates that Practical Completion might be reached on 8 April 2019.[275] Equally, the 5 April 2019 email from Mr Brennan also does not give the Condition 28.1(c) notice – rather at Item 1(g), it says that "notice" will be given on 8 April 2019.[276]

[268] Thallon Mole submitted that strict compliance with Condition 28.1 was not required.[277] I reject this submission. Such a construction does not accord with the context and words of the condition. It overlooks that these notices plainly serve an important purpose (to the benefit of both parties) – near the end of the fulfilment of their respective obligations under the Contract as they put in place a process by which the Owner is given notice of the anticipated date of Practical Completion and of the actual date of Practical Completion having been achieved. This clearly allows the Owner to protect his or her interests. Consistent with the fact that the requirements of condition 28.1 are mandatory is the context of the provision as a whole. The provisions also underpin the process to follow (including the final payment to the Contractor), for example:

(a) Condition 28.2 contemplates that within two business days following the notification under Condition 28.1(c), there is to be an Owner's inspection, and if the Contractor produces to the Owner satisfactory written evidence that all relevant inspection and approvals required by the *Sustainable Planning Act 2009* and the ***Building Act*** *1975* have been satisfactorily completed, the Contractor must*:* complete and sign the QBCC Form 6 or similar appropriate document; give the Owner a completed and signed QBCC Form 7 Certificate for Practical Completion; and hand over the works to the Owner;

(b) Condition 28.3 then provides for what is to occur if the Owner considers that the works have not reached Practical Completion. It provides that the Owner must give the Contractor written notice of the matters which are required to be done for the works to reach Practical Completion. It also provides that the Contractor must carry out such matters as may be necessary for the works to reach Practical Completion and must otherwise proceed in accordance with the preceding paragraph (28.2);

(c) Condition 28.4 makes clear that the issue of a Certificate of Practical Completion does not constitute approval of any work under this Contract, nor does it prejudice any claim by the Owner in respect of the work under this Contract; and

(d) Condition 28.5 importantly provides that: "[w]hen the Contractor has satisfied all of its obligations under Condition 28.2 the Owner must within

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274 The Plaintiff's Trial Submissions at [611] overlooked that three business days were required.
275 Exhibit 79.
276 Ibid p. 70127.
277 Plaintiff's Trial Submissions at [606]-[607].

five business days pay the Contractor the progress claim for the practical completion stage (as adjusted under Condition 24, if applicable)."

[269] I am satisfied that on a plain reading of these provisions, the notices in Condition 28.1(a) are preconditions to the application of Condition 28.2. The notices were never given, so it follows that the Condition 28.2 obligation did not arise. Further, Condition 28.5 makes clear that it is only when the Contractor has satisfied all its obligations under Condition 28.2 that the Owner must (within five days) pay the Contractor the progress claim for the Practical Completion Stage.

[270] I therefore find that Final Progress Claim 26 is not a valid claim for the Practical Completion Stage of the Contract. This finding is consistent with the recent findings in *Cochrane v Lees* [2021] QCATA 74 that there was no payment obligation arising under Condition 28 in circumstances where the Condition 28.2 obligations had not been satisfied.[278]

Conclusion: Amounts of the Progress Claims Due and Payable by Mrs Morton

[271] The overall findings in these Reasons reveal that a number of the disputes raised by Mrs Morton have been proved to be valid. Leaving aside the disputes that have been resolved in Mrs Morton's favour, there are aspects of the work covered in the progress claims that Mrs Morton has received the benefit of, but she has not paid for. But Thallon Mole have not established a contractual basis for payment of this work. In any event, it is impossible on both the pleadings (as they stand) and on the evidence to make any realistic assessment of the value of this work. Thallon Mole's written submissions in reply flagged that leave may be sought to amend the pleadings to make a claim for restitution on the basis of a quantum meruit. During final oral addresses, I allowed Senior Counsel for Thallon Mole the opportunity to obtain instructions to amend the pleadings to include such a claim. No such application was pressed. I have therefore not considered such a claim in this context.

[272] But I am satisfied that Mrs Morton was in breach of the Contract by failing to pay the amount of $55,517.74 as the undisputed part of Progress Claim 25. Against this, Mrs Morton pleaded (and I accept) that she is entitled to set-off this sum against any amount found to be owing to her.[279]

[273] I therefore find that Thallon Mole is entitled to payment on the sum of $55,517.74 together with simple interest under Condition 20.1 of the Contract, from 29 March 2019 until the date of the final orders.

[274] I am also satisfied that a failure by Mrs Morton to pay the sum of $55,517.74 is a substantial breach of Condition 26.3(b) of the Contract. A substantial breach of the Contract gives rise to a right to terminate, pursuant to Condition 26.1 of the Contract, provided that the notice and time to remedy required by that condition is met. Thallon Mole did not serve any such notices or purport to terminate the Contract relying on Mrs Morton's failure to pay the undisputed sum of $55,517.74.

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278 *Cochrane v Lees* [2021] QCATA 74, 14 [84] (per Senior Member Brown and Member Howe). See also *Metro Edgley Pty Limited v MK & JA Roche Pty Limited & Ors* [2007] NSWCA 160 [49], [83]-[84], [86]-[88], [93].

279 SADCC at [38].

But of course, Mrs Morton later terminated the Contract for her own reasons. The issues surrounding the parties' respective rights to terminate are dealt with under that heading later in these Reasons.

[275] Mrs Morton's termination of the Contract on 10 April 2019 was underpinned by alleged defects in the installation of the external Waterproofing, Pool Balustrade and Newbolt Street balustrade. It is therefore convenient to deal with each of these issues next, as they feed into both the issues of Practical Completion and Termination of the Contract.

External Waterproofing

[276] Three main issues emerge under the overarching heading of external waterproofing:

(a) First, what were the waterproofing requirements under the Contract?

(b) Secondly, was the installation of the waterproofing at the house inadequate or defective?

(c) Thirdly, if there was a breach of Contract, is rectification required and are the damages claimed reasonable?

[277] These issues are dealt with in turn below.

External Waterproofing Requirements Under the Contract

[278] As to the first issue, Mrs Morton submitted that on a proper construction of the Contract, a waterproof membrane identified as Bituthene 3000 was required to be laid on the external suspended concrete areas including the Newbolt Street side podium, the pool podium, the stairs from the pool podium, the podium outside of the doors on the Otway Street side, and the back podium.

[279] On the other hand, Thallon Mole submitted that the appropriateness of the waterproofing was a matter for it, as all the Contract required was the use of a product that was fit for purpose to ensure the podium slabs were appropriately waterproofed; and that the "**Shalex** Sealit Multipurpose Compound" that was in fact used by Thallon Mole was a suitable alternative to Bituthene 3000.

Relevant Contractual Provisions Concerning External Waterproofing

[280] Given the arguments, it is necessary to start by considering the following contractual provisions relevant to the external suspended slab waterproofing issue as follows:[280]

> **GENERAL CONDITIONS OF QBCC New Home Construction Contract**
>
> GENERAL CONDITIONS
>
> 3. Warranties under Schedule 1B of QBCC Act

280 Exhibit 4 p. 220018.

3.1 To the extent required by Schedule 1B of the QBCC Act, the Contractor warrants that

…

(c) the work under this Contract will be carried out in accordance with all relevant laws and legal requirements including, for example, the Building Act 1975;

(d) the work under this Contract will be carried out in accordance with the plans and specifications and any other Contract documents described in Schedule I Item 15;

… [Emphasis added]

26.1 If:

(a) a party is in substantial breach of this Contract; and

(b) the other party gives a notice to the party in breach identifying and describing the breach and stating the intention of the party giving notice to terminate the Contract if the breach is not remedied within 10 business days from the giving of the notice; and

(c) the breach is not so remedied, then the party giving that notice may terminate this Contract by a further written notice given to the party in breach and may recover from the party in breach all damages, loss, cost or expense occasioned to the party so terminating by or in connection with the breach or that termination and may set off such claim against payment otherwise due by the party so terminating.

26.2 The right to terminate under this Condition is in addition to any other powers, rights or remedies the terminating party may have.

…

26.4 **Substantial breach by the Contractor** includes:

(a) failing to perform the work under this Contract competently;

(b) failing to provide materials which comply with this Contract;

(c) unreasonably failing to replace or remedy defective work or materials;"

...

MORTON ADDITIONAL CONTRACT CONDITIONS

2. AUSTRALIAN STANDARDS

> The Contractor must in carrying out the Works use workmanship and materials:
>
> (a) of the standard prescribed in the Contract; or
>
> (b) to the extent they are not so prescribed, of a standard consistent with the best industry standards for work of a nature similar to the Works and which are at least fit for purpose and comply with the requirements of the National Construction Code and all relevant standards of Standards Australia
>
> [Underlined emphasis added]

[281] It follows from Clause 3.1(d), that Work under the Contract is expressly required to be carried out in accordance with the plans, specifications and the documents described in Schedule I Item 15. These documents include the plans and specifications supplied by the owner on 9 December 2016.[281] Relevantly, the notes to Schedule I Item 15 provide that "[a]ny amendments or '**variations' to this Contract must be recorded in a variation document** (such as QBCC Form 5) which then forms part of the Contract."[282]

[282] Turning firstly to the relevant plans. The first of these plans is the architectural drawings of TSA. These plans start with a "Cover Sheet", Issue N.[283] On the bottom left-hand corner of that cover sheet, the General Notes for all the subsequent plans appear. This note provides relevantly as follows:

> …The contractor shall carry out works in accordance with drawings and specifications and anything reasonably inferred, and with the conditions of contract, and in accordance with the directions and satisfaction of the architect, whose interpretation of the contract documents shall be final.
>
> The drawings and specifications shall be considered complementary, and any work and/or materials and selections absent from one but present or implied in the other, shall be furnished as if they were present in both. Any discrepancies are to be brought to the attention of the architect for direction.

[283] Relevantly, the drawings and specifications are expressly stated to be complementary. If there is something in the specifications which is not in the drawings it is to be implied into the drawings; and any discrepancies are to be brought to the attention of TSA for direction.

[284] The various external suspended concrete slab areas are usefully shown at Drawing 210-01 Issue N of the Contract.[284] Drawing 220-00 Issue C of the Contract shows that the external suspended concrete slab areas sit over; the garage, the

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281 Exhibit 4 p. 220024.
282 Ibid.
283 The plans were issues at the post-tender Value Management Stage; Exhibit 4 p. 220094.
284 Exhibit 4 p. 220106.

storage/workshop, the plant area (which shows the electrical plant), the gym and the electrical room (which shows the electrical plant, including two batteries).[285]

[285] The left-hand bottom side of Drawing 600-1 Issue C of the Contract relevantly shows a cross-section which includes the Newbolt Street balustrade and the podium between the balustrade and the house. Underneath the tiles there is a dotted line with the description "line represents waterproofing indicative extent of waterproofing as required".[286]

[286] The engineering drawings in the Contract also contain the general note as follows:[287]

> G1 – These drawings shall be read in conjunction with all architectural and other consultants' drawings, specifications and instructions. Any discrepancies or omissions shall be referred to the engineer for clarification before proceeding with the work.

[287] Sheet No. 3.3 of the Contract includes various depictions of podium areas.[288] Some of those areas have a darkened colour above the podium slabs. There are statements to the effect "Tiling bedding & waterproofing (by a builder)." [289]

[288] Finally, section two of the Value Management schedule in the Contract contains the "Finishes and Selections schedule" and under the heading waterproofing in a horizontal column table style, the following appears:[290]

> "Waterproof Membrane; Retaining walls / Planters / External Suspended Slabs / External Timber framed Decks; Bituthene 3000; WR Grace Limited; Installed in accordance with manufacturer's recommendations / provide a warranty for a period of 10 years for the materials and workmanship for the tanking. Protection board: protect tanking membrane after installation with Bitugard Protection Board by WR Grace Australia Limited in accordance with the manufacturer's recommendations." [Emphasis added]

[289] Underneath these provisions (still under the heading waterproofing), the following appears in capital letters:

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285 Exhibit 4 p. 220109. Using reference points A and B from drawing 210-01 Issue N and the area which runs between those two points and the area that runs between reference points 3 and 4 on that drawing.

286 Exhibit 4 p. 220138.

287 Exhibit 4 p. 220151.

288 Exhibit 4 p. 220177.

289 As the Plaintiff's Trial Submissions pointed out at [191], cross-section SS1 shows the podium along Newbolt Street. Cross-sections SS2 and SS3 show the podium outside the doors leading to the pool, steps and the pool podium. Cross-section SS2 has the statement "steps to arch's detail." It is relevant to observe that the external suspended concrete slab in SS2 is monolithic in that it is represented by a single pour with continuous structural steel in the flat area next to the pool, the stairs, and the flat area outside the doors. In SS2 the drainage is represented at the bottom of the last steps with the phrase "drainage (by others)". Cross-section SS5, is the back podium area. The Sheet 3.3 cross-sections are to be read positionally via Sheet 3.0 of the Contract. In Sheet 3.0 when a cross-section is identified by a triangle attached to a circle, the triangle shows the direction in which the eye is oriented for the cross-section, and the straight line on the edge of the circle, gives the position of the cut for the cross-section.

290 Exhibit 4 p. 220078.

> "To be installed <u>in accordance with Australian standards requirements</u>, preparation and installation of all sealer/waterproofing products to manufactures/ suppliers specification, contractor to ensure all warranties and fit for purpose products are agreed with the specialist prior to procurement and installation." [emphasis added]

[290] The General Notes which appear earlier in the cover sheet in front of the "Finishes and Selections" schedule" in the Contract relevantly provide as follows:[291]

> **<u>GENERAL NOTES</u>**:
>
> …
>
> "Any substitution and/or change has to be signed off by the architect/client prior to execution. Finishes Schedules are to be read in conjunction with drawings. Finishes Schedule is to be read in conjunction with consultant drawings/specification. Builder to ensure all nominated products/finishes are fit for the purposes and application."

<u>Waterproofing Requirements Under the Contract</u>

[291] It was submitted by Thallon Mole that the Contract was uncertain about whether a waterproof membrane was to be used in the waterproofing at the house. But I reject this submission for the following reasons:

(a) First, it is inconsistent with the following evidence (which I accept) as to Thallon Mole's understanding at the relevant time:

(i) Mr Cook's evidence was that he was aware that the contractual requirement for waterproofing was for the use of a waterproof membrane for the external suspended slabs which included the Newbolt Street side podium, the pool podium, the area on the steps up from the pool and the podium at the top of the steps that run outside the doors.[292]

(ii) Mr Mole agreed with the question put to him, by Senior Counsel for Thallon Mole that "[y]ou're aware the contract specified Bituthene 3000 for waterproofing on all retaining walls and external slabs and decks"[293]; and other evidence from which it is reasonable to infer (as I do), that Mr Mole knew that Bituthene 3000 was a waterproof membrane.

(b) Secondly, on a proper construction of the relevant contractual provisions referred to under that heading above, I am satisfied that:

(i) A waterproof membrane was required to be constructed in the external suspended concrete areas including the Newbolt Street side podium, the pool podium, the stairs from the pool podium, the podium outside of the doors on the Otway Street side, and the back podium, was a waterproof membrane; and

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291 Exhibit 4 p. 220066.
292 T9-78, ll 16-21; T9-79, ll 34-45.
293 T2-27, ll 36-39.

(ii) The type of waterproof membrane to be used was Bituthene 3000.

Did the Architect "Sign Off" on Use of Another Product?

[292] The uncontroversial evidence is that Thallon Mole did not use Bituthene 3000 to waterproof where required at the house – rather it used a waterproofing sealant call Shalex. But this does not necessarily mean that Thallon Mole breached the Contract. The Contract clearly contemplated that a product other than Bituthene 3000 might be used in waterproofing the house. For example: the General Notes required Thallon Mole to "ensure all nominated products/finishes are fit for purpose and application".[294] In fact, one of the "General Notes" on Drawing 450-01 H stated "[w]aterproof membrane shown indicative only, builder to ensure building is appropriately waterproofed and all substrate installations are as per manufacturers technical specification/requirements."[295] But, as set out in paragraph 289 above, the General Notes also expressly contemplated that any substitution and/or change had to be signed off by the architect/client prior to execution.

[293] It follows that if Bituthene 3000 was not going to be used by Thallon Mole for whatever reason (including that it had formed a view that it was not fit for purpose), there was a contractual obligation for any substitution to be "signed off" by Mr Stewart or Mrs Morton.

[294] Thallon Mole submitted that the General Notes only required the discrepancy or change in product to be "brought to the attention of the architect for direction," and not that it be in writing, or the subject of a formal variation.[296] It further submitted that as a matter of fact, this requirement was fulfilled. I reject these submissions for the reasons that follow.

[295] The starting point is to consider the meaning of the phrase "signed off". The expression is not defined in the Contract but the Cambridge online dictionary attributes to it a meaning "to approve something officially." As a matter of common sense and on a plain reading of the expression as it appears in the text, the reference to any "substitution and/or change" having to be "signed off" is a reference to it having to be approved. The text then refers to only one party (the architect or client) being required to sign off or (as I have found) approve the substitution or change. It does not state how this is to be communicated - whether it is to be done orally or in writing. In that sense, the text is ambiguous. It is therefore necessary to consider the expression in the context of not only the General Notes but also in the context of the Contract read as a whole.

[296] Waterproofing is obviously work required under the Contract. As a matter of common sense, it is reasonable to infer (as I do), that the product to be used for waterproofing forms part of the work. On one view any change to that product is a variation of the work to be performed, subsequently invoking Clause 21 of the Contract which states as follows:

21 Variations

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294 Exhibit 4 p. 220066.
295 Exhibit 4 p. 220122.
296 Plaintiff's Points in Reply [1](b).

> 21.1 The **work under this Contract** may be varied by way of an increase, decrease or substitution of **work under this Contract** agreed between the Contractor and the Owner provided that, before work commences, the details of the variation are put in writing in a Variation Document signed by both parties and initialled as necessary by the Owner.
>
> 21.1A Notwithstanding Condition 21.1, the Owner may at any time direct a variation to omit any part of the **Works**. Such a variation will be documented in writing in a Variation Document signed by the Owner.
>
> [Underlined emphasis added]

[297] On the other hand, the language used in the General Notes is more informal and contemplates a more fluid process than that stipulated in other parts of the Contract.

[298] On balance, I am satisfied that the proper construction of how the substitution or change of an item identified in the Finishes and Selections schedule (such as the waterproofing product to be used), was to be "signed off" or approved, was that it be done in writing by Mrs Morton or Mr Stewart (similar to what is contemplated by Condition 21.1A). But I am not persuaded that it needed to be done by way of a formal variation document signed off by both parties (as contemplated by Condition 21.1). My finding is generally consistent with what in fact happened.

[299] For example:

(a) There was no evidence of a written formal variation to a change to the retaining wall waterproofing in mid-2017.[297] On that occasion an issue was raised by Mr Stewart or Mr Wright about the waterproofing membrane that had been used on the retaining wall. A Data Sheet was then supplied to them by Thallon Mole which showed that the product that was used was a waterproof membrane (called CP 50).[298] Mr Stewart's evidence was that he agreed that this waterproof membrane could stay;[299] and

(b) There was no evidence of a written formal variation authorising the use of Crystoflex – although there is reference to it being approved in the site meeting notes and in correspondence between the parties.

[300] But, even if the Contract allowed for the signing off to be done orally, I am not satisfied that this requirement was otherwise satisfied in this case concerning the use of Shalex.

[301] Thallon Mole submitted that the requirements of the General Notes were fulfilled because Mr Mole told Mr Rhodes in the Value Management Stage that "we wouldn't be using Bituthene 3000".[300] I accept Mr Mole's unchallenged evidence

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297 This was after and not prior to execution as required by the General Notes to the Finishes and Selections schedule.

298 T9-78, l 41.

299 T13-40, l 24 to T13-41, l 17. There was no evidence of whether this was done in writing or orally.

300 T2-28, ll 44-47. It was also referred to in Progress Meeting Notes #8 and #9 (Exhibits 64 & 65).

about this.[301] But, I fail to see how the requirements of the General Notes are satisfied by this or any other evidence. At the very least there ought to have been some form of acknowledgment or agreement about the product that was approved to be used instead of Bituthene 3000. There was no evidence of any oral direction or authorisation by Mr Rhodes or someone from TSA or Mrs Morton, about the use of Shalex either before execution (as the General Notes required) or afterwards.[302]

[302] I find that the use of Shalex was not approved either orally or in writing (the latter as required under the Contract).

[303] This is not the end of the matter. Thallon Mole submitted that it remains necessary to consider whether Shalex was a contractually suitable product in place of Bituthene 3000 or otherwise. That issue is addressed under that heading below. But it is relevant to reflect upon what appears to be the root of the waterproofing issue, why the product specified by TSA (Bithuthene 3000) was not used.

Was Bituthene 3000 Suitable?

[304] It is instructive to observe that at the relevant time, TSA did not appear to cavil with the suggestion from Thallon Mole that Bituthene 3000 was not appropriate and needed to be substituted with another product. That is evident from its approval of the use of Crystoflex and lack of insistence of Bituthene 3000 being used at the relevant time.

[305] Mr Mole's evidence was that at the time, he did not consider Bituthene 3000 to be appropriate or fit for the purpose of waterproofing the house because:

(a) It had been superseded in the market and Thallon Mole no longer used it;[303]

(b) It suffered from issues including; that it is difficult to apply, it is susceptible to damage, and to breaking down;[304] and

(c) The tiles would not adhere to it because it is a rubber-based compound.[305]

[306] I accept Mr Mole's evidence on this point for the following reasons:

(a) First, no cogent evidence contradicting Mr Mole's view was adduced, nor was it put to him that he was wrong to reject Bituthene 3000 as appropriate.

(b) Secondly, Mr John Blasé, the waterproofing expert called by Mrs Morton did not respond directly to questions about whether Bituthene 3000 was suitable for the use proposed by TSA. [306] But that is not surprising given Mr Blasé's report attached emails from the manufacturer of Bituthene 3000 which showed that it was most likely not suitable for the installation proposed.[307]

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301 T3-6, ll 1-37. Mr Mole was cross examined about this evidence, and it was put to him that it was a "recent invention." Mr Mole told Counsel for Mrs Morton to ask Mr Rhodes about it, but this did happen. No evidence was adduced from Mr Rhodes to the effect that the conversation did not occur.

302 The progress meeting notes of 6 June 2017 (Exhibit 64) expressly acknowledge that Thallon Mole used different waterproofing than the one specified – and that the specifications of the waterproofing were to be sent to Mr Wright. This occurred on 20 June 2017.

303 T2-28, ll 1-4.

304 T2-28, ll 6-12.

305 T2-33, ll 10-17.

306 Mr Blasé's Written Report is Exhibit 317.

307 Exhibit 317 p. 280264.

(c) Thirdly, Mr Mole's evidence is consistent with Mr Dixon's evidence that Bituthene 3000 was inappropriate for the waterproofing at the house.[308]

[307] It follows that I am not satisfied on the evidence that Bituthene 3000 was fit for purpose.

Was the Installation of the External Waterproofing at the House Inadequate or Defective?

[308] Thallon Mole submitted that the following two issues are to be determined under this sub-heading:

(a) First, was the Shalex product used by Thallon Mole an appropriate waterproofing product, fit for the purpose for use at the house; and

(b) Secondly, whether Shalex or Crystoflex was applied to all parts of the podium slab and the pool podium level, and whether the installation was performed correctly.

[309] The answers to these questions are informed by an understanding of the relevant factual background. But, before turning to address those facts, it is necessary to observe that Mrs Morton submitted that the alleged fitness for purpose of Shalex does not come into play because it is not a waterproof membrane as was specified in the Contract. There is some force to this submission given my finding that the contractual bargain was that Mrs Morton was to have a waterproof membrane in the areas identified above. But anyway, and for the reasons set out under that heading below, I am not satisfied that Shalex is an appropriate product, fit for the purpose of waterproofing at the house.

Relevant Facts

[310] In mid to late May 2018, Mr Stewart inspected the tiles that had been laid on the pool podium and was unable to see a waterproof membrane at the edge where the tiles were exposed. Subsequently, on 22 May 2018, he issued Site Instruction 19 which relevantly stated as follows:[309]

> "As neither the client or the architect were able to site the installation of the waterproof membrane on the podium (ground) level of the project prior to the installation of tiles, will you please provide for us evidence of the waterproofing having been applied, as well as the detail of the product which was used
>
> The spaces that we refer to include the deck area between the living space and the pool as well as the outdoor room between the living area and the grass and any areas above the level below"

[311] Mr Cook was the site supervisor overseeing the waterproofing at the house. He understood from this Site Instruction (which he agreed he would have seen on that day), that Mr Stewart wanted to see a waterproof membrane, and that it was an important issue to Mrs Morton and TSA.[310] Mr Cook knew at this time that Shalex

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308 Exhibit 169 p. 280654; T6-29, l 35 to T6-31, l 3.
309 Exhibit 128.
310 T9-81, ll 27-44; T9-82, ll 7-15; T9-84, ll 20-23.

(which was described by the manufacturer as a penetrative sealer and waterproofing compound) had been applied to these areas. He also knew that Shalex was not a waterproofing membrane product.[311]

[312] On 23 May 2018, Mr Mole sent an email to Mr Stewart which stated relevantly as follows:[312]

> "SI20 – The waterproofing in these areas is being done by the tiler. It is installed using a roller and applied under the bedding. He also includes F-LOC in his bed. I will provide the info relating to the product and associated specs. I would also like to confirm that the waterproofing is completed to the areas that are already tiled. Waterproofing of these are done progressively as not to damage it. All Form 15's for waterproofing will be provided – I will speak with the tiler tomorrow to send spec's…"

[313] Mr Cook's evidence was that it was Thallon Mole and not a tiler who carried out the waterproofing in this area.[313] It follows that Mr Mole's statement that the tilers were doing the waterproofing work in this location was plainly wrong.[314]

[314] On 24 May 2018, Thallon Mole sent TSA photographs of the waterproofing product it was using, namely the Shalex Sealant.[315]

[315] On 24 May 2018, Mr Stewart emailed Mr Mole relevantly as follows:[316]

> "We would like confirmation on the product being used before any further installation of the waterproofing product. Please hold all further waterproofing and tiling on the areas in question until it has been resolved and agreed by the client.
>
> As it is not the same as the product that was specified in the documents Greg and I would like to confirm its appropriateness. The specification along with the details of the manufacturer would be helpful so that we can make inquiries."

[316] Despite this correspondence (and knowing full well that Shalex was not a waterproof membrane and that he had been told not to continue to use it), quite inexplicably, on an unknown date between 24 May 2018 and 2 June 2018, Mr Cook applied Shalex mixed with green food colouring, on the Newbolt podium slab area.[317]

[317] On 5 June 2018, Mr Stewart emailed Mr Mole attaching a number of site instructions (including Site Instruction 25) noting that "[m]any of these we had discussed but need in writing so should be very quick to turn around. I expect that

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311 T9-89, ll 1-30.

312 Exhibit 129 p. 40019; Nothing turns on it, but the email wrongly refers to Site instruction 20 and not 19.

313 T9-82, ll 40-44.

314 The consequences of this evidence are discussed later in these Reasons under the heading "Waterproofing of the Podium Slab Including Stairs."

315 Exhibit 138 p. 2.

316 Exhibit 129 p. 40018. This email was cc'd to Mrs Morton and Mr Wright.

317 T9-86, ll 13-30; T9-87 ll 16-27; The green food colouring can be seen in the photos taken by Mrs Morton on 2 June (Exhibit 67).

you should be able to deal with all of them by the end of the week…".[318] Site Instruction 25 stated relevantly as follows:[319]

> "Bruce, it has been noted that the waterproofing on the external deck areas (not all areas are yet complete) has not been installed as the specified product. Previously TSA instructed that further use of the product was to be ceased until resolution is met. Please show cause as to why this is not in accordance with the documents. Please provide an outline of a proposed remedy."

[318] The issues concerning waterproofing were discussed at a site meeting at the house on 12 June 2018. The relevant extracts from Mr Mole's meeting notes are as follows:[320]

> "Discuss responses to the "Site Instruction". [The next extract is in red writing] Discuss this. This major item is the waterproofing. They may want us to remove the tiles. We will discuss the extent of the expansion joints. They kinda wanted larger joints at each side of the bridges….
>
> This will mean cutting tile a little. We will also try to install the cut off flanges if possible…
>
> Please see the spec sheet of the product that our waterproofer would prefer to use and our tiler is happy with. [The next wording is in red]. Gave this to Tim"

[319] Mr Cook's evidence (which I accept as consistent with these meeting notes), was that by this time Thallon Mole had told TSA and Mrs Morton that the waterproofing product that had been used was Shalex and that Thallon Mole knew that the removal of the tiles laid over this base was "on the cards".[321] Mr Cook's evidence (which I accept), was that Mr Mole had told him he understood that Mrs Morton wanted a waterproof membrane and that Mr Cook had informed Mr Mole that Shalex was not a waterproof membrane system.[322] I also accept Mr Cook's evidence that the reference to a "spec sheet" of a product that "our waterproofer" would prefer to use and "our tiler" was happy with, was to a waterproofing membrane named Crystoflex, which was being put forward by Thallon Mole as appropriate.[323]

[320] It was uncontroversial that Crystoflex was subsequently approved by Mr Stewart and Mrs Morton as an appropriate product to be used by Thallon Mole to carry out the waterproofing.[324] Although as set out in paragraph 298 above, there was no evidence that this approval (or signing off) was in writing.

[321] At some stage (most likely in June, July or August 2018), Thallon Mole tiled over most of the areas where the green coloured Shalex had been applied. Inexplicably, this was done with Thallon Mole's knowledge that Mrs Morton and TSA were not

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318 This email was also sent to Mr Cook and cc'd to Mrs Morton and Mr Wright.
319 Ibid p. 40032.
320 Exhibit 133 p.120053.
321 T9-88, ll 23-39.
322 T9-93, ll 33-34 (in the context of the exchange at 13-30); T9-93, ll 16-30.
323 T9-89, ll 4-13.
324 T9-90, ll 24-46; Exhibit 123 p. 110055 [32.22]; T9-92, ll 1-5.

satisfied Shalex was appropriate but had approved Crystoflex being used.[325] It is instructive to observe at this point, that it was uncontroversial that over the period leading up to February 2019, Crystoflex was used by Thallon Mole on the podium outside of the doors above the stairs and at least on part of the stairs. Although, there is a dispute as to exactly whether Shalex or Crystoflex was applied to all parts of the podium slab and the pool podium level, and whether that installation was performed correctly. This issue is discussed in further detail under that heading below.

[322] On 14 December 2018, Mr Stewart sent an email to Mr Mole attaching **Site Instruction 30** which stated relevantly as follows:[326]

> "In regard to the waterproofing as installed underneath the tile on the external uncovered terraces;
>
> The waterproofing product under the tiles to the external uncovered terrace area is not the specified product or an accepted alternative to the specified product. The product used has not been accepted as an alternative and the area of concern is required to be rectified using waterproofing product as agreed by the client and architect.
>
> Should you require further information regarding the scope of the works described please refer your inquiry to TSA."

[323] On 5 February 2019, Mrs Morton sent an email to Mr Mole which stated relevantly as follows:[327]

> "Pursuant to your persistent refusal to rectify outstanding performance issues of your making, I am issuing the following notices under our contract with TMG:
>
> **NOTICE 1**
>
> **Breach of Contract – Waterproofing**
>
> Site Instruction 31[328] required that the waterproofing product used under the tiles to the external uncovered terrace areas be rectified so that the correct waterproofing product is used. You have failed to act in accordance with the Site Instruction and as a result are in breach of contract. You have a contractual obligation pursuant to section 3.1(d) of the Contract to carry out the work in accordance with the Contract plans and specifications. You have a separate contractual obligation to perform the Work under the Contract competently.
>
> Despite repeated discussions regarding the waterproofing product, in circumstances where the waterproofing product is explicitly dealt with in the Contract specifications and where you have indicated that you are aware of this issue, you still refused to rectify the waterproofing product. Given this failure by you to adhere to the

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325 T9-91, ll 31-39; T 9-92, ll 5-19.
326 Exhibit 70.
327 Exhibit 136.
328 This email (Exhibit 136) was copied to Mr Stewart and Mr Morton. It was uncontroversial that this ought to have been a reference to Site Instruction 30; T1-92, ll 30-40.

Contract, this Site Instruction is also a Notice of Dispute given under section 25 of the Contract. You have 10 business days to rectify the waterproofing to the external pool."

[324] On 6 February 2019, Mr Brennan of Thallon Mole sent a response to Mrs Morton, stating relevantly as follows:[329]

" **Notice 1 – Waterproofing**

- We do not consider this to be a breach of contract.
- The waterproofing to the external pool tiles does not require rectification.
- The waterproofing has been installed in accordance with the Building Code of Australia (BCA) and manufacturer's recommendations.
- A Form 16 will be provided to the Building Certifier on completion of the project to allow Certificate of Occupancy to issue.
- The waterproofing product used is an equivalent product to the one specified and includes appropriate manufacturer warranties.
- The waterproofing product specified was not suitable for this area and was required to be substituted in any event.
- The waterproofed area is fit for purpose.
- There was no variation issued for this change as there was a nil cost difference
- It is unnecessary and unreasonable to require the waterproofing to be replaced…"

[325] Mr Brennan's response overlooks the evidence referred to earlier that a different waterproofing membrane (Crystoflex) had been verbally approved or signed off by Mr Stewart in the second half of 2018 and had in fact been used by Thallon Mole in some areas of the house requiring waterproofing.[330]

[326] On 26 March 2019, Mrs Morton sent a notice to Thallon Mole under the termination clause in the Contract. This notice relied on the use of Shalex, and Thallon Mole's refusal to rectify those areas where Shalex had been applied, as a basis of the breach underpinning Mrs Morton's entitlement to terminate the Contract.[331]

Was the Shalex Product Used by Thallon Mole an Appropriate Waterproofing Product for Use at the House?

[327] For the reasons set out at paragraph 291 of these Reasons, the Contract required a waterproof membrane to be used in the external suspended concrete areas including; the Newbolt Street side podium, the pool podium, the stairs from the pool podium, the podium outside of the doors on the Otway Street side and the back podium.

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329 Exhibit 137.
330 T9-94, ll 5-18.
331 Exhibit 138.

Shalex was not a waterproof membrane, but rather a waterproofing compound.[332] Thallon Mole knew this but submitted that Shalex was a suitable alternative to Bituthene 3000, and an appropriate waterproofing product fit for the purpose of waterproofing the house.

[328] Mr John Blasé, a waterproofing expert called by Mrs Morton, usefully and uncontroversially explained that "[w]aterproofing is the process of making an object or structure waterproof or water-resistant so that it remains relatively unaffected by water and moisture ingress under specified or specific weather conditions."[333]

[329] Mr Blasé relevantly explained the difference between a waterproofing membrane and compound as follows:

> "A waterproofing membrane has a high solid content and is pigmented to cover a substrate it is applied to.
>
> ……..A liquid applied waterproofing membrane has some form of colour and will usually have a DFT (dry film thickness) of between 0.8mm and 1.5mm when cured. The solid content of a waterproofing membrane system is essential to obtain a thickness (DFT), so the membrane can perform as intended. Most membrane systems usually have a solids content of between 55% and 63% depending on the material makeup, i.e. Water-based membrane have a solid content of between 50-63%, which means during the curing process, the product will lose between 37% and 50% of its wet-film thickness during the curing process. Polyurethane membranes with a solid content of 94% are moisture cured and will only lose 6-10% of their solid content during the curing process. A sealer has a solid compound of between 20% and 30%, as they are generally used to highlight the surface substrate. Nearly all waterproofing membranes are covered or protected with some form of material or finishes such as paints, renders, and tile, which is crucial to the waterproofing system's overall performance and longevity."
>
> [Emphasis added]

[330] Mr Stewart also usefully explained why he specified a waterproof membrane over a sealant (as best practice) as follows: [334]

> "So a waterproof membrane is – it's actually a whole separate layer that is waterproof and it – it forms an impenetrable barrier for water and it also has a level of density and malleability to it. So it, for instance, goes along the surface of the – of the – the slab, but it also can turn up the edge of the slab. And it might – and it would – in certain instances, there may be joins or breaks in the slab which it then covers and actually creates a layer covering over a hole or imperfection or anything like that. It's not re - so it's actually something weighed down and rolled up, almost like you're wrapping

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332 John Blasé was the waterproofing expert for Mrs Morton. He had more than 30 years' experience in the waterproofing and coating industry. In his report dated 23 March 2019 (Exhibit 317), Mr Blase described Shalex as a waterproofing compound and not a waterproofing membrane.

333 Exhibit 317 p. 280244.

334 T14 -57, ll 34-46.

> – creating a bathtub. And that's the – that's actually terminology, the tub effect, that is used for a waterproof membrane. So we see it not just protecting the surface, but protecting the faces, the – and the joins at the faces and edges."

[331] Mr Blasé also observed that all waterproofing membrane's systems must be carried out to comply with the current Australian Standard for Waterproofing Membrane for External Above-ground Use (AS 4654-2012) and the National Construction Code.[335] Thallon Mole accepted that Shalex had not been tested to comply with AS4654-2012.[336] It submitted that it was not necessary for it to comply with its contractual duty to conduct the work in accordance with Australian Standards because AS4564-2012 has no application to Shalex, because it is not a membrane; and that otherwise no relevant standard applies to the use of waterproofing compounds, as opposed to membranes.[337] I accept both propositions, but the submission is a convenient one that completely overlooks that the contractual obligation on Thallon Mole was to use a waterproofing membrane and not a compound.

[332] Thallon Mole otherwise submitted that it complied with its obligation under the Contract to apply waterproofing to the podium slabs (even though the NCC would not have otherwise required it).[338] It submitted that by adopting the following Performance Solution[339] with respect to "weatherproofing",[340] it did comply with the NCC as follows:

(a) The product itself is specified to perform as a waterproofing product for the purpose that it was used;

(b) The purpose included sealing concrete that was designed to hold stagnant bodies of water - from which it may be inferred that it is a product suitable for preventing the passage of water through concrete; and

(c) There is no evidence that after three years, there has been any issue with the performance of the waterproofing, let alone penetration of water that could cause unhealthy or dangerous conditions or loss of amenity, or undue dampness.

[333] These submissions also underpin Thallon Mole's submissions as to the appropriateness of Shalex in this case. The crux of these submissions is that Shalex was an appropriate waterproofing product for use at the house; and that this is

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335 Exhibit 330 [1.02], [1.04]. The National Construction Code ("**NCC**") is a performance-based standard—meaning that compliance with its performance requirements is to be met by adopting either a *"performance solution"* or a *"deemed-to-satisfy"* solution. The NCC itself sets out the deemed-to-satisfy solutions in detail in s. 3, with the deemed-to-satisfy solutions in respect of Wet Areas and External Waterproofing set out in 3.8.1.2 and 3.8.1.3. It is in the case of external areas that reference is made to AS4654.

336 Exhibit 166 p. 280068 [114].

337 T17-78, ll 1-17.

338 Waterproofing of areas that are non-habitable (class 10) is not required.

339 Section 3.8.1 on p. 310 of the NCC contemplates that an alternative system for external waterproofing may be used, provided that it complies with Performance Requirement P2.2.2 and the relevant Performance Requirements determined in accordance with 1.0.7.

340 Performance Requirement P2.2.2 in relation to weather proofing is set out on p. 65 of the NCC. It is unnecessary to set this provision out in full as it is a distraction to the real issue of whether Thallon Mole complied with its requirements under the Contract to apply waterproofing.

supported by the fact that there has been no evidence (some three years later) of any issues in areas where it was used.

[334] The second point is rejected and easily addressed because the evidence (which I accept as a matter of common sense) is that it is reasonable to expect longevity of waterproofing up to 50 years.[341] Therefore, the fact that there have been no issues with areas where Shalex was applied is of little probative value.

[335] Mr Blasé's conclusion was that Shalex was not suitable for the waterproofing application required at the house because there was no visible solid content or requirement to obtain a required thickness on the technical data sheet. He described Shalex as "just a sealer."[342] Thallon Mole criticised Mr Blasé's evidence on the basis that: he had never experienced a site in which Shalex had been used and failed;[343]and he had conducted no investigations in respect of how Shalex worked before preparing his reports.[344] But, I do not accept these matters are necessarily a fair representation of Mr Blasé's evidence or that even if accepted they undermine his conclusion.

[336] Thallon Mole referred to the evidence of Donald Dixon (an experienced residential building inspector) that Shalex was highly likely to be fit for the purpose it was used at the house.[345] But, this evidence must be considered in the context that Mr Dixon referred to Shalex as being used as a "waterproof membrane" when all of the evidence (which I accept) is that it was not one; and that later, Mr Dixon conceded that he had concerns about long term expected performance of Shalex in the setting in which it had been applied.[346]

[337] Overall, I prefer and accept Mr Blasé's opinion on this issue for several reasons:

(a) First, (and most persuasively) it is consistent with the evidence from the product manufacturer itself. On 12 May 2020, following an enquiry from James Morton (Mrs Morton's husband) about whether Sealit was fit for the purpose and the best waterproofing product to use for a "concrete slab around pool area with room underneath: tiles to be applied: all exter product" Shalex responded as follows:[347]

"John you really need a membrane over the slab but I'd suggest a two part cement based water proofer as those are more resistant to the chemicals in and around pools.

Sorry we can't help with this type of water proofer."

[Emphasis added]

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341 Mr Dixon's evidence at T6-38, l 37 to T6-39, l3; see also Mr Stewart's evidence at T14-10, ll 36-41 that waterproofing is very long term, and this was a "forever house" for Mrs Morton.

342 Exhibit 317 p. 280247.

343 Plaintiff's Trial Submissions ay [288] T18-87, ll 37-39.

344 T17-87, ll 11-12.

345 Exhibit 166 p. 280059 [43].

346 In a supplementary Building Report No. 2 dated 27 April 2021 Mr Dixon brought together his opinion, Mr Dyer's opinion and Mr Blasé's opinion. Exhibit 169 p. 280653.

347 Exhibit 317 page 280249.

(b) Secondly, it is also consistent with the evidence of Mr Wayne Dyer who sadly passed away before the trial.[348] Mr Dyer's evidence was that he had contacted Shalex on 31 July 2019 (regarding the Shalex Sealit product) and he was told that; "Sealit" is a sealing compound applied to surfaces to act as a waterproof inhibitor to repel water and is not designed as a waterproof membrane; and the correct Shalex material for use as a waterproof membrane from their product range would be Shalex "Waterproofit" or "Membrane."[349] Of course, there was no evidence that this later product was used in this case.

(c) Thirdly, it is consistent with Mr Dixon's concessions that: the technical information provided in Mr Blasé's report, adds further weight to "my stated concern for the expected performance of Shalex "Sealit Multipurpose" (long term), when used in this situation as a substitute product;"[350] and he was unable to form a view as to whether or not Shalex is in fact fit for the purpose.[351]

(d) Fourthly, it is consistent with Mr Stewart's evidence (which I accept) that having read the manufacture information for Shalex he would not have approved it for use in the circumstances it was used in this case.[352]

[338] Upon the above analysis, I therefore find as follows:

(a) Shalex was not a suitable alternative to Bituthene 3000;

(b) Thallon Mole breached the Contract by installing Shalex; and

(c) There was a breach of a site instruction by failing to remove the Shalex and replacing it with a product that Mrs Morton specifically approved.

[339] But these findings are not the end of the matter. Mrs Morton's case is that there are defects in the attempted waterproofing of the external concrete slabs other than simply the use of Shalex.

The Defects in the Waterproofing Installed

[340] The issues that ultimately emerged from whether the waterproofing was defectively installed are as follows:

(a) Was the stone cladded rock wall along the Newbolt Street side of the house waterproofed with either Crystoflex or Shalex?

(b) Was waterproofing applied to the pool podium slab?

(c) Were the pool stairs waterproofed using either Shalex or Crystoflex?

(d) Were there issues with the application of Crystoflex in some areas?

(e) Was the waterproofing at the house properly and legally certified?

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348 Mr Dyer's joint report with Mr Dixon is Exhibit 168; see also Exhibit 169 p. 280653.

349 Mr Dixon referred to Mr Dyer's reference to a 12 May 2020 email from Shalex to Mr Morton to the effect that a waterproofing membrane was recommended by Shalex to be used around the pool as they were resistant to pool chemicals.

350 Exhibit 169 p. 280653.

351 T6-39, l 5.

352 T14-9, l 42.

[341] These issues are addressed in turn below.

Waterproofing of the Stone Cladded Wall at the Newbolt Street Side of the House

[342] Thallon Mole's case is that Shalex was applied behind the stone cladded wall at the Newbolt Street side of the house. Mrs Morton submitted that the evidence does not establish that any waterproofing was applied to this area.

[343] The effect of Mr Cook's evidence in chief on 4 June 2018 was that waterproofing had been applied to the stone cladded wall and that a Crystoflex upturn of about 200mm had been placed on it.[353] After explaining that the stone was installed by a stonemason on a blockwork wall,[354] the following excerpt from the transcript reveals that Mr Cook was most particular in his recollection about the waterproofing that was applied at this point in time: [355]

> "did you perform any waterproofing with respect to that wall?---A BondCrete agent goes on there, so it's essential – a sealer more than a waterproofer, and then it's just the bottom of the wall that gets waterproofed.
>
> And has the bottom of that wall been waterproofed before the stones go on?---Yes.
>
> And who did that?---TMG [indistinct] and John.
>
> At the juncture of the wall and the floor, do you apply waterproofing?---Yes, we do.
>
> And how do you do that?---In a perfect world, it's applied before the cladding is installed to the wall. So, in that instance, we would've used Crystoflex. Crystoflex is the same waterproofing we saw on that, and it's a cement-based one, which means the glue for the stone can adhere to it. And then sometimes the bottom gets turned out straightaway; sometimes the bottom laps back up, depending on how vulnerable it is to damage, once again, being on the floor.
>
> And what method was used here?---I believe we – we put about 200 mil waterproofing up the wall and turned down a bit on the floor. And then, once this waterproofing was on, we went back through, as there was a 50-mil gap still under there and returned waterproofing up under that."
>
> [Emphasis added]

[344] But then under cross examination on 6 September 2021,[356] Mr Cook at first could not recall stating previously that it was Crystoflex applied behind the wall;[357] but later said that when he gave that evidence (about it having been applied there), "I was very certain it was there and, to be honest, when I was on site, I was surprised

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353 T8-50, l 36 to T8-51, l 21; T8-56, l 36 to T8-57, l 8; with reference to Exhibit 215.
354 T8-50, ll 40-44.
355 T8-51, ll 1-21.
356 The trial was heard in two blocks, and this was the first day of the second block of hearings.
357 T9-66, ll 14-28.

to not see it there."[358] Also under cross examination, Mr Cook specifically recalled putting Shalex waterproofing "behind there";[359] was "fairly certain" that it was Shalex that was applied;[360] and that "it is possible" that it was Shalex and not Crystoflex.[361] He gave evidence to the effect that he did not have any positive recollection that Shalex was put behind the rock wall except to say that "I know waterproofed behind the rock – the rock wall."[362] All of this gives me concern about the reliability of Mr Cook's evidence on this point. His change of heart that it was in fact Shalex that was applied is also rather convenient considering the following matters:

(a) During the intervening court break the wall was dissembled and inspected (in Mr Cook's presence) and showed no evidence of Crystoflex having been applied; and[363]

(b) The uncontroversial evidence is that Crystoflex was only approved after the wall had been built.

[345] It follows that I am not satisfied on the state of the evidence that Shalex was applied to this wall. But even if it was, I remain unsatisfied that an adequate waterproofing system was applied. The Contract called for a waterproof membrane. This was a junction between a Besser brick wall and a concrete substrate. The evidence was that a waterproof membrane system needed to have been in place at that junction going to 200mm up. It was not.

[346] I therefore find that the waterproofing of the stone cladded wall at the Newbolt Street side of the house was defective. Mr Cook's evidence (which I accept), is that when the rock wall was removed, it exposed untreated timber which was a concern; and that no waterproofing in this area was "quite a serious matter."[364]

Waterproofing of the Pool Podium

[347] It is uncontroversial that a waterproofing membrane was not applied to the pool podium. Thallon Mole's case is that Shalex was applied to this area. On the other hand, Mrs Morton submitted that that it was not – rather that no waterproofing was applied to the pool podium at all.[365]

[348] The uncontroversial evidence (which I accept) is that the pool podium tiling was done by 18 May 2018.[366] The only person who gave evidence that Shalex was applied before the tiles were laid was Mr Cook – the site supervisor. Mr Mole did not see it being applied. He did not supervise the waterproofing – he had in fact

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358 T9-71, ll 27-29; It is also instructive that when taken back to his evidence in chief on this point Mr Cook firstly tried to say that the evidence was not in respect of the Newbolt Street stone wall but in respect of another wall. He subsequently accepted that was not correct.

359 T9-66, l 19.

360 T9-66, l 21.

361 See the full exchange at T9-70, l 22 to T9-71, l 32.

362 T9-70, l 22 to T9-71, l 32.

363 Ibid.

364 T9-71, ll 31-36.

365 Although on the pleadings the issue was only whether there was waterproofing applied to the stairs. There is no surprise to Thallon Mole about this being a point of contention. It is part of Issue 33 of the agreed issues list (MFI Z), evidence was lead at trial and submissions were made by both sides.

366 As revealed in the Abacus Quality Surveying Report; Exhibit 127 p. 388.

designated this role to Mr Cook.[367] Mr Cook was asked during his evidence in chief who performed the waterproofing for the area around the pool on the podium slab. He said "TMG did".[368] When pressed he could not recall much except to say as follows:[369]

> "I had two guys [indistinct] onsite with us that day. There was Dylan Weirs and Sam St John and myself. I performed at least half of it myself and with the guys. But the nature of my job means I'm stopping and start – stopping and starting. I can't remember the person that was with me doing it, but there was someone else I was doing it with. And then I was coming back, continuing with them, making sure it was all done right, and then disappearing and coming back again"

[349] Mr Weirs and Sam St John were not called at trial.

[350] Mr Cook maintained under cross examination that Shalex had been applied to the pool podium area.[370] Overall, I found his uncorroborated evidence that Shalex was applied to this area unconvincing, and I therefore reject it for the following reasons:

(a) First, no one associated with TSA or Mrs Morton saw the waterproofing occur and indeed were concerned at the time that no waterproof membrane could be seen on the exposed edges of the tiles. When Site Instruction 19 was issued on 22 May 2018 asking Thallon Mole to provide information about what waterproofing had been undertaken, it is reasonable to infer (as I do) that the only person who could have properly instructed Mr Mole about what had happened was Mr Cook. Mr Cook accepted that it is likely he would have spoken to Mr Mole that day.[371] But curiously, Mr Mole's response to Mr Stewart on the next day was to the effect that: the "tiler" had waterproofed the areas tiled using a roller and applied under the bedding substrate; and that further information about the product used would be provided.[372]

(b) It is instructive that no mention of Shalex having been applied was made. The only plausible and reasonable inference to draw (as I do) is that the information in this email had come from Mr Cook. Mrs Morton submitted that I should find that Mr Cook deliberately told Mr Mole this to cover up that fact that no waterproofing had been applied before the tiles had been laid.[373] This proposition was not put to Mr Cook and such a finding would therefore be unfair to make. But this evidence does give me some concern about the reliability of Mr Cook's evidence that Shalex had been applied, such that his evidence on this point warrants some corroboration (of which there is none). For example, work sheets, invoices for the Shalex, evidence from the tilers about their observations laying the tiles (particularly given the contents of Mr Mole's email on 23 May 2018 that waterprorofing of the pool podium was done progressively as not to damage it).

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367 T5-18, l 46 to T5-19 l2.
368 T8-46, l 25.
369 T8-46, ll 27-34.
370 T9-101, ll 19-26.
371 T9-82, ll 12-15.
372 Exhibit 129 p. 40019.
373 T19-31, ll 27-32.

(c) Secondly, the physical evidence is consistent with Shalex not having been applied on the pool podium. The evidence was that the pool podium tiles were removed on two occasions. The first occasion was when a small number of tiles were removed in an initial inspection. All the tiles were later removed over a two-day period in July 2021 (during the break between the hearings of this trial) when an inspection of the area behind the rock wall occurred. Mr Blase inspected the tiles on the pool podium that had been removed and did not find any evidence of any physical barrier which indicated Shalex had been installed, all he found was tile adhesive and bedding substrate.[374] He was however, able to identify the "skin" or "film" of the Shalex which was placed on the Newbolt Street external suspended slab.[375] In his evidence in chief, Mr Blase identified that where no food colouring was present (so that it was clear), you could still see it.[376]

(d) Thirdly, the Shalex Technical Sheet identified that "Sealit provides a fine waterproof "skin" over the masonry surface as well as waterproof protection at and just below the surface."[377] In other words, a film would be left after application. It was put to Mr Cook under cross examination that there was no physical evidence of Shalex having been applied and I accept he did not waver from his evidence that it had been applied.[378] Instead he proffered the explanation that due to the concrete slab and tile bedding there was no smooth surface that allowed for the "snapping effect" to enable Shalex to be visible.[379] Thallon Mole submitted that this evidence was consistent with the product description, which indicated that it was designed to seep into the concrete, and so it would not necessarily leave any film. But I reject this submission as it is contrary to the information of the Shalex Technical Sheet I have just set out.

(e) Fourthly, Thallon Mole submitted that there is no logical reason as to why the pool podium tiles would have been laid without waterproofing. On the state of the evidence before me, I am satisfied there is an obvious explanation – that is that Mr Cook overlooked it.

(f) Fifthly, Thallon Mole submitted that "despite request" it was "not permitted to take samples of the pool podium tiles for testing and that an inference ought to be drawn that the reason for such a refusal was that testing would likely have proved the existence of waterproofing on the pool podium area.[380] Thallon Mole also described Mrs Morton's conduct in this instance as "obstructionist." I do not consider this is necessarily a fair description of Mrs Morton's conduct on this issue or that the inference sought to be drawn is a reasonable one, in light of the following relevant facts:

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374 T17-95, l 33.

375 Exhibit 316 pp. 280793-280796.

376 T17-96, ll 1-4; It is instructive too that Mr Aaron Weigel who was called by Mrs Morton could not see or feel any evidence of a membrane of a film on the tiles and bedding that had been removed from the pool deck. Although under cross examination (T17-57 ll, 1-9) he said he understood Shalex was a clear compound which would absorb into the concrete– but I reject his evidence on this point because it is contrary to; the evidence of Mr Blasé who was in the position of being able to make a relevant comparison; and the contents of the technical date sheet.

377 Exhibit 131 p. 40003.

378 T9-108, ll 26-30.

379 T9-108, ll 13-24.

380 Plaintiff's Trial Submissions at [321].

(i) The request from Thallon Mole was for Mr Cook to take samples of uplifted tiles which were assumed would be in the form of "builder's rubble to be dumped".[381] At that point Thallon Mole's expert on this issue Mr Dixon had finished his evidence so Thallon Mole did not wish to incur the further costs of his attendance at the house.

(ii) Mrs Morton's response on 6 July 2021 was only a qualified refusal to take samples at that point. The letter made it clear that both Mr Dixon and Mr Mole could attend, and that Mr Cook could take photos of the tiles but that he was not permitted to take samples of that point until Mrs Morton had time to consider:[382]

(A) Details of the expert engaged or proposed to be engaged by your client for the purpose of that testing and presumably, the proposed expert report to follow; and

(B) The proposed orders with respect to the filing and service of such expert evidence.

(iii) Thallon Mole's solicitors did not engage with Mrs Morton's solicitors in relation to the request for information about testing and orders or exchange of reports.

(iv) Mr Cook was present on the first day of the inspection at the house during the break in the trial. He did not return the second day when the tiles on the pool podium were likely to be lifted because he and Mr Mole did not consider it worth him coming back from the coast as they "didn't believe the waterproofing that was done was going to be visible."[383]

(v) Although Mr Cook did not attend to inspect the tiles, Mr Aaron Weigel the Project Manager employed by Hutchinson did. His affidavit evidence was that he "picked up and inspected some of the tiles and bedding that had been removed from the pool deck and could not see or feel any evidence of membrane or film."[384] Mr Blase also inspected the tiles on the second day and only found "tile – tile adhesive, bedding substrate."[385]

(vi) There is no evidence of any tests (other than visual and touching tests) being undertaken on any of the removed pool podium tiles. Although, I note Mr Weigel's evidence was that when he attended the inspection on 30 April 2018, a solicitor for Mrs Morton collected samples of these tiles.[386] Despite this, there was no evidence that any tests were in fact conducted on these samples.

[351] This was a lengthy trial that was supervised on the commercial list. The hearing was run on a tight schedule - with the court sitting overtime to accommodate the needs of both sides. It was not an unreasonable request from Mrs Morton to understand

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381 As described in its solicitor's letter on 28 June 2021; Exhibit 260.
382 Exhibit 253.
383 T 8-56, ll 5-40.
384 Plaintiff's Trial Submissions at [315].
385 T17-96, ll 40-41.
386 Exhibit 314 [15].

mid proceeding the nature and consequences of any further evidence to be led by Thallon Mole arising from the proposed testing of samples. More crucially, it was not a blanket refusal on Mrs Morton's part for such a course to have been taken. Ultimately, I am not satisfied that this evidence is probative of anything but a distraction in this case.

[352] On the above analysis, I am not satisfied that Shalex (or any type of waterproofing) was applied to the pool podium by Thallon Mole.

The Coverage of Crystoflex on the Stairs

[353] Mrs Morton submitted that the riser of the bottom stairs leading down to the pool (just above the drain) did not have Crystoflex applied to it.[387] Thallon Mole submitted it did.

[354] Mr Cook gave some very general evidence about the fact that Crystoflex had been applied to the stairs by highlighting in yellow (on a plan provided to him by Senior Counsel during his evidence in chief), this and other areas in which he believed Crystoflex and Shalex had been applied.[388] It was not apparent whether Mr Cook recalled applying waterproofing to these areas himself, whether he got someone else from Thallon Mole to do it, or whether he supervised it.[389] Most relevantly, the following exchange about waterproofing on the first riser took place under cross examination:[390]

> Now, can I suggest to you, that the first riser – so this is in the bottom step riser, which sits above the drain there?---Yes.
>
> The only waterproof membrane there was the turn up from the drain?---Okay.
>
> And can I suggest to you, that that had not been waterproofed with Crystoflex on that first riser. So I'm not suggesting the second or the third, but the first riser?---That it was not waterproofed, sorry?
>
> Yes?---Okay.
>
> Do you accept that could have happened?---Could have. I'd find it very unlikely

[355] My impression from this, as well as the other evidence from Mr Cook about what exactly was used to waterproof and where (at the house), is that he was vague and confused about this issue. Support for this finding is found in:

(a) My findings in relation to the waterproofing pool podium under that heading above; and

(b) Mr Cook's evidence about the waterproofing of the stone cladded wall discussed under that heading above.

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387 It was not in dispute that the turn up to the drain near this area had not been waterproofed.
388 T8-53, ll 21-27; Exhibit 214.
389 T1-101, ll 42-46.
390 T9-102, ll 9-19.

[356] It follows that I have treated Mr Cook's evidence on the issue of waterproofing with some caution as it was not particularly reliable.

[357] This finding is not necessarily a criticism of Mr Cook. He was doing his best to recall events from several years ago under the microscope of the unfamiliar courtroom environment; this was a big residential construction; and this case involved a myriad of intricate issues. It means however, that Mr Cook's evidence needs to be scrutinised carefully and where possible corroborated.

[358] Ultimately, I am not satisfied that Crystoflex was applied to the riser to the bottom step just above the drain as Mr Cook contends and I therefore reject his evidence on this issue for three reasons:

(a) First, his evidence is unreliable for the reasons summarised at paragraph 354 above;

(b) Secondly, the photographic evidence in Mr Blasé's supplementary Report does not support Mr Cook's evidence that Crystoflex was applied to the riser; [391] and

(c) Thirdly, it is not corroborated by any other witness. The evidence of Mr Blase and Mr Weigel was that they did not see any sign of Crystoflex having been applied on the riser to the bottom step - that is above the turnup from the drain.[392] Mr Dixon's evidence was that the membrane installed on either side of the strip drain was not continuous and was therefore non-compliant.[393]

[359] Thallon Mole's submission that the Crystoflex could not be seen because it had come loose or off the bottom riser of the stairs is not supported by the evidence that I accept. This includes that the bottom riser still had the intact turnup membrane from the drain; clear concrete with no Crystoflex applied to it can be seen immediately above that; and the photographic evidence showed (as Mr Weigel emphasised) that there was still considerable adhesive to the bottom riser - a lot more than had removed to the risers on top, where obviously a membrane had been applied.[394]

Issues with the Application of Crystoflex

[360] The issues about the application of Crystoflex raised by Mrs Morton are two-fold:

(a) First, that there was delamination of the Crystoflex in one main area; and

(b) Secondly, that Crystoflex had not been applied as a continuous system in other areas.

Delamination

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391 Supplementary Waterproofing Report of Mr Blasé dated 11 May 2021; Exhibit 318 p. 280691 [Photograph 8]

392 T17-94, ll 6-30 (Cross examination of Mr Blasé); T17-65, l 23 to T17-67, l 12 (Cross examination of Mr Weigel).

393 T6-50, l 33 to T6-51, l 13.

394 Exhibit 318 p. 280691 [Photograph 8]; T17-66, ll 25-36.

[361] Mrs Morton submitted that there had been delamination where both Shalex and Crystoflex had been applied namely an area on the Newbolt Street podium side next to the left corner of the building.

[362] Mr Cook's evidence (which I accept), was that he recalled Shalex being present along the Newbolt Street side but he understood (as site supervisor) that Crystoflex had been applied part way down this side of the Newbolt Street podium from the pool side.[395]

[363] I am satisfied that the waterproofing in this area is defective due to delamination for the following reasons:

(a) Mr Blasé's evidence (which I accept and is supported by photographic evidence)[396] is that the overlay of Shalex and Crystoflex has delaminated from the concrete substrate due to poor adhesion to the primary substrate; and that when cement-based membrane is applied to parts of the podium area, this results in the waterproofing system not being compliant with the technical date and AS4654.2 of the Building Code.[397]

(b) As Mr Blasé also observed, and it is a matter of common sense, there are potential accountability issues with product warranties (as different products have been applied over each other from different manufacturers), which may null or void any product warranty from the manufacturer.[398]

(c) Mr Cook's evidence about the application of Crystoflex over Shalex, was that the only inquiry he had made was to a waterproof supplier who told him they were compatible, but he made no contact with the manufacturer of the products.[399]

(d) The evidence I accept is that Shalex leaves some type of thin residue or film, to which the Crystoflex is bonded to. As a matter of common sense, it is reasonable to assume (as I do and is consistent with the evidence of Mr Blasé) that in these circumstances there is at risk of delamination over time.

Continuous Waterproofing Membrane System

[364] Mrs Morton submitted that there were a number of areas where Crystoflex had not been applied as a continuous system: that is, it is not allowed to have any breaks until it terminates in an end point such as the ground or drain. Mr Cook understood and accepted this. For the reasons that follow, I am satisfied on the evidence that there were two main areas where the Crystoflex waterproofing as applied had such a break:

(a) First, and as discussed earlier in this section of the Reasons[400] a waterproof membrane is necessary in the Newbolt Street podium side because a

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395 T9-106, ll 42 to T9-107, l 23.
396 Exhibit 315 p. 280703 [Photograph 2].
397 Exhibit 315 pp. 280681, 280693-280694.
398 Exhibit 315 pp. 280681 [8.3], 280682.
399 T9-106, ll 25-34.
400 See the analysis under the heading "Waterproofing of the Stone Cladded Wall at the Newbolt Street Side of the House" in these Reasons.

waterproof membrane (or the bond breaker)[401] contains a physical impermeable barrier across movement joints which, at this location, is the besser brick wall and the concrete substrate. This is to address the movement in the building throughout its lifecycle. Shalex is a form of sealer and on Thallon Mole's case, is absorbed into the concrete or the Besser brick wall. I am not satisfied on the evidence that Shalex provides the required physical impermeable barrier to the movement joint between these two items.[402]

(b) Secondly, and again as discussed earlier in this section of the Reasons,[403] there was an upturn of the waterproofing system of the drain, part way up the riser but no Crystoflex applied to the riser. Mr Dixon's evidence (which I accept) is that the membrane installed on either side of the strip drain was not continuous and was therefore non-compliant.[404]

Was the Waterproofing Validly Certified?

[365] Mrs Morton submitted that whatever waterproofing works were undertaken, they were not properly and legally certified and therefore not capable of a **Form 16** certification.

[366] The Form 16 issued by Mr Mole was subsequently rejected by the certifier. But, Thallon Mole submitted that the certifier did not make the relevant enquiries of Mr Mole and had he done, he would not have rejected the Form 16.[405] Mr Mole does not hold a waterproofing licence, but his evidence was that his QBCC licence allowed him to sign the Form 16.[406] I accept as a matter of principle that a builder who holds an open licence is permitted by law to perform waterproofing work.[407]

[367] But the question is whether the waterproofing works were able to be certified by Mr Mole on the facts of this case. For the following reasons, they clearly were not:

(a) The uncontroversial evidence is that Mr Mole did not carry out any supervision of the waterproofing of the external suspended concrete slab. He delegated this role to Mr Cook the site supervisor whose role was to supervise the works on a day-to-day basis.

(b) Mr Cook's evidence was that at the time of the construction of the house he did not hold any form of QBCC Licence. It follows that under s. 43 of the *QBCC Act* he was unable to legally supervise this waterproofing work.

(c) Mr Mole issued the Form 16 solely on the basis that Mr Cook told him that the work was done properly.

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401 Thallon Mole submitted that the need for a bond breaker is not pleaded. But this overlooks that what is pleaded is that the Shalex system was not a waterproof membrane system. A bond breaker is part of a waterproof membrane system because it ensures that there is a monolithic membrane system in place that was fit for purpose at control joints. A sealant is not.

402 Exhibit 319 p. 5 [Figure 4] (the Ardex Technical Data Sheet) is a visual example of what needs to be done for that product where there are movement joints.

403 Under the heading "The Coverage of Crystoflex on the Stairs."

404 T6-50, ll 33 to T6-51, l 13.

405 Plaintiff's Trial Submissions at [337]-[343].

406 T1-24, ll 9-12.

407 T15-33, ll 7-12 (Evidence of Certifier).

(d) The assurances by Mr Cook to Mr Mole that the waterproofing had been undertaken properly was without foundation for a number of reasons. This is discussed under the heading "External waterproofing" in these Reasons, including that; no waterproofing was undertaken in the pool podium; a waterproof membrane was required to be used under the Contract, but Shalex was used in certain areas instead; Shalex is not a waterproof membrane; the use of Shalex was not authorised or approved under the Contract; and there were defects in the waterproofing in fact installed.

[368] I therefore find that the Form 16 certification issued by Mr Mole is invalid.

Costs of Rectifying the Waterproofing

[369] Mrs Morton claims the sum of $45,046.02 (excl. GST) plus a proportion of the 10 percent margin of $9,024 for builder's margin, being a total sum of $49,550.62 (excl. GST) or $54,505.68 (incl. GST), as the costs of the work required to rectify the waterproofing at the house.

[370] Thallon Mole submitted that a margin for the builder was not claimable. But I am satisfied that the builder's margin ought to be allowed.[408] Thallon Mole accepted the public interest in recognising a promisee's performance interest under a contract[409] but submitted that rectification is not a reasonable remedy in this case and that any award of damages would be "visiting a venial fault with oppressive retribution".[410] This submission was underpinned by the following three propositions (all of which I reject):

(a) First, on the basis that had the Contract been complied with, Mrs Morton would have had an entirely unsuitable waterproofing product installed at her house. This submission is premised on the basis that Bituthene 3000 was not an appropriate product to lay on the podium – a proposition I accept. I otherwise reject this submission as it overlooks that the Contract required Thallon Mole to ensure that a waterproofing membrane that was fit for the purpose was used; and that any change was to be authorised by Mrs Morton. As my findings reveal,– neither of these things happened in this case.

(b) Secondly, that the concrete itself provided waterproofing because of its density. The concrete around the pool area had a density of 40 megapascals; around the podium slabs, the topping slab had a density of 25 megapascals, but sat on top of a further slab that had a density of 32 megapascals. Even accepting these propositions as correct - I reject this submission. It overlooks that a waterproofing membrane was expressly specified in the Contract to

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408 Exhibit 314 [27] - Mr Weigel's affidavit.

409 But submitted too that this must be balanced against the public interest of preventing a party from "abus[ing] this protection by using an insignificant breach as a pretext for evading its contractual obligation": with reference to Allan Farnsworth, *Farnsworth on Contracts 2* (Aspen, 3rd ed, 2004) 577.

410 With reference to the expression of Cardozo J in *Jacob & Youngs v Kent* 129 NE 889 (NY, 1921) which referred to in *Ruxley Electronics & Construction Ltd v Forsyth* [1996] 1 AC 344 and *Stone v Chappel* (2017) 128 SASR 165. See also *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, [134]; *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* (2008) 166 FCR 494, [79], [114]; *Birse Construction Ltd v Eastern Telegraph Co Ltd* [2004] All ER (D) 92, [46], [51].

provide a particular physical waterproofing barrier above those concrete slabs.[411] And one was not given.

(c) Thirdly, that "the Defendant's hunt in this case for a defect - culminating in the destructive testing that took place shortly before and during the course of the trial -was itself causative of a breach in the waterproof membrane that was installed."[412] Or rather that Mrs Morton is the author of her own loss - as she chose to do destructive testing in circumstances where there was no evidence that the waterproofing installed by Thallon Mole was failing.[413] I reject this submission. The destructive testing revealed in multiple respects that Thallon Mole was in breach of the Contract. It did not cause loss but rather revealed the breaches.

The Test of "Unreasonableness"

[371] It has been over 60 years since the High Court recognised in ***Belgrove*** *v Eldridge* (1954) 900 CLR 613 that a plaintiff whose property is damaged or defective as a consequence of a defendant's breach is generally entitled to recover the costs of reinstating the property so that it corresponds to the contractual promise, except to the extent that it is unreasonable to insist on reinstatement.[414] Most recently in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*,[415] the High Court relevantly observed that the qualification in *Belgrove* ought only to be found in fairly exceptional circumstances.[416] For example, the cost of rectification will be unreasonable if it is wholly disproportionate to achievement of the contractual objective.[417]

[372] The onus is on Thallon Mole to prove that Mrs Morton has acted unreasonably, it is not for her to prove that she acted reasonably.[418] The question of what is reasonable

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411 As Defendant's Submissions in Reply submitted at [177]; the concrete strength of individual slabs is irrelevant. Concrete slabs crack, concrete slabs have movement joints when coming into contact with other building elements and the concrete slabs may have other joints constructed into them, (such as the diamond features seen on the Newbolt Street podium).

412 Plaintiff's Trial Submissions at [350].

413 This submission is underpinned by the proposition that because of that testing, regardless of what was found, the waterproofing would need to have been completely redone, as lapping the breached membrane was never going to be possible without uplifting all of the tiles; See T17-59, ll 37-40, Aaron Weigel under cross-examination, *"Now, was it your understanding that, once those tiles were removed, it didn't really matter what was found underneath. That was the start of the process. The membrane would have been breached, or the product would have been breached, and you were going to have to re-waterproof the whole of it?---Yes."*; See also Blase at T17-91, ll 21-44, T17-94, l 46 to T17-95, l 7.

414 *Bellgrove v Eldridge* (1954) 90 CLR 613, 618-619.

415 (2009) 236 CLR 272, 286-290.

416 BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2016] QSC 05, 24-26.

417 Bannister & Hunter Pty Ltd v Transition Resort Holdings Pty Ltd (No. 2) [2013] NSWSC 1943, 330.

418 *Owners – Strata Plan NO 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067, [46] (per Ball J) (considered with approval by the South Australian Court of Appeal in *Bedrock Construction and Development Pty Ltd v Crea* [2021] SASCA 66) citing *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130, [138]; *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 673 (per Brennan J), *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130, 158 (per Hope JA); *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313, [187] (per Giles JA with whom Handley JA and Stein JJA agreed).

depends on all the circumstances of the particular case.[419] For example In *Willshee v Westcourt Ltd* [2009] WASCA 87 the Western Australian Court of Appeal held that the defendant's use of inferior quality limestone involved a significant and substantial departure from the benefit contracted for by the plaintiff, reasoning relevantly as follows:[420]

> "[68] The decision in Tabcorp establishes that this process of reasoning is erroneous. Although in the present case there was no express term of the contract relating to the aesthetic standard to be achieved by the limestone cladding, there was a term of the contract which required the limestone cladding to be of high quality. It was breach of that term which resulted in accelerated deterioration of the limestone surfaces which Mr Willshee did not regard as aesthetically pleasing. As the High Court points out in Tabcorp, the question of whether or not Mr Willshee's views in this respect are idiosyncratic, or would be shared by others, is not to the point [16]. Mr Willshee entered into a contract which he considered served his interests, and he is entitled to the performance of that contract quite irrespective of the views which other people might form in relation to the advancement of those interests, such as views relating to the aesthetic appearance of the house.

[373] And later (at [75]) concluded as follows:

> "[75] With respect to the trial judge, that is a very different situation to the present case. In the present case there was a contractual obligation to supply limestone of high quality for use as the external cladding of the house. The external cladding of a house is quite obviously a matter of great significance and importance to its owner. Notwithstanding that contractual obligation, Westcourt installed a significant quantity of limestone which was of inferior quality, with the result that it deteriorated rapidly, necessitating significant remedial work. Even though the deterioration did not adversely affect the structural soundness of the building, it was nevertheless material to the calibre and quality of the building supplied, when compared to the calibre and quality of the building for which Mr Willshee contracted." [Emphasis added]

Conclusion re Damages for Waterproofing

[374] I am not satisfied (as Thallon Mole submitted), that it is unreasonable in this case for Mrs Morton to have the costs necessary to produce conformity with the Contract. That is the costs of requiring a waterproof membrane in to be installed. But I am satisfied (as Mrs Morton submitted) that the proportion of the builder's margin claimed is reasonable.

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419 The concept of reasonableness in the context of an alleged failure to mitigate case was analysed usefully by Giles JA in *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313, [187].

420 *Willshee v Westcourt Ltd* [2009] WASCA 87, [68].

[375] I therefore find that Mrs Morton is entitled to the sum of $54,505.68 (incl. GST) as the reasonable costs of rectification for the waterproofing at the house.[421]

The Pool and Newbolt Street Balustrades

[376] An inordinate amount of time at trial was spent on issues arising from disputes over the installation of the Pool and Newbolt Street balustrades. These issues are dealt with in turn below.

The Pool Balustrade (On Spigots)

[377] The design of the pool balustrade specified in the Contract required a cantilevered glass balustrade. The pool balustrade installed by Thallon Mole was on spigots and was not in accordance with that design.[422] Subsequently, Mrs Morton directed Thallon Mole to rectify the pool balustrade so that it was built in accordance with the Contract requirements. Thallon Mole declined to do so. Mrs Morton relied on this defiance as a substantial breach of the Contract entitling her to terminate. She claims the sum of $20,642.60 (incl. GST) or $18,766 (excl. GST).[423]

[378] Thallon Mole conceded that it did not provide Mrs Morton with any written variation documentation or shop drawings as were required under the Contract before proceeding with the change in design of the pool balustrade. Nor was any site instruction to make the change issued by TSA. Thallon Mole maintained however that it was verbally directed to install the pool balustrade on spigots (by Mr Stewart at the direction of Mr Wright) and that it follows that Mrs Morton is estopped from denying that Thallon Mole was authorised to do so or from relying on this fact as a breach of the Contract.

[379] Mrs Morton does not accept that there was any authorised direction to make the change, but even if there was, denies that estoppel is available as a matter of law.

Analysis

[380] The precise terms of the "direction" allegedly given to change the balustrade are not immediately apparent from the evidence, pleadings and submissions.

[381] Thallon Mole's pleaded case is that:

(a) It changed the balustrading in response to a verbal direction to do so given by the "Architect" (Mr Stewart) during a site meeting on 9 May 2018. This direction was given at the request of Greg Wright (Mrs Morton's father) as her agent; and confirmation of that direction, was given by the "Architect" at a site meeting on 13 November 2018.[424] The substance of the directions were later particularised by Thallon Mole to be to "change the pool balustrading to prevent the pooling of water";[425]

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421 $49,550.62 (excl. GST).
422 MFI Z p. 5.
423 Both figures include a 10 percent builders margin.
424 FASOC at [23](a).
425 Further and Better Particulars dated 29 August at [11].

(b) A confirmation of that direction was given by the Architect at a site meeting on 13 November 2018;[426] and

(c) The direction was authorised by Mrs Morton by her selecting material (black spigots) which were specified by her and Mr Stewart for Thallon Mole to use in complying with the direction.[427]

[382] Thallon Mole's written submissions contended that "it should be accepted that the direction to raise the pool balustrade was given by Mr Wright, and that direction was confirmed by Mr Stewart in the course of the site meeting where the spigots were chosen."[428]

May 2017 Meeting

[383] There is no evidence of any direction about the pool balustrade at a site meeting on 9 May 2018. Mr Mole's evidence was that the direction was given prior to the structural slab being poured - and this occurred in early June 2017. The pleaded date is clearly wrong.[429] It is therefore reasonable to infer (as I do) that Thallon Mole is referring to a meeting at the Stomp Café in May 2017 attended by Mr Wright, Mr Stewart, Mr Cook and Mr Mole. I am satisfied and find that Mrs Morton was not at this meeting.[430]

[384] Whatever the exact date, the uncontroversial evidence that I accept is that at this meeting in May 2017, Mr Wright raised a concern about the fall of the water being towards the pool and that there was the potential for the planned cantilevered balustrade fence to block the flow of water. I am not satisfied that at this point, an oral direction to raise the pool balustrade was given by Mr Wright, for two reasons:

(a) First, Mr Stewart's evidence (which I accept) is that the issue of potential problems with the water flow was discussed, but the effect of his evidence was that nothing was definitively resolved at this meeting.[431]

(b) Secondly and consistently with this finding, Mr Mole's evidence was very vague and not supportive of a finding that any specific direction was given by Mr Wright at this meeting.[432] Rather his evidence in chief was that Mr Wright raised a valid concern about ensuring that water did not get stuck up against the pool balustrade and that the raising of the balustrade on spigots was proposed as a simple solution.[433] It is also instructive that none of the relevant progress meeting notes taken by Mr Mole around this time refer to a direction

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426 FASOC at [23](a)(ii).

427 FASOC at [23] (b).

428 Plaintiff's Trial Submissions at [220].

429 T5-20, ll 5-10; T5-20, l 45.

430 Mr Cook was the only person who said Mrs Morton was present at this meeting – but subsequently accepted that she may have not been at this meeting but at another. T10-3, ll 27-30.

431 T13-23, l 26.

432 Thallon Mole's Trial Submissions reference T2-23, ll 14-32 as evidence that the direction was given to Mr Mole, but a review of this passage does not reveal any specific direction to lift the balustrade on to spigots.

433 T2-23, ll 20-32; Mr Cooks evidence about the conversations at this meeting (T8-58, ll 5-15) is generally consistent with Mr Mole's evidence. Again, Mr Cook's evidence does not support Thallon Mole's case that a direction to lift the pool balustrade on spigots was given at this time.

to change the design of the pool balustrade. Mr Mole acknowledged that it would have been important to have recorded such a change but explained that he had "obviously forgotten".[434] I reject Mr Mole's evidence that he "forgot" because I am not satisfied on the evidence that an oral direction was given to raise the pool balustrade on spigots at this time.

[385] Whilst I am not satisfied that any direction was given, I am satisfied that the general understanding or expectation of all those attending the May 2017 meeting was that the issue Mr Wright had raised was a valid one; and the raising of the pool balustrade on spigots was a practical and inexpensive solution to this problem. Mr Stewart certainly thought so.[435]

[386] Consistent with the general understanding or expectation from the May 2017 meeting (that the pool balustrade would be raised), in around June 2018, (at Mr Wright's direction), Mr Stewart engaged a surveyor to take the levels of the external tiled areas and obtained a report in August 2018 about the falls on the external areas from hydraulic engineers.

[387] It is instructive too (and consistent with my findings above) that Mr Stewart was cross examined on the basis that at the stage the report was received (in August 2018) he was "contemplating" that there was going to be a raised balustrade.[436]

[388] There is some tension in my finding that there was no oral direction given to Thallon Mole in May 2017 (about lifting the pool balustrade onto spigots) with what in fact happened, that is that the slab was poured in June 2017 without a recess (consistent with the balustrade being on spigots). This tension is explained by the fact that Mr Cook assumed from the discussions at the May 2017 meeting (understandably in my view), that the pool balustrade was to be raised on spigots – so, he poured the slab without a recess. Mr Stewart did not object to the slab being poured this way.[437] It was submitted on Thallon Mole's behalf that at this time there was no reason to think that Mrs Morton would not have approved the use of spigots because "she had, after all, used them in her previous renovation".[438] I reject this submission. There is no cogent evidence that any one from Thallon Mole knew this fact at the relevant time – and in any event, if Mrs Morton had wanted a pool balustrade like that in her previous house, it is reasonable to assume (as I do), that she would have asked TSA to design one like that for her new house, but she did not.

[389] Thallon Mole's apparently casual approach to the proposed change of design is perhaps best explained by the fact that it did not consider that the raised pool balustrade would cost any more than the recessed one[439] and the parties relationship was (at least at this time) both amicable and conciliatory.

Authority Issue

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434 T5-22, ll 45-47; T5-23, l 1.
435 T13-54, ll 15-21.
436 T13-56, l 6.
437 T-13-52, ll 17-27.
438 Plaintiff's Trial Submissions at [216]; T12-20, ll 7-47.
439 T2-23, ll 28-32; Exhibit 60.

[390] In any case, I am not satisfied on the evidence that Mr Wright was Mrs Morton's authorised agent or that he had ostensible authority to give such a direction in May 2017 for two reasons:

(a) First, the May 2017 meeting was about two months into the Contract. The matters Thallon Mole refer to in their written submissions as supporting a finding of agency or ostensible authority (such as Mrs Morton deferring to her father about building matters and Mr Wright regularly attending site meetings and being recorded on TSA minutes as either the client or client representative) are matters which I accept – and arguably support such a finding later in time. This submission overlooks that none of these facts were sufficiently known to Thallon Mole in May 2017.[440]

(b) Secondly, as both Mr Mole and Mr Cook well knew (or ought to have known), the Contract expressly stated that Mr Stewart was the client's authorised agent, not Mr Wright. Mr Stewart was at the May 2017 meeting – so it was reasonable for Mr Mole and Mr Cook to have assumed to the extent they were content to rely on an oral direction, that any such direction should have come from Mr Stewart not Mr Wright.

November 2018 Direction

[391] Thallon Mole's case is that a confirmation of the May 2017 direction was given by Mr Stewart at a site meeting conducted at the house on 13 November 2018. Mrs Morton, Mr Wright, Mr Stewart, Mr Mole and Mr Cook were all present at this meeting. The first part of Thallon Mole's pleaded case has not been proved. But it remains necessary to consider whether the facts establish that a confirmation or a direction to lift the pool balustrade on spigots was given on 13 November 2018.

[392] Most relevantly, and on any view of the facts, Mr Stewart (who was Mrs Morton's authorised agent under the Contract) understood at this point, (as did Mr Wright) that the pool balustrade was going to be built on spigots.[441] It was submitted on behalf of Mrs Morton – that this fact was not necessarily evidence of a "specific direction" to raise the pool balustrade on spigots having been given. I reject this submission because it overlooks the obvious fact that Mr Stewart was proceeding on the assumption that the pool balustrade was to be built on spigots. It is reasonable to infer (as I do), both from his actions and words and given what happened under his watch) that Mr Stewart confirmed what had been an earlier understanding that the balustrade was to be built that way. Mr Stewart's subsequent reference to "the client" (as opposed to TSA) not accepting Thallon Mole's assertion about the change to the pool balustrade is consistent with my finding.[442]

[393] In these circumstances, I am satisfied that the evidence establishes that Mr Stewart either verbally confirmed or authorised the variation of the pool balustrade so that it was to be built on spigots. At one point in his evidence, Mr Stewart accepted that he

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440 Plaintiff's Trial Submissions at [21].

441 As was conceded in the Defendant's Trial Submissions at [71].

442 See email from Thallon Mole to TSA dated 30 November 2018 (Exhibit 61) and Site Instruction 29 (Exhibit 62) issued to Thallon Mole on 14 December 2018, requesting Thallon Mole remove the installed balustrade and replace it with the originally specified product.

thought that Mrs Morton understood the balustrade was to be raised.[443] However for the reasons discussed below, I am satisfied that Mr Stewart did not expressly tell Mrs Morton that fact.

[394] Mrs Morton's evidence was that she did not know or appreciate that the pool fence would be raised on spigots and not recessed.[444] At first blush it is difficult to understand how she could have been oblivious to this fact. But after carefully considering the relevant evidence, I accept Mrs Morton's evidence for the following reasons:

(a) First, there is no evidence that Mr Stewart, Mr Mole or anyone, expressly told Mrs Morton that the pool balustrade was to be raised on spigots and Mrs Morton was not directly challenged about her lack of knowledge under cross examination. This finding is consistent with Mr Stewart's observation that Mrs Morton was extremely distraught and upset and questioned what had happened when she first saw the pool balustrade built on spigots.[445] It follows that I reject the submission on behalf of Thallon Mole that Mrs Morton's reaction was "simply consistent with her combustible personality in this context".[446] My finding that Mrs Morton genuinely did not know that the pool balustrade was to be built on spigots is consistent with Mr Mole's evidence as reflected in his progress meeting notes of 14 January 2019 as follows:[447]

> "Again she was very aggressive about this item.(greg was not) I do believe that she did not know about the spigots but i do believe that Greg did know has it has been discussed on a number of occasions. (hence his reaction in trying to calm Louise down) He is the client rep and it was he who requestsed [sic] that the balustrade be lifted off the tiles to allow water to flow under. I explained that i will provide a cost to change. I think that i should simply respond and say that this removal of this is in dispute."[my underlining]

(b) Secondly, I accept that the relevant site meeting minutes (of 13 November 2018) refer to the "side fix clamps to match spigots approved".[448] It is reasonable to infer (as I do), that the side clamps that were used to install the Newbolt Street balustrade were agreed to be installed in a design that matched the spigots which were (apparently) also approved by Mrs Morton.[449] Mr Stewart's evidence was that Mrs Morton had chosen black spigots because she did not like the idea of "tea stains' which might occur on a stainless-steel finish. Mr Mole's evidence is consistent with this finding,[450] as is Mr Stewart's evidence. Although, Mr Stewart thought that the spigots were approved at one meeting, and the side fix clamps at another.[451] I accept this evidence as it is consistent with the natural and ordinary reading of the

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443 T 13-59, ll 1-5.
444 T12-12, l 5 to T12-14, l 10; T12-103, ll 14-20.
445 T13-26, ll 4-15.
446 Plaintiff's Trial Submissions at [218] - with reference to Exhibit 71.
447 Exhibit 96 p. 120063 (the text in red).
448 The site meeting minutes are dated 15 November 2018, see Exhibit 6, p.110084.
449 Exhibit 58, which also contains a photo of the side clamps.
450 T2-24, ll 25-32.
451 T13-24, ll 29-35. Nothing turns on this.

site meeting minutes. On the other hand, Mrs Morton's evidence (which I also accept), is that: she knew what a spigot was; and that around 13 November 2018 she was shown a shape D flat piece of metal which she thought looked like "what you would have below a pool- to pull up a pool fence knob" and that she did not understand this to be a spigot.[452] Rather, she understood that she was being shown colours and she wanted something matte and black to match the rest of the house as opposed to the chrome she was being shown.[453]

(c) Thirdly, it is entirely plausible that Mrs Morton did not understand at this time that the pool balustrade was to be built on spigots. The Contract required the pool balustrade to be cantilevered and recessed into the pool podium slab. Thallon Mole conceded that it did not issue a variation in relation to a change to the pool balustrade design, nor did it receive written agreement from Mrs Morton or any one on her behalf for that change to occur.

(d) Fourthly, the contractual requirement for shop drawings in relation to the balustrades and the handrails was identified in numerous places in the Contract. This included on the Finishing Schedule for BAL01 and on the Architectural Drawings themselves. Surprisingly and inexplicably, TSA did not provide Mrs Morton or Thallon Mole with any drawings and Thallon Mole did not provide any shop drawings to either TSA or Mrs Morton. Mr Mole accepted that what had been installed differed from the specifications in the Contract.[454] Mr Cook accepted that Thallon Mole was required to produce shop drawings for the pool balustrade, but it failed to do so.[455] It follows that it was reasonable for Mrs Morton to have expected that any necessary change to the design of the pool balustrades would have been reflected in revised drawings provided to her to review and approve. This did not happen.

[395] I am therefore not satisfied that the facts establish that a confirmation or an oral direction to lift the pool balustrade was given by Mrs Morton on 13 November 2018. But of course, this finding does not distract from the fact that Mrs Morton's authorised agent Mr Stewart directed and authorised the change to the pool balustrade; and therefore, represented that the change to the balustrade was an acceptable variation under the Contract.

[396] I am also satisfied that the evidence established that:

(a) Thallon Mole relied on the representation by installing the balustrade as directed – and was induced to do so by this representation; and

(b) Thallon Mole will suffer detriment (the cost of removing the balustrade and installing it with a cantilevered design)[456] if Mrs Morton is permitted to resile from the representation.

Consequences of the Variation not Being in Writing

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452 T12-101, ll 36-38.
453 T12-101, ll 45-48.
454 T5-35, ll 22-24.
455 T10-6, l 40 to T10-7, l 7. A request for shop drawings (including for balustrades) were included in some of the minutes of site meetings. For example, Exhibit 160.
456 Exhibit 61.

[397] Thallon Mole accept that under condition 21 and 21.1A of the Contract it was required to obtain the written approval from Mrs Morton (or her authorised representative under the Contract) before proceeding with the work required to lift the pool balustrade and that it did not do so.[457] But, it submits that the absence of a variation in writing is overcome by the estoppel which is made out in its case.

[398] The starting point is schedule 1B of the *Queensland Building and Construction Commission Act* 1991 (Qld) (**QBCC Act**) which applies to domestic building contracts. Relevantly, s. 40 of Schedule 1B imposes the following obligations in respect of variations:

> **40 Variations must be in writing**
>
> (1) This section applies if there is to be a variation of a regulated contract.
>
> (2) The building contractor must give the building owner a copy of the variation in writing before the first of the following happens–
>
> (a) 5 business days elapses from the day the building contractor and the building owner agree to the variation;
>
> (b) any domestic building work the subject of the variation starts; Maximum penalty–20 penalty units.
>
> (3) The building contractor may give the building owner the variation under subsection (2)–
>
> (a) personally; or
>
> (b) by sending it by post, facsimile or email; or
>
> (c) in accordance with any provision in the contract providing for services of notices on the building contractor.
>
> (4) In a proceeding for a contravention of subsection (2), it is a defence for the building contractor to prove that–
>
> (a) the variation is for domestic building work that is required to be carried out urgently; and
>
> (b) it is not reasonably practicable, in the particular circumstances, to produce a copy of the variation in writing before carrying out the work.
>
> (5) The building contractor must not start to carry out any domestic building work the subject of the variation before the building owner agrees to the variation in writing.
>
> Maximum penalty–20 penalty units.

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457 Contrary to paragraphs [529]-[531] of the Defendant's Trial Submissions, it is not Thallon Mole's case that it was it was entitled to construct the pool balustrade contrary to the contractual specifications without an approved written variation, because it would have been a $nil variation. See Plaintiff's Trial Submissions at [226]-[227].

Section 5 of Schedule 1B of the QBCC Act states:

5 Meaning of regulated contract

(1) Each of the following is a ***regulated contract***–

(a) a domestic building contract for which the contract price is more than the regulated amount;

Section 3 of Schedule 1B of the QBCC Act states:

(1) *A domestic building contract*

(a) a contract to carry out domestic building work;

…

Section 4 of Schedule 1B of the QBCC Act states:

(1) Each of the following is ***domestic building work–***

(a) a contract the erection or construction of a detached dwelling;

…

Section 1 of Schedule 1B of the QBCC Act states:

Regulated amount means $3300 or the higher amount, if any, prescribed by regulation.

[399] The *Queensland Building and Construction Commission Regulation* 2003 (Qld), which was in force at the time the Contract was entered, does not prescribe a higher amount. I therefore find that the Contract is a regulated contract for the purposes of the *QBCC Act*, and the provisions of Schedule 1B apply.

[400] The Contract contained a Thallon Mole variation form in lieu of the QBCC Form 5. Obtaining this signed form from Mrs Morton before work was carried out was a requirement under the Contract and the *QBCC Act*. Thallon Mole was aware of the formal requirements for the making of variations as prescribed under the Contract and the *QBCC Act*. This was acknowledged explicitly by Mr Cook.[458] It was Thallon Mole's practice to present variation documents to Mrs Morton for written approval at site meetings.[459]

[401] In reliance on the case of ***Day Ford*** *Pty Ltd v Sciacca* [1991] 2 Qd R 209, it was submitted on behalf of Mrs Morton (without elaboration) that "[a]n estoppel is not available in the face of the statute" (s. 40 of Schedule 1B of the *QBCC Act*)[460] and "estoppel cannot nullify a statutory obligation."[461] But I do not accept that *Day Ford* is necessarily authority for such a sweeping or broad proposition.[462]

[402] *Day Ford* concerned an estoppel argument raised as a means of avoiding statutory illegality under s. 8(2) of the *Land Sales Act* 1985 (Qld), which rendered

458 T10-7, ll 4-7.
459 T5-25, ll 1-2.
460 Defendant's Trial Submissions at [363]; Defendant's Submissions in Reply at [73].
461 Defendant's Trial Submissions at [370].
462 This view is consistent with the Plaintiff's Written Points in Reply dated 14 February 2022 at [6].

instruments for the sale of relevant freehold land void unless there was an approved sub divisional plan in existence and in that case, there was not. In ultimately rejecting the plaintiff's claim in *Day Ford*, (in so far as it relied upon estoppel), the Chief Justice made the following relevant observations:

> "There is no need to multiply examples by the citation of authorities since the appropriateness of this approach based on consideration of social and statutory policy is so amply supported. In the present case we see that the statute by s. 8 imposed an unconditional prohibition upon the very type of sale which the written contract of May 1988 provided for."

[403] In considering the correct approach in deciding whether an estoppel might be set up against the operation of a statute, Chief Justice Macrossan (with whom Kelly SPJ and Ambrose J agreed), endorsed and followed the English line authority as follows: [463]

> "the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision."

[404] It was submitted on behalf of Thallon Mole that s. 40 does not render such a contract void or illegal if the variations are not in writing (or even if the Contract was to provide for variation to be oral rather than in writing). This submission was underpinned by reference to s. 44 of the *QBCC Act*, which relevantly provides as follows:[464]

> "Unless the contrary intention appears in this Act, a failure by a building contractor to comply with a requirement under this Act in relation to a domestic building contract does not make the contract illegal, void or unenforceable."

[405] But this submission overlooks the express provisions of s. 108D of the *QBCC Act* as follows:

> **108D Contracting out prohibited**
>
> A person can not contract out of the provisions of this Act.
>
> A domestic building contract is void to the extent to which it–
>
> is contrary to this Act; or
>
> purports to annul, exclude or change a provision of this Act.
>
> An agreement (other than a domestic building contract) is void to the extent to which it seeks to exclude, change or restrict a right conferred under this Act in relation to a domestic building contract.
>
> Nothing in this section prevents the parties to a domestic building contract from including provisions in the contract that impose greater or more

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463 *Day Ford Pty Ltd v Sciacca* [1990] 2 Qd R 209, 216-217 with reference to *Maritime Electric Co* v *General Dairies Ltd* [1937] AC 610, 620-621; and *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1016.

464 Plaintiff's Points in Reply at [6]

> onerous obligations on a building contractor than are imposed under this Act.
>
> Subsections (2) and (3) apply to any contrary intention in this Act.
>
> [Emphasis added]

[406] On a natural and ordinary reading of these provisions, I am satisfied that the admission of an estoppel would effectively exclude, change or restrict Mrs Morton's statutory right to have a variation in writing and would therefore have the effect of nullifying the express statutory provisions contained in both s. 40 and s. 108D.

[407] This finding is consistent with an analysis of the nature and obligations of the *QBCC Act* which can be determined, first, by examining the objects of the Act.[465]

[408] Section 3 of the *QBCC Act* outlines the objects of the Act which include amongst other things; to regulate the building industry, to ensure the maintenance of proper standards in the industry and to achieve a reasonable balance between the interests of building contractors and consumers.[466]

[409] Section 40 of the *QBCC Act* was inserted into the Act as part of the *Queensland Building and Construction Commission and Other Legislation* ***Amendment Bill*** 2014. Relevantly, the *Amendment Bill* also included legislative amendments aimed at improving the commission's effectiveness at balancing the interests of consumers and the building industry.

[410] In applying this legislative background to s. 40, it is clear that the purpose of requiring contract variations to be in writing was to enforce minimum standards in the building industry to create certainty and to better balance the interests of consumers with the building industry. While the Act is more generally focused on balancing interests between consumers and builders, this particular section is arguably more focused on consumer protection.

[411] It is instructive too, that s. 40 of the *QBCC Act* is identical to s. 79 of the *Domestic Building Contracts Act* (DBC Act), which was repealed in July 2015.[467] The *DBC Act,* where this section originated, had the purpose of reinforcing consumer protection, as outlined in the second reading speech relevant to that Act as follows:

> "The Bill gives consumers a range of rights, without burdening them with unnecessary obligations…
>
> This is a first for Queensland, where contracts with trade contractors have not previously been regulated. It responds to consumer demand, as expressed through complaints about trade contracts…

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465 As outlined in the case of *Amricama Pty Ltd* v *Red Carpet Real Estate* [2014] QSC 267.

466 At the first reading speech of the *Queensland Building Services Authority Bill* in 1991, the Honourable T. J. Burns said that the Bill was to provide greater protection for all sides involved in the building process including consumers and that in turn, it would result in greater confidence in the industry from consumers.

467 The *DBC Act* was repealed in 2015, but a number of sections were amalgamated into the *QBCC Act* as part of the 2014 *Amendment Bill*.

> This Government listens to consumers as well as to industry. And it understands that well informed, confident consumers are the essence of an industry such as building and construction."[468]

[412] Clause 54 of the *Amendment Bill 2014* also inserted a new ss. 108D(2) to (5) into the *QBCC Act* which clarified that a domestic building contract is void to the extent that it is contrary to the Act or purports to vary a provision of the Act.[469] This section encompasses the same purpose as s. 93 of the since repealed *DBC Act,* which stipulated that a domestic building contract is void to the extent to which it is contrary to the act or purports to annul exclude or change a provision of the Act.

[413] In ***Neumann*** *Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2011] 2 Qd R 114, the Queensland Court of Appeal held that a prohibition against contracting out was "a strong indication" that the Act conferred rights which "it is in the public interest to maintain and thus cannot be eroded by estoppel".[470]

[414] In *M J Arthurs Pty Ltd v Isenbert* [2017] QDC 85, McGill SC DCJ considered whether an estoppel operated against the statutory rights contained in s. 72 of the *DBC Act.*[471] Consistent with the approach in *Neumann*, his Honour relevantly observed as follows:[472]

> "There are several things I would say about this. In the first place this is a statutory right which exists as a form of consumer protection for those who enter into regulated building contracts, and accordingly this is one of those cases where in my view no estoppel will run against the exercise of a statutory right by the defendants. <u>This is consumer protection legislation, and by s 93 the parties cannot contract out of this provision, which suggests that there can be no estoppel against it</u>." [Emphasis added]

[415] My finding that Thallon Mole's estoppel argument fails as a matter of law is consistent with this reasoning.

<u>Breach of Contract</u>

[416] The analysis above demonstrates that Thallon Mole failed to comply with the requirements under the Contract not only to provide a written variation but also to shop drawings in relation to the pool balustrade.

[417] Absent a written variation, Thallon Mole's obligation under the Contract was to construct the cantilevered pool balustrade. To construct a balustrade raised on spigots required a written variation of the contractual scope. As there was no variation of the contractual scope in respect of this item, I am satisfied there was a breach of the Contract by Thallon Mole in failing to construct the scope work.

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468 Second reading speech of the DBC Act as read by the Hon. J. C. Spence and contained in the QLD Parliamentary Hansard 1990, pp. 4610 - 4613.

469 The Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014 Explanatory Notes, p. 19.

470 Analysis from Amricama Pty Ltd v Red Carpet Real Estate [2014] QSC 267.

471 This section refers to the right of building owner to withdraw from a contract in cooling off period.

472 At paragraph [119].

[418] The breach of Contract by not producing a shop drawing is submitted by Mrs Morton as a separate breach to the breach of failing to not construct in accordance with the Contract. It is submitted on behalf of Mrs Morton that if a shop drawing had been produced showing a non-compliant (with the Contract) pool balustrade, then Mrs Morton and Mr Stewart would have ensured that this construction would not have occurred. As set out earlier in these Reasons, I am satisfied that Mr Stewart understood from an early stage that the pool balustrade would be raised and built on spigots and that ultimately, he authorised it to be built this way. Given this finding, I am not satisfied on the evidence that he would have ensured that the construction would not have occurred if he had been provided shop drawings.

Damages in the Alternative

[419] Thallon Mole submits that if estoppel cannot be relied upon, there ought not be an award of any damages in respect of this part of the case because it would not be reasonable to award damages for a change in the pool fence for two main reasons:

(a) First, that the cantilevered design was not in fact important to the design of the house (either to Mr Stewart or Mrs Morton); and

(b) Secondly, that regardless of whether it was strictly necessary, the design had an engineering purpose – namely to enable the better flow of water and provide Mrs Morton with a functioning pool fence.

[420] There is some force to Thallon Mole's first submission. Under cross examination Mrs Morton said that it was not so much the fact that the fence was raised on spigots that she "loathed" rather it was the "quality of the spigots" that she detested. Her lament being that the spigots installed were not an "architectural item" – as they were from Bunnings. This evidence needs to be considered in the context that:

(a) Mrs Morton had previously had a house with a cantilevered pool fence and that she subsequently contracted to have the pool fence for her "high-end house" not to be built on spigots;

(b) The Contract expressly provided "that the setout of balustrade components is integral to the overall design intent;"[473] and

(c) That the balustrades were an important architectural item with prominent visual positions within the overall house design.[474]

[421] On balance, I am satisfied that the design of the pool fence was important to Mrs Morton. But I am not persuaded that it was so to Mr Stewart, or that he understood that Mrs Morton was concerned with aesthetics over practicality and efficiency. If he had been, it is reasonable to assume (as I do,) that he would have told Mrs Morton about the change.

[422] Mrs Morton submitted that whilst the change in design might have had an engineering purpose, having successfully established breach, the proper measure of damage is the cost of giving effect to the provision of a cantilevered pool balustrade she contracted for. I accept that a claimant whose property is defective as a

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473 Exhibit 4 p. 220067.

474 The five leaf Vitrocsa doors were designed to pull back into one leaf to leave a visually open area from the ground floor living area in the building to the pool.

consequence of another's breach is generally entitled to recover the costs of reinstating the property so that it corresponds to the contractual promise. But of course, that is only to the extent that it is unreasonable to insist on reinstatement;[475] and bearing in mind that this qualification is ordinarily only found in fairly exceptional circumstances.[476]

[423] The onus is on Thallon Mole to prove that Mrs Morton has acted unreasonably, it is not for her to prove that she acted reasonably.[477] The question of what is reasonable depends on all the circumstances of the particular case.[478]

Conclusion re: of Claim for Pool Balustrade

[424] Mrs Morton claims the sum of $18,766 (excl. GST) as the cost of having the pool fence installed on spigots.[479]

[425] The facts of this case (as I have found them to be in relation to this issue) are somewhat unusual, particularly given that: the change of design was directed by the architect Mr Stewart; the original design whilst aesthetically important to Mrs Morton, was not in fact important to the aesthetic design of the house from Mr Stewart's perspective; and that whilst not strictly necessary, the change had an engineering purpose of improving the way in which water flowed whilst still providing Mrs Morton with a functioning pool fence.

[426] In these circumstances, I am satisfied that it would be unreasonable to award any damages to Mrs Morton for costs of having the pool fence rebuilt on spigots.[480] I therefore dismiss her claim for $18,766 (excl. GST) for the pool balustrade.

The Newbolt Street Balustrade

[427] The issues around the installation of the Newbolt Street balustrade concern the number of glass panes, its correct height and the type of handrail (a cap handrail or

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475 *Bellgrove v Eldridge* (1954) 90 CLR 613, 618-619.

476 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286-290.

477 *The Owners – Strata Plan NO 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067, [46] (per Ball J); (considered with approval by the South Australian Court of Appeal in *Bedrock Construction and Development Pty Ltd v Crea* [2021] SASCA 66) citing *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* [1963] 180 CLR 130, 138; *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 673 (per Brennan J); *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130, 158 (per Hope JA with whom Priestley and Meagher JJA agreed); *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313, [187] (per Giles JA with whom Handley JA and Stein JJA agreed).

478 The concept of reasonableness in the context of an alleged failure to mitigate case was analysed usefully by Giles JA in *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313, [187].

479 That amount is set out at Item 2.0 of the Hutchinson Builders Quote dated 13 May 2021 (Exhibit 314, pp. 270449-270450). Thallon Mole raised an issue about the margin claimed in the Plaintiff's Trial Submissions at [238]-[240]. But I am satisfied as a matter of common sense and because it is mathematically correct, that the margin relates only to Items 2 to 5 on the quotation.

480 An example of where damages were found to have been unreasonable is *Casbee Properties Pty Ltd v Patoka Pty Ltd* [2003] NSWCA 361 (decided before Tabcorp); although *Casbee* is distinguishable in the sense that the issue of aesthetics did not arise; and the evidence in that case was that if the table drains were built on the low side (as per the contract detail), then the drainage system would not functionally work due to saturation problems. Relevantly though, the drains were built in accordance with good engineering practice.

a pin fixed handrail).[481] Mrs Morton submitted that the Contract required a four-pane glass balustrade at the same height as the retaining walls, with a handrail embedded in it (a pin fixed handrail). But the balustrade as constructed by Thallon Mole in November 2018 (on its case in accordance with the Contract) was comprised of ten panels of glass sitting at a level of about 200mm below the retaining wall without an embedded handrail but rather with a cap handrail.[482] Thallon Mole conceded that the handrail was not installed in the way specified in the Contract but argued that this variation was made pursuant to an oral direction given by Mr Stewart to Mr Cook around September 2018.

The Relevant Contractual Provisions and Architectural Construction Drawings

[428] The requirements for the Newbolt Street balustrade under the Contract are general and found in disparate places. Pages 220099 to 220101 of Exhibit 4 depict the balustrade with no handrail and as one single piece of glass running the length of the walkway and at the height of the adjacent wall.[483] The Contract does not otherwise describe the height of the balustrade or the number of panels of glass.

[429] Page 220067 specifies a semi-framed glass balustrade (without mention of the height or number of panels - only the type of handrail), as follows:

> Custom steel framed glass balustrade system – with core drilled and fascia fixed stanchions / handrail with pin fixed toughened glass glazed infill panels fitted off handrail. (Glass panels to comply with AS1288) – detail to be developed with specialist manufacturer.

[430] The drawing on p. 220138 depicts the balustrade at a side-on view. It shows the balustrade at a height of 1200m (the same height as the adjacent blockwork retaining wall); a handrail embedded in the glass with the top handgrip part of the handrail at 900mm; and contains a note that "frameless glass balustrade, refer to Finishes Schedule". Again, there is no reference to the number of panels.

[431] It follows that the final design was to be determined by construction drawings to be prepared by TSA at some point later.

[432] Consistent with this, on 22 February 2017, Construction Issue Drawing 300-01 Issue 1 was prepared by TSA. This drawing identified as "proposed elevations sheet 1" depicts a sideview of the house facing Newbolt Street. It shows the Newbolt Street balustrade as a single sheet of glass at a height slightly below the blockwork retaining walls on either side of the balustrade. No representation of the handrail, number of panels or dimensions are shown.[484] Between 3 March 2017 and 16 December 2017, five further drawings (Issues 2 to 6 of Drawing 300/01) of the Newbolt Street balustrade were prepared by TSA. These drawings were each identified as "for construction" drawings and continued to show the Newbolt balustrade as only one panel of glass and at a height slightly below the height of the

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481 There was no dispute that the style of fixing of the glass was appropriate despite it not being pin fixed. See Mr Stewart's evidence T14-37, ll 15-6.

482 Exhibit 58. It was uncontroversial that Thallon Mole installed 10 glass panels to make up the balustrade.

483 Neither party contended that the balustrade was to be installed with a single piece of glass.

484 Exhibit 163 p. 210027.

adjacent wall, with no representation of the handrail, number of panels or any dimensions.[485]

[433] On 1 February 2018, Mr Rhodes sent an email to Mr Cook, Mr Mole and Mr Andrews attaching Drawing 510-06 Issue 1 with a drawing description "TYP. Handrail and Details Sheet 1."[486] In the middle of Drawing 510-06 Issue 1, the details for the construction of the Newbolt balustrade are set out with specificity. For example, details of the handrail, the dimensions of the panels and the gaps between panels, the height of the handrails and the height of the glass balustrade are given.

[434] On 2 February 2018, Mr Stewart sent Mr Cook an email transmittal with the purpose expressed to be "For your use."[487] The remarks to the transmittal stated, "Please find consolidated drawing package based on balustrade updates to bridge (match stair balustrade design)." The email attached 14 drawings. The first of the drawings is Drawing 000-01 Issue 11. In bold capitals at the top of the first page of Drawing 000-01 Issue 11, the words "CONSTRUCTION DOCUMENTATION" clearly appear. Immediately below there is a reference to a "drawing register" which identifies the relevant drawings by the terminology "Sheet Number, Current Rev and Rev Date." Not every one of these drawings in the email has a separate "for construction" reference on it. But importantly, the drawings relevant to the Newbolt Street balustrade are identified in the drawing register. Relevantly those documents include:

(a) Drawing 300-01 Issue 7 with the words "for construction" on it.[488] This version depicts the Newbolt Street balustrade at the same height as the retaining walls either side, fixtures for handrails within the glass and four panes of glass; and

(b) Drawing 510-06 Issue 2 which in the middle refers to the Newbolt Street balustrade. It does not bear the words "for construction" but is listed in the coversheet document 000-01 Issue 11 as being part of the Construction Documentation Drawing Register. This is obviously the second issue of the drawing called "Typ. Handrail and Balustrade Details Sheet 1."[489] It provides the detail set out of the Newbolt Street balustrade both in terms of detailed dimensions, number of panes and the height of the balustrade (being the same as the retaining walls).

[435] Some nine months later, in late October or early September 2018 (prior to the glass having been ordered), Mr Mole, Mr Cook and Mr Stewart attended a meeting at the house.[490] Mr Stewart's evidence (which I accept), is that Drawing 510-06 was discussed although he could not recall whether it was the Issue 1 or Issue 2 version.[491] Mr Stewart recalled that the discussion was about the handrails to the left of the balustrade going down the stairs and along the pool podium[492]and that it was

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485 Ibid pp. 210023-210026.

486 Exhibit 300. It is evident from this exhibit that this drawing was emailed to Thallon Mole personnel on at least three occasions on 1 February 2018; See also Exhibit 264.

487 Exhibit 233. Another copy of this transmission is found at Exhibit 265.

488 A version of this drawing is also at Exhibit 188.

489 Its issue date is 2 February 2018 and records that the first issue was 30 January 2018

490 T13-20, l 40. Mr Stewart thought it occurred in the garage at the house.

491 T13-20, ll 30-34.

492 T13-22, ll 8-9. As reflected in his markings of Exhibit 233 in Exhibit 265.

these handrails that were to be deleted.[493] On the other hand, Mr Cook's evidence in chief was that there was a discussion about the removal of the glass balustrade handrail – and that is why it was ultimately removed.[494] I prefer the evidence of Mr Stewart and find that there was no direction that the handrail which was to be embedded within the glass balustrade was to be removed for two reasons:

(a) First, until his oral evidence in chief, this was the first occasion that Mr Cook had made any mention of such a conversation taking place. He made no mention of it in his detailed affidavit or his evidence summary.

(b) Secondly, it is not corroborated by any written or oral evidence. Mr Mole's evidence (which I accept), is consistent with Mr Stewart's version, that there was no discussion about the handrail on the glass balustrade being removed.[495]

[436] Mr Cook denied seeing Drawing 510-06 Issue 1 (or Issue 2) at the relevant time. But I reject his evidence on this point for the following reasons:

(a) First, Mr Cook gave evidence that as site supervisor, these transmittals would come to his attention.[496]

(b) Secondly, Mr Andrews sent a further copy of the email chain with attachments to Mr Cook and Mr Mole relevantly stating, "see attached" and "Rhys, I have printed off and put in job out tray in office."[497] Mr Cook accepted that the "job out tray" was where paperwork was placed to be accessed by those working at the site.[498] It is therefore reasonable to infer (as I do), that the documentation came to Mr Cook's attention (or ought to have come to his attention) in this way too.

(c) Thirdly, Mr Cook's evidence (which I accept), was that his practice was to work off the most current set of construction drawings.[499] In the case of the Newbolt Street balustrade, I am satisfied that the most current set was the consolidated drawing package sent to Mr Cook on 2 February 2018 as referred to in paragraph 433 of these Reasons and that this set included Drawing 510-06 Issue 2.[500]

(d) Fourthly, Mr Cook recalled discussing and seeing a plan at the meeting in late September or early October which showed the handrail for the Newbolt Street balustrade going down the steps and along the retaining wall.[501] Drawing 510-06 sets out the detail for the construction of the Newbolt Street balustrade and is the only drawing showing these details.

[437] The evidence, (which I accept) is that red clouding is commonly used to show a change in the "for construction" documentation issued by an architect.[502] It was

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493 The evidence was that these handrails were never constructed.
494 T10-76, ll 1-4.
495 T5-34, ll 43-44.
496 T9-102, l 24 to T9-103 l 33 (in the context of Exhibit 233).
497 Exhibit 300.
498 T16-12, ll 28-30.
499 T16-13, ll 29-30.
500 Exhibit 233. A version of this exhibit as marked up by Mr Stewart is Exhibit 265.
501 T16-31, ll 40-42; T16-31, l 40 to T16-32, l 7; T16-32, ll 13-1.
502 T14-35, ll 36-44.

submitted on behalf of Thallon Mole that because the changes between drawing 300-01 (revisions 1 to 6) and revision 7 were not identified in this way, version 7 did not supersede the earlier versions. It is unfortunate that the architect did not follow this practice on this occasion. But nothing turns on this fact because as the above analysis shows, I am satisfied that both Issues 1 and 2 of drawing 510-06 (which showed the Newbolt Street balustrade and handrail as it was to be constructed – consistent with 300-01 revision 7) came to Thallon Mole's attention in early February 2018.

[438] For the reasons discussed above, I am not satisfied that Mr Cook was given a direction to remove the handrail from the Newbolt Street balustrade. But regardless, any such direction ought to have been in writing and it was not.[503]

Breach

[439] As the analysis above reveals, I am satisfied that Thallon Mole did not build the Newbolt Street balustrade in accordance with the Construction Documentation issued under the Contract. I therefore find that Thallon Mole breached the Contract for the installation of the Newbolt Street balustrade.

[440] Thallon Mole described Mrs Morton's claim under this heading as an "afterthought" and "opportunistic and cynical" because it was (apparently) only raised some four to five months after the balustrade was installed.[504] This submission is misplaced for two reasons.

(a) First, the factual premise upon which it is based is entirely incorrect. The evidence of Mr Mole (which I accept) is that almost immediately after this balustrade was installed both Mr Stewart and Mrs Morton expressed their unhappiness that it was not built according to the plan.[505]

(b) Secondly, it overlooks that Mrs Morton is entitled to have what she contractually bargained for constructed.

Quantum of Damages

[441] Mrs Morton claims the sum of $25,341.51 as the cost of the rectification work for the Newbolt Street balustrade. This sum is said to comprise of a sum of $20,950 based on a quote from Fitout Glass & Aluminium (for four panels of 3m long glass, with a thickness of 15mm) and a 10 percent builder's margin of $2,095. Thallon Mole submitted this claim amounts to one of betterment and that the reasonable cost of re-installing the glass balustrade to the height of the blockwork, with a protruding handrail, and pin-fixed, is the sum of $7,121,[506] plus the builder's margin. Thallon Mole's quote is for an eight-panel balustrade.

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503 Thallon Mole do not plead an estoppel – but any argument would fail for the reasons discussed under that heading earlier in these Reasons.

504 Plaintiff's Trial Submissions at [266].

505 T8-59, ll 30-36; Mrs Morton's dissatisfaction was also raised as part of her response to Payment Claim 24 on 25 February 2019.

506 Exhibit 164, The cost quoted by Clearly Glass Systems; Mr Whitehead identified at T9-34, ll 37-44 that this quote relied on "off the shelf" stuff, which was pre-engineered at about 1,800cm.

[442] The difference in price (according to Mr Mole) was that the Hutchinson glass of 15mm was thicker and the panels were substantially larger.[507] But his evidence overlooks that the Construction Documentation required four panes of glass not eight or ten and there was no evidence that the quantum claimed for the four panels was unreasonable for the work performed. The contractual drawings show the Newbolt Street balustrade as a single pane of glass, but the subsequent Construction Documentation showed four panes of glass (each self-evidently shorter in length to the one pane of glass). It follows that this was not an augmentation of what was shown in the Contract but rather a reduction. I am therefore not satisfied that these rectification costs claimed by Mrs Morton are for a grade of material not contemplated or for more than contemplated by the Contract. It follows that I reject Thallon Mole's submission of betterment.

[443] I therefore allow Mrs Morton's claim for the Newbolt Street balustrade in the sum of $25,341.51 (incl. GST).

Practical Completion

[444] Thallon Mole maintained Practical Completion was reached on three different dates. Initially, its pleaded case was that the Works were at the stage of Practical Completion by 3 February 2019, but later it was alleged that Practical Completion was achieved by 3 April 2019.[508] Finally, at trial, Practical Completion was said to have been achieved "no later than 8 April 2019".[509]

[445] Mrs Morton denies Thallon Mole achieved Practical Completion on any of these dates or at all.[510]

[446] Thallon Mole focused on the common law meaning of "Practical Completion" as being completion of the physical works required under the Contract for all practical purposes.[511] It also correctly accepted that any such meaning is only in "broad terms" and subject to the definition in the Contract.[512]

[447] Ultimately, the question of whether Practical Completion was reached in the present case is a question of fact to be answered by reference to the terms of and definitions in the Contract.[513]

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507 T5-61, ll 42-43.

508 FASOC at [43], [45]; FARA at [33](aa).

509 Plaintiff's Trial Submissions at [586].

510 SFADCC at [43].

511 Plaintiff's Trial Submissions at [27]-[36]; with particular reference to the observations of GN Williams J (as his Honour then was) in *Murphy Corporation Ltd v Acumen Design & Development (Qld) Pty Ltd & Hooper* (1995) 11 BCL 274, [294] cited with approval in *Grocon Constructions (Qld) Pty Ltd v Juniper Developer (No 2) Pty Ltd* [2015] QCA 291, [59] (per McMeekin J, with whom Holmes CJ and Atkinson JA agreed).

512 For examples of different provisions see: *Pivovarova v Michelsen* (2019) 2 QR 508, [51]–[52] (per Crow J) and *Clyde Contractors P/L v Northern Beaches Developments P/L* [2001] QCA 314, [16] (per McMurdo P, Williams JA and Philippides J).

513 Applying the orthodox construction of contract principles discussed by Gibbs J (as he then was) in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109. Consistent with the approach endorsed by the majority in *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 640, 656 [35], the terms of the Contract in relation to the requirements for Practical Completion are to be determined by what a reasonable businessperson would have understood those terms to mean; and the Contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience.

Relevant Contractual Provisions

[448] The starting point is the definition of Practical Completion as set out in Condition 1.1(s) of the Contract as follows:

> **"Practical Completion**" means the date upon which the Works are completed in accordance with the requirements of this Contract, including Condition 3 and Condition 28, apart from minor omissions or minor defects. [Emphasis added]

[449] The following terms are also relevantly defined in the Contract:

(a) Condition 1.1(i) defined "Date of Practical Completion" as meaning "the date certified in the QBCC Form 7 – Certificate of Practical Completion in accordance with Condition 28";

(b) Condition 1.1(cc) defined "work under this Contract" as meaning, relevantly, "all that work necessary to build the Works in accordance with the plans and specifications in this Contract... ";[514]

(c) Condition 1.1(dd) defined "Works" as meaning "the work described in Schedule Item 3 to be built in accordance with this Contract, including variations authorised under the contract, and which by the Contract is to be handed over to the Owner"; and

(d) Schedule Item 3 described the Works as a "3 Storey Home with Pool & Associated Hard Scapes".

[450] Condition 3.1 incorporated the warranties under Schedule 1B of the *QBCC Act* into the Contract by which Thallon Mole warranted relevantly that:

(a) The **work under this Contract** will be carried out in an appropriate and skilful way and with reasonable care and skill and reasonable diligence;

(b) All materials supplied will be of good quality and suitable for the purpose for which they are used having regard to the **Relevant Criteria**, and that all materials used will be new unless this Contract expressly provides otherwise;

(c) The **work under this Contract** will be carried out in accordance with all relevant laws and legal requirements including, for example, the *Building Act 1975*;

(d) The **work under this Contract** will be carried out in accordance with the plans and specifications and any other Contract documents described in Schedule Item 15; and

(e) If the **work under this Contract** consists of the erection or construction of a detached dwelling to a stage suitable for occupation or is intended to renovate, alter, extend, improve or repair a home to a stage reasonably

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514 Under this condition (unless expressly excluded) this was said to include: work to make the site assessable to the Contractor; provision of any special equipment; work to clean the site for the building; set out of the Works and survey (if necessary), necessary structural retaining walls; sewerage, draining and electrical connection; provision of temporary water and power during construction; and provision of clean up and disposal of water material from the Site.

suitable for occupation, that the detached dwelling or home will be suitable for occupation when the **Works** are finished….

…

[451] By Condition 3.2, Thallon Mole also warranted as follows:

> The Contractor must, unless the Contract expressly provides otherwise, supply at the Contractor's cost and expense, everything necessary for the proper completion of the **Works** and for the performance of the **work under this Contract**.

[452] By Condition 3.3, Mrs Morton was expressly obliged to pay Thallon Mole "the **Contract Price** for the **Works** in accordance with this Contract."

[453] Condition 28 which is set out in full at paragraph 218 of these Reasons prescribed the following two processes for Practical Completion to be achieved:

(a) First, Condition 28.1 required Thallon Mole to give:

(i) Two notices of the date upon which it anticipated that the Works would reach Practical Completion, the first not less than 10 business days before and the second not less than three business days before;

(ii) Notice to Mrs Morton in writing if Practical Completion will not be reached by the anticipated date; and

(iii) Notice to Mrs Morton in writing when it considers that the Works have reached Practical Completion.

(b) Secondly, after giving the required notice that Practical Completion had been achieved, Condition 28.2 stipulated a process which required Thallon Mole to do a number of things which included:

(i) Providing evidence that the Works had been inspected (by Mrs Morton or her representative) and complied with relevant approvals and statutory requirements including under the *Building Act 1975* (Qld);

(ii) Completing, signing and giving Mrs Morton the QBCC Form 6 - Defects Document or similar appropriate documents identifying agreed and non-agreed minor defects and minor omissions, and when they will be remedied;

(iii) Providing Mrs Morton with a completed and signed QBCC Form 7 - Certificate of Practical Completion stating that date as the Date of Practical Completion; and

(iv) Handing over the Works to Mrs Morton.

[454] Under the heading "**MORTON ADDDITIONAL CONTRACT CONDITIONS**" the Contract also stipulated the following further conditions expressly stated to "take precedence over any other documents forming part of the Contract":

> **2 AUSTRALIAN STANDARDS**

> The Contractor must in carrying out the Works use workmanship and materials:
>
> (a) of the standard prescribed in the Contract; or
>
> (b) to the extent they are not so prescribed, of a standard consistent with the best industry standards for work of a nature similar to the Works and which are at least fit for purpose and comply with the requirements of the National Construction Code and all relevant standards of Standards Australia.

Practical Completion – Proper Construction of the Contract

[455] Mrs Morton submitted that what she defined as the "Completion Documents" had to be delivered to her as a precondition to Practical Completion.[515] Her pleaded case was that these documents included: copies of as-built drawings; manufacturers warranties; operation and maintenance manuals, all statutory certificates; and all mechanical, gas and hydraulic services.[516]

[456] Thallon Mole submitted that properly construed, "Practical Completion" under the Contract is a reference to the physical build works only, and not things like provision of certificates or approvals, drawings or the commissioning of dishwashers and lifts;[517] and that it is not necessary for the works to be defect free for Practical Completion to be reached.

[457] Dealing with the second point first. I accept that Works to be carried out under the Contract were not required to be defect free.[518] This is obvious from a plain reading of the Contract which expressly contemplates Practical Completion being achieved with "minor omissions or minor defects".[519] The issue of defects and omissions is discussed further under that heading below, but I otherwise reject Thallon Mole's contention that Mrs Morton was insisting upon "absolute perfection" in the construction – because it is plain that she was not.[520] Rather, she was insisting that Thallon Mole comply with its contractual obligations.

[458] Turning then to the first point. I reject Thallon Mole's submission that Practical Completion in the Contract only concerned physical building works because such a reading is contrary to an ordinary reading of the relevant provisions of the Contract.

Documents Required for Practical Completion to be Achieved

[459] The plain and unambiguous words in the definition of "Practical Completion" required completion of all the Works in compliance with the Contract, including the requirements in Conditions 3.1 and 28. On a proper construction of the relevant

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515 This expression is not defined in the Contract or the *QBCC Act.*

516 SFADCC at [5](r).

517 In support of this submission, Thallon Mole referred to the definition of "domestic building work" in Schedule 1B of the *QBCC Act* as only referencing the physical work associated with building the house. That may be true, but this submission overlooks the express provision of the Contract.

518 This finding is consistent with the authorities. See for example *Walter Construction Group Ltd v Walker Corporation Ltd* [2001] NSWSC 283.

519 Exhibit 4 p. 220006, Condition 1.1(s) of the Contract.

520 Plaintiff's Trial Submissions at [36](b).

contractual provisions above, Practical Completion under the Contract required not just the physical completion of the building Works to the required standard, but also the delivery of all relevant inspection certificates and other documentary evidence demonstrating compliance with the Development Approval and the *Building Act* required by Condition 28.2.

[460] Thallon Mole described it as a "curious form of drafting" for a contract and payment administration clause such as Condition 28 to be included in the definition of Practical Completion.[521] I do not accept this submission for two reasons:

(a) First, there is no suggestion that it was included by mistake or that it makes "commercial nonsense" or "working commercial inconvenience".[522]

(b) Secondly, the inclusion of such a clause in the definition of Practical Completion is not a novel one and clearly serves an important purpose. For example, the New South Wales Court of Appeal considered the effect of a failure to follow the procedural requirements for the issuing of a certificate of Practical Completion in *Metro Edgley & Anor Pty Ltd v MK & JA Roche Pty Ltd & Anor* [2007] NSWCA 160. In this case, the contract required 15 business days' notice of the date which the developer anticipated that Practical Completion would be reached, before a certificate of Practical Completion could be issued by an independent certifier. Two purported certificates of Practical Completion were issued by the independent certifier, both of which failed to comply with the notice of anticipated Practical Completion provisions of the contract. The unanimous decision of the Court of Appeal was that the failure to comply with the procedural steps in giving notices meant that the two certificates of Practical Completion were invalid, and that Practical Completion was not reached.[523]

[461] I am satisfied that the provisions of Condition 28.2 imposed an obligation on Thallon Mole to produce to Mrs Morton all relevant inspection and approval certificates required for the purposes of the building approval, and any other relevant authority, including council approvals for constructed work, as part of the Works required to be built in accordance with the requirements of the Contract (and handed over to the Owner). I find that the provision of these certificates was a condition of the works reaching Practical Completion in accordance with the requirements of the Contract.

[462] Without those certificates the private certifier could not assess whether the Works had been completed in accordance with relevant requirements and was unable to issue a final occupancy certificate for the house.[524]

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521 Plaintiff's Trial Submissions at [43]-[44].

522 Consistent with the approach endorsed by the majority in *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 640, 656 [35] the terms of the Contract in relation to the requirements for Practical Completion are to be determined by what a reasonable businessperson would have understood those terms to mean; and the Contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience.

523 Metro Edgley Pty Ltd & Anor v MK & JA Roche Pty Ltd & Ors [2007] NSWCA 160, [49], [83]-[84], [86]-[88], [93].

524 Again, the Form 7 Certificate of Practical Completion in the Contract (Exhibit 4 p. 220038) required evidence of those certificates to have been satisfactorily completed as the first requirement before Practical Completion could be certified; and that the Contractor was to complete and sign that Form 7 before seeking payment for the Practical Completion Stage.

[463] On 13 March 2019, the private certifier confirmed to Thallon Mole that the Form 15 design certificates and Form 16 inspection certificates were required to be delivered, as a condition of the Decision Notice[525] for him to issue a Form 21 final certificate.[526] Thallon Mole was aware of this requirement[527] but did not provide the Form 15 and Form 16 certificates to the private certifier until 30 April 2020.[528] The plumbing compliance certificates were not provided until 5 August 2019.[529] At the commencement of trial, the private certifier had not yet issued a final occupancy certificate, but this is partly attributable to his refusal to accept Mr Mole's signature for the Form 16 for external waterproofing.

[464] I find that Thallon Mole's failure to deliver the inspection certificates until 30 April 2020 was not a "minor omission."

[465] This finding does not necessarily mean that a failure by Thallon Mole to provide for example a manufacturer's warranty for a dishwasher or an appliance required to be delivered under the Contract means that Practical Completion could not be achieved. The effect of failing to provide any such warranties (alone) is clearly an example of a minor omission as contemplated by the Contract.

[466] Regardless of these findings (and my earlier finding that Final Progress Claim 26 was not a valid claim for the Practical Completion Stage of the Contract), for the reasons discussed under the next heading, I am otherwise not satisfied that the "physical works" (to use Thallon Mole's preferred definition) required for Practical Completion were in fact achieved by Thallon Mole as it alleges.

Did the Physical Works at the House Reach Practical Completion ?

[467] Mrs Morton obtained several defect reports following Thallon Mole's advice to her that Practical Completion was anticipated in early February 2019.[530] Her pleaded case is that Practical Completion had not been achieved because Thallon Mole had not rectified the following defects identified in the following reports:[531]

(a) The Hydraulics Report dated 18 March 2019 by ACOR;

(b) The Electrical Consultant Report dated 4 March 2019 by Mr Wildeisen;

(c) The Mechanical Services Consultant Reports dated 15 March and 26 March 2019 by Walkerbai;

(d) The Building Finishes (Handovers) report dated 13 March 2019; and

(e) The Issman Internal and External Defects Reports.

[468] Thallon Mole referred to the Quality Assurance Report from Mr Parker as an "indication that objectively, the work that needed to be done from 13 March 2019

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525 Exhibit 282 pp. 181772-181773

526 Exhibit 283; Exhibit 284; Exhibit 286; Exhibit 288; T15-26, l 40 to T15-27, l 43.

527 T15-23, ll 23-28; T15-24, ll 9-45; T15-25, l 44 to T15-26, l 10.

528 Exhibit 157; T4-27 to T4-30; T15-28, ll 10-35.

529 Exhibit 153.

530 These included the Issman Reports, the TSA Major Defects List, the Handovers.com Defects Report and the Wildeisen & Associates Electrical Services Site Inspection Report and others as set out in Exhibit 269 (Mr Stewart's affidavit) at [15].

531 SFADCC at [41](a).

was in the nature of minor omissions and defects".[532] But this report is of little assistance in determining the issue of whether Practical Completion was in fact achieved for two reasons:

(a) First, it is contrary to Thallon Mole's ultimate case that Practical Completion was completed no later than 8 April 2019; and

(b) Secondly, whilst the report identified 146 matters that needed attending to, it is devoid of detail: for example, it lists matters such as "complete works to the pool"; and "[c]omplete finish to step tread and handrails"; and "clean out garage and check for defects"; and complete work to hydraulics room right hand side of garage" – without any estimate of what was required or any time frames.

[469] Thallon Mole submitted that by 5 April 2019, the Work was "in a remarkably complete state" and that whilst there was minor work still being completed, the house was in a state that was capable of being lived in as demonstrated by a number of exhibits.[533] Thallon Mole also relied on the evidence of its building expert, Mr Donald Dixon. His evidence was that none of the defects notified to it were a "major defect" and that each defect was required to be considered individually. For the reasons set out in the preceding paragraph, I reject as incorrect the proposition that each defect or omission is to be looked at in isolation - it is the entire state of the Works that must be considered. I also reject Mr Dixon's use of the term "major defect" in this context because it emanates from AS 4349.0 - a pre-purchase building inspection standard which expressly does not include compliance with building regulations or assessment of the building under construction.[534] The definition in this standard is therefore irrelevant to a consideration of minor defects or omissions under the present Contract.

[470] I accept however, as a very general proposition, that the house looked "in a remarkedly complete state" by early April 2019. But of course, that is not the test of Practical Completion. Looks can be deceiving.

[471] The definition of Practical Completion under the Contract requires the objective assessment of whether the entire state of the Works is complete apart from "minor defects and minor omissions". The assessment of whether the house is reasonably suitable for occupation is just one criteria by which Practical Completion is to be assessed.[535] As Mr Dixon rightly conceded under cross examination, and I accept as a matter of common sense, in the context of the provision, other factors such as the severity of the defect, the time required to rectify the defect, whether it poses a safety risk and the extent and effect of whether dust and other consequential matters of rectification affected the use of the house, are also relevant and need to be considered.[536]

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532 Plaintiff's Trial Submissions at [592].

533 Plaintiff's Trial Submissions at [593]-[594] - setting out a number of exhibits.

534 The definition of "major defect" in AS4349 is "a defect of sufficient magnitude where rectification has to be carried out in order to avoid unsafe conditions, loss of utility or further deterioration of the property"; Exhibit 183, [1.3.9]; See Cross examination of Mr Dixon at T6-78, ll 13-30; T6-79, l 25 to T6-81, l 10. This standard was correctly rejected by Mrs Morton's building expert, Mr Carpenter (an experienced building expert and ex-QBCC inspector), as irrelevant.

535 Exhibit 4 p. 220007 [3.1](e).

536 T6-82, l 34 to T6-83, l 38.

[472] Mrs Morton submitted that the nature and extent of the defects listed in the various reports were significant and could not be considered "minor defects or minor omissions" and it is therefore unreasonable to expect her to accept Thallon Mole's claim that Practical Completion was achieved on 8 April 2019.

[473] The evidence from Thallon Mole (which I accept) was that the defects identified in these reports (leaving aside contested issues such as the waterproofing, timber floor boarding, painting and driveway) were being addressed by it from mid to late March up until 10 April 2019, when the Contract was terminated by Mrs Morton. This finding is consistent with the evidence that the Issman Report was open on the kitchen table at the house on 5 April 2019 and was being used to complete defective work.

[474] Overall, I am satisfied that, viewed as a whole, the majority of the items listed in the various defect reports including the Hutchies Defects List were minor defects or omissions that did not prevent Practical Completion being achieved by 8 April 2019. But as the analysis below reveals, there were a number of items that could not be considered as minor defects or omissions (either viewed individually or as a whole) and made the house unsuitable for occupation on 8 April 2019.

[475] Ultimately, the real question of whether Practical Completion was achieved by 8 April 2019 turns on my findings about the alleged defects in the external waterproofing, pool balustrade, timber flooring, passenger lift, driveway, and painting at the house.[537]

[476] Each of these issues are addressed in turn below.

Waterproofing and Pool Balustrade Issues

[477] As discussed earlier under those headings elsewhere in these Reasons, I am satisfied that Mrs Morton was entitled to rectify the external waterproofing and Newbolt Street balustrade as a result of Thallon Mole's defective work.

[478] Thallon Mole submitted that the waterproofing was plainly something that could be addressed "with people living in the house".[538] At first blush, and practically speaking, there is some force to this submission. But the submission otherwise overlooks that occupancy is not the only determinative factor in this case.

[479] Regardless, and on any view, the issue with the external waterproofing could not be fairly categorised as a minor defect or omission under the Contract. Considerable work was required to rectify this issue as evidenced by the work and costs involved. The evidence (which I accept) is that Mrs Morton had relatively young children at the time; and it is reasonable to infer (as I do), given the close location of the pool to the house, that the extent of the rectification work required would not only have made Practical Completion unreasonable, but it would also have potentially impeded the family's safe access to, use of and occupation in the house. I therefore find that Practical Completion was not achieved on 8 April 2019 because of the defective external waterproofing.

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537 This finding is supported by the parties' submissions (Plaintiff's Trial Submissions at [598]; Defendant's Trial Submissions at [349]) and the evidence of the Hutchinson's site foreman Mr Dean White (Exhibit 297 [7]).

538 Plaintiff's Trial Submissions at [599](a).

Timber Flooring

[480] As discussed earlier under this heading in the Defects section of these Reasons, I am satisfied that the timber flooring on the upper-level floor of the house was defective. Removal and replacement of the flooring required skirting and other joinery to be removed and then reinstalled;[539] painting and finishing work to occur after the floor had been sanded;[540] and the entire floor to be sanded and re-varnished, (even if only some of the boards were required to be replaced).

[481] I am therefore satisfied that the defects in the timber flooring, were not minor and the extent of work required to rectify this work was considerable.

[482] I am also satisfied that replacement of the timber flooring in the bedrooms involved substantial disruption and that the house would not have been habitable while this was carried out.[541]

[483] I therefore find that Thallon Mole had not achieved Practical Completion by 8 April 2019 by reason of the defective timber flooring.

The Lift

[484] The Contract required the supply and installation of a passenger lift to all three levels of the home.[542] Mrs Morton submitted that the lift Works were incomplete, and the lift was not operational when Thallon Mole claimed Practical Completion had been achieved because:

(a) No ceiling to the lift shaft had been installed;

(b) There was no operational phone line; and

(c) The walls within the lift shaft (either side of the opening) had not been completed.

[485] On the other hand, Thallon Mole relied on Mr Cook's evidence that all that was required for the lift to be operational was for it to be commissioned, by turning the power on and testing it.[543] I reject this claim, as it is not supported by the following evidence which I accept:

(a) First, both Mr Mole and Mr Cook ultimately conceded that Thallon Mole did not install the ceiling to the lift shaft or the operational phone line for the lift and agreed that this prevented the commissioning and safe operation of the

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539 Evidence of Mr White: Exhibit 296 [128]-[144]; Mr Stewart :Exhibit 269 [28]-[30]; and Mr Carpenter Exhibit 309 [93], [105].

540 T5-46, l 22 to T5-47, l24; Exhibit 309, p. 280552 [105].

541 Exhibit 216 [26]; T10-43, ll 1-14; Exhibit 296 [138]-[144]; T5-47, ll 18-26; T10-43, ll 1-14: Exhibit 309 [93], [105].

542 The installation was to comply with detailed specifications in the Contract entitled "Client Responsibilities; Exhibit 4 pp. 220073, 220397-220409. Also see p. 220408 [9], [12].

543 Exhibit 216 [60].

lift.[544] I am therefore satisfied that the failure to install an operational phone line was a key safety feature preventing the safe operation of the lift.[545]

(b) Secondly, on 10 April 2019, the lift was identified as non-operational and presenting a safety risk as there was no power to the lift and doors, which remained open. This defect was notified in the Significant Defects List issued in early April 2019.[546] I am therefore satisfied on the evidence that the work required for the lift under the Contract was not completed, and the lift was not in commission as at Thallon Mole's claimed date of Practical Completion of 8 April 2019.[547]

[486] Mr Mole agreed the issues with the lift were not minor defects or omissions.[548] But despite this evidence, Thallon Mole submitted that even if the lift was not able to be safely operated (due to the absence of a working phone line) and not having been commissioned, it would not have prevented occupation of the residence as the occupants could use the stairs. But I reject this submission for three reasons:

(a) First, it ignores that the lift was part of the habitable area of the home.

(b) Secondly, it overlooks the requirement that the works must be completed in compliance with all the requirements of the Contract including the plans and specifications.

(c) Thirdly, whether the house is suitable for habitation is only one of the criteria for Practical Completion.

[487] On balance, I am satisfied that the defects with the lift meant that Practical Completion had not been achieved on 8 April 2019.

Driveway

[488] The evidence, (which I accept), is that the driveway could not be used for vehicle access to the house at the time Thallon Mole claimed Practical Completion had been achieved.[549] For the reasons discussed under that heading in the Alleged Defects and Omissions section of these Reasons, I am satisfied that the driveway works undertaken by Thallon Mole were defective. I am also satisfied that these works were not minor defects or omissions and that they unreasonably affected occupation of the house. I am therefore satisfied that the Works did not reach Practical Completion because of the defective driveway work.

Painting

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544 T4-49, ll 5-42; T10-25, l 9 to T10-26, l 7.

545 Exhibit 309 pp. 280543-280545; Exhibit 170 pp. 28720-28722.

546 Exhibit 149; Exhibit 247 [37]–[38]; Exhibit 269 [31]. The evidence (which I accept) was that the required Form 15 design certificates and Form 15 installation inspection certificate were not provided until 29 July 2019, at the time when the work was being completed and the lift commissioned by the supplier; Exhibit 296, pp. 251181-251192.

547 Exhibit 296 pp. 250321-250322 [299]-[306]; Exhibit 170 pp. 280720-280722.

548 T4-48, ll 13-39; T4-49, l 5 to T4-51, l 10; T4-52, ll 6-14. The phone line was not connected to the Telstra pits on the verges: T15-87, ll 14-19; Exhibit 296 pp. 250932, 250934, 250936, 250937; Exhibit 98 p. 261211; T4-91, ll 29-39.

549 Exhibit 170 pp. 280724, 280727; T17-37, ll 12-20; T6-66, ll 15-21.

[489] For the reasons discussed under that heading in the Alleged Defects and Omission section of these Reasons, the defective painting work at the house was extensive. I am satisfied that due to the extent of this work, Practical Completion was not achieved on 8 April 2019.

Conclusion re Practical Completion.

[490] I find that the defects with the waterproofing, driveway, lifts, timber flooring and painting at the house, either individually or in combination meant that Thallon Mole did not achieve Practical Completion as it alleged on 8 April 2019.

Termination of the Contract

[491] The following three questions are posed for my determination under this heading:

(a) First, was Mrs Morton in breach of the Contract by her failure to make payment of any of the outstanding progress claims?

(b) Secondly, was Thallon Mole in breach of the Contract by failure to remedy the alleged defects prior to Practical Completion, such that the termination by Mrs Morton on 10 April 2019 was effective?

(c) Thirdly, if the termination was not effective, did Thallon Mole lawfully terminate on 11 July 2019?

[492] The answers emerge easily from my earlier findings of facts and a consideration of the relevant provisions of the Contract.

[493] The express contractual right to terminate the Contract is found in Condition 26 which relevantly states as follows:

> 26.1 If:
>
> (a) a party is in substantial breach of this Contract; and
>
> (b) the other party gives a notice to the party in breach identifying and describing the breach and stating the intention of the party giving notice to terminate the Contract if the breach is not remedied within 10 business days from the giving of the notice; and
>
> (c) the breach is not so remedied, then the party giving that notice may terminate this Contract by a further written notice given to the party in breach and may recover from the party in breach all damages, loss, cost or expense occasioned to the party so terminating by or in connection with the breach or that termination and may set off such claim against payment otherwise due by the party so terminating.

26.2 The right to terminate under this Condition is in addition to any other powers, rights or remedies the terminating party may have.

…

26.4 Substantial breach by the Contractor includes:

(a) failing to perform the work under this Contract competently;

(b) failing to provide materials which comply with this Contract;

(c) unreasonably failing to replace or remedy defective work or materials;"

...

Was Mrs Morton in Breach of the Contract by Failing to Pay the Progress Claims

[494] Question one is easily answered. As discussed earlier, I am satisfied that Mrs Morton was required to pay the undisputed amount of Progress Claim No. 25 (of $55,717.74) by 28 March 2019 and from that point she was in substantial breach of Condition 26.3(b) of the Contract in not doing so.

Was Mrs Morton's Termination of the Contract on 10 April 2019 Valid?

[495] The second question is also easily answered given my earlier findings under the heading "External Waterproofing". But first it is necessary to address an ancillary issue raised by Thallon Mole about Mrs Morton's entitlement to terminate in circumstances where it is found (as I have) that Mrs Morton was herself in breach of the Contract.[550]

[496] I reject Thallon Mole's contention that Mrs Morton's prior substantial breach disentitled her to terminate the Contract because the two breaches are not interdependent on each other and therefore the existence of the breach does not disentitle the other party to terminate based on the other breach.[551]

[497] Mrs Morton relied on the waterproofing defect as a valid basis for her termination of the Contract on 10 April 2019. Thallon Mole does not contend that there was non-compliance with any of the notice provisions under the Contract but rather that the underlying premise of the termination has not been made out. In doing so, Thallon Mole conceded that the "only" route to a finding that Mrs Morton was entitled to terminate for substantial breach is a finding that the use of Shalex was in breach of the Contract; and the failure to rectify was unreasonable.[552]

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550 Plaintiff's Trial Submissions [628](b). No authority is cited for this proposition.

551 *Roadshow Entertainment v (ACN 053 006 269) Pty Ltd* (1997) NSWLR 462, 483; *Woo Nam Lee v Surfers Paradise Beach Resort Pty Ltd* [2008] 2 Qd R 249, [53] (per Dutney J).

552 Plaintiff's Submissions in Reply [57].

[498] Both of these findings have been made earlier in these Reasons. I therefore find that Mrs Morton's termination of the Contract on 10 April 2019 was valid, and the Contract came to an end on that same date.

[499] Given these findings, it is unnecessary for the third question to be answered.[553] But it remains necessary to consider Mrs Morton's claims for defective and omitted work arising from her valid termination of the Contract. But before doing so, it is necessary to deal with the balance of Thallon Mole's claim which is a restituitionary one for a quantum meruit.

Thallon Mole's Quantum Meruit Claim

[500] Thallon Mole claims $21,770.65 (excl. GST) as a quantum meruit in relation to Variations No. V033 and No. V059. These variations are said to arise from alleged agreed changes in the scope of the cabinetry works undertaken by Thallon Mole's subcontractor, **BRC** Cabinets.

[501] It is uncontroversial that Thallon Mole did not obtain prior written approval for the work the subject of these variations; that BRC were paid for this extra work and that Mrs Morton refused to sign and pay the amount of the variations.

[502] In these circumstances, Thallon Mole submitted that Mrs Morton has been unjustly enriched and is liable to repay the value of this work on a quantum meruit basis because:

(a) Mrs Morton requested, directed and approved the value of the work performed;

(b) Thallon Mole's subcontractor (BRC) carried out the value of the work; and

(c) Mrs Morton has received a benefit from the work.

[503] On the other hand, Mrs Morton submitted that the claim in quantum meruit should fail for two reasons:

(a) First, Mrs Morton did not direct or approve Thallon Mole to carry out the value of the work; and

(b) Secondly, even if Mrs Morton did give such a direction, Thallon Mole has no entitlement to payment for work other than under the Contract.

Relevant Facts

[504] BRC Cabinets quoted and were subsequently engaged by Thallon Mole to undertake the extensive cabinetry work (over $300,000 worth) at the house.[554] The managing director of BRC, Kenneth Brooks (a highly experienced cabinet maker with the relevant qualifications, licences and over 38 years in the industry) gave evidence at trial.[555] His evidence (which I accept), was that from February 2018,

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553 In any event, Thallon Mole submitted that given it is not seeking a loss of bargain damages, it is unnecessary to answer this question. See Plaintiff's Trial Submissions at [631].

554 In accordance with Quote 9040 issued on 10 February 2016 in the sum of $274,530 (excl. GST) or $301,983 (incl. GST); Exhibit 83.

555 Mr Brooks' affidavit is Exhibit 187.

during the course of BRC undertaking the cabinetry works, there were changes requested which required repricing and consequential variations.

Variation No. V033

[505] Thallon Mole's pleaded case is that:[556]

(a) On or soon before 28 May 2018, there was a change in the Cabinetry Scope of Work required at the direction of Mr Stewart [66(a)] (leading to a cost increase of $25,932.50);[557]

(b) At a site meeting on 29 May 2018, Thallon Mole provided Mrs Morton Quote 9548 in the amount of $23,575 (excl. GST) and a variation notice [66(b)];

(c) At the request of Mrs Morton, "via direction from Tim Stewart Architects per change to Scope of Works" Thallon Mole performed the works [66(c)].

[506] Thallon Mole's initial answers to the request for particulars of these vague allegations (as follows) shed no light on its case:[558]

(a) The alleged requirement or direction of Mr Stewart was answered by reiterating his role as the architect and attaching Quote 9518-B (not Quote 9548 as was pleaded) ;[559]

(b) The alleged direction from TSA is said to be the requirement resulting from the change in cabinetry scope of works pleaded in paragraph 66(a).

[507] Thallon Mole's later answers to a further request of paragraph 66(c) as follows are both opaque and confusing:[560]

> "..the request made by the Defendant via direction from Tim Stewart Architects directly to the Plaintiff's subcontractor, at a site meeting on 26 April 2019 that did not include the Plaintiff. This site meeting involved the Defendant, Tim Stewart Architect ("TSA") and the Plaintiff's subcontract maker. The changes were noted in the Plaintiff's progress report#28 and noted in the TSA meeting notes #29 under the heading "variations". Item 27.02 of the TSA meeting notes records that TSA was instructing the cabinet maker directly. In late April 2018, the Defendant and TSA visited the cabinet maker's warehouse, which resulted in after [sic] TSA issuing amended drawings on 18 May 2018."

[508] By her defence, Mrs Morton admitted that Thallon Mole performed the works the subject of Variation No V033, but relevantly denied amongst other things that; she was provided Quote 9548 on 29 May 2018 (or at all); that she ever received a copy of Quote 9518-B; or that she requested Thallon Mole to perform the work because she "had not agreed to the pricing proposed by the Plaintiff which would change the

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556 FASOC at [66]-[67].

557 As particularised in 66(a); this figure includes a 15 percent margin and GST.

558 Undated Further and Better Particulars at [36]-[37].

559 In answers to particulars dated 7 October 2020, Thallon Mole particularised the direction regarding the change in cabinetry scope of work (pleaded in 66(a)) as having been given by Mr Stewart.

560 FASOC at [12].

contract price and form part of the variation document and any work was carried out by the Plaintiff in the absence of any agreement as to price."[561]

[509] Mr Brooks' evidence in chief was that[562] in April 2018, the walk-in robes were nearly at completion stage (in accordance with the plans and specification of the Contract), but during a site inspection attended by Mrs Morton she stated "in very clear words" that she did not like the colour of the Robes [in the ensuite] and wanted them changed. Sometime after this meeting, the architect "directed" a change to the colour of the Robes and this direction meant: the removal of the works undertaken to date; a need to fabricate new robes in the different colour; the installation of the new robes and a delay of about 4 weeks. Mr Brooks was not directly challenged about this evidence and Mr Stewart and Mrs Morton did not give any relevant evidence about this meeting. Whilst I accept there was a meeting of some description about issues with the ensuite, clearly, given BRC's subsequent quote (and Thallon Mole's case), it was more than the colour of the robes that was discussed.

[510] Mr Mole's evidence (which I accept) is that he was not privy to the changes happening to the cabinets and the walk-in robe, but he understood from conversations with Mr Stewart, that Mrs Morton had "gone to BRC Cabinets for a meeting."[563] Subsequently, TSA provided drawings to BRC and a new quote was obtained "potentially" in April 2018.[564] The progress notes of 7 February 2018 reflect that Mr Mole was waiting for cabinetry repricing which he "expected to go up quite a bit" and that he assumed there was to be an EOT "for this stuff".[565]

[511] On 20 April 2018, BRC issued **Quote 9518-B** in the sum of $98,714 (incl. GST) to Thallon Mole.[566] Subsequently, (around early May 2018), Thallon Mole received **Quote 9518** from BRC (in the sum of $324,533 incl. GST) updating the February 2016 quote and incorporating Quote 9518-B.[567] This change related to an increase in price to the ensuite, walk in robe and the panelling associated with Door D08 (the pelmet)[568] - and resulted in an increase of around $20,500 (excl. GST) to BRC's original quote of 10 February 2016 quote.[569]

[512] There was no evidence from Mr Brooks or Mr Mole that these further quotes were provided to Mrs Morton at the time (nor was it suggested to Mrs Morton that she received these quotes). Mr Stewart gave no relevant (or indeed any) evidence about this issue at all. I am therefore not satisfied that Mrs Morton was provided these quotes at the relevant time. This finding is consistent with Mr Mole's nonresponsive answer during his evidence in chief, (when asked whether he directed BRC to carry out the work after he received the amended quotation and a letter from BRC about a

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561 SADCC at [64].
562 Exhibit 187 [10]-[11].
563 T2-56, l 44.
564 Exhibit 85.
565 Exhibit 84.
566 Exhibit 85. This quote for $89,740 (excl. GST) was for: a timber veneer storage cabinet to the ensuite for $26,340 (excl. GST); timber veneer faces to Bed 1 for $59,300 (excl. GST); and $4,100 (excl. GST) to remove the existing doors and panels and to replace edge gables in black PVC.
567 Exhibit 86: this document is dated 19 May 2021, but this is clearly the date it was printed on.
568 T2-58, ll 9-24: T2-59, ll 1-5.
569 That is the difference between Exhibit 83 and 86.

four-week extension being required as a result of this work)[570] - that he was "[p]retty sure they were already doing it".[571]

[513] Under cross examination Mr Brooks was shown a copy of BRC's Quote 9518-B.[572] He accepted that this was work outside the original quote BRC had given under the Contract and that BRC completed this work and Thallon Mole subsequently paid it for this extra work. Mr Brooks clearly understood that before undertaking cabinetry work onsite that he was technically (or contractually) required to obtain a purchase order from TMG - and that this would happen in a "perfect world." But he also said (and I accept) that sometimes things evolved onsite – so this requirement was not always strictly complied with. In this case, the effect of his evidence was that "the boys" (I assume to be his subcontractors) had a relationship with the owners; and that BRC had a relationship with both Thallon Mole and TSA, so he was not particularly concerned that there was no written authorisation.[573]

[514] Subsequently (in late May 2018), Thallon Mole prepared a variation (Variation No. V033) for $25,932.50 for the changes in the cabinetry scope. This comprised the $20,500 difference plus a 15 percent markup and 10 percent GST. On its face this document refers to the original Quote 9040 of 10 February 2016 and "current quote #9548 dated 28 May 2018". The first quote is the original quote from BRC, but it is not apparent what the latter quote is. Neither of these quotes are attached to the one-page document tendered at trial.[574] Mr Mole's evidence was that Variation No. V033 was given to Mrs Morton during the course of a site meeting on 29 May 2018. The progress notes and the minutes of the site meeting minutes refer generally to a "variation" in relation to the cabinetry having been given. But Mrs Morton denied receiving Variation No. V033 until 1 February 2019 and maintained even at that point in time, that the relevant quote and scope changes had not been provided to her for "assessment and approval".[575]

[515] On balance, I am satisfied that Mrs Morton was provided a variation on 29 May 2018 and it is reasonable to assume (as I do) that this was variation No. V033. This finding is consistent with the contemporaneous documentary evidence recording a variation having been given at the time.[576] But for the reasons discussed in the previous paragraph, I am not satisfied that the referenced (or relevant) quotes were attached to this variation or given to Mrs Morton at any relevant time. Regardless of this finding and most relevantly, the minutes of the 29 May 2018 meeting expressly record that "TSA and Client" were still "considering" the variation (V033).

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570 Exhibit 87. This is an undated letter from BRC to Thallon Mole stating that the joinery would be delayed for 4 weeks due to the late arrival of the amended plans; Mr Brooks evidence was that the letter was sent in early June.

571 T2-598, ll 37-40.

572 Exhibit 85.

573 T7-29, ll 1-20.

574 Exhibit 88 – Variation No. V033. The document is dated 19 February 2018, but Mr Mole explained that when a variation is potentially flagged (as it was, I infer in February 2018) Mr Andrew created a shell in his computer to be populated later.

575 Exhibit 97.

576 This finding is made despite my concerns about the accuracy of the progress notes; in for example these notes refer to the letter about the four-week extension having been provided on this date too – but Mr Brooks' evidence was that this letter was not prepared until early June 2018.

[516] It was not entirely clear on the evidence when the works the subject of Variation No. V033 were actually undertaken - or that Mrs Morton even knew they were being undertaken. But it is reasonable to infer (as I do), that they were completed sometime between early May and late June 2018. There was also no cogent evidence of any direction or confirmation from Mrs Morton or TSA to BRC or Thallon Mole approving the work (and the costs of the work as had been quoted) the subject of Variation No. V033.

[517] Mr Mole's evidence, (which I accept) is that "he did not indicate for BRC to do the extra works"[577] rather that Thallon Mole paid BRC for the work because it believed it was a legitimate variation and Mrs Morton would pay. He explained the basis for this belief to be that "the defendant has issued the changes not us" and that this had occurred at the meeting (back in February 2018) that Thallon Mole were not privy to.[578] But, there is a tension between this evidence and Mr Mole's other evidence on this issue (as discussed under this heading) which I found confusing and impossible to reconcile in the context of: Thallon Mole's pleaded case; the amended quote for the work not being prepared until 20 April; and that the minutes of the 28 May meeting and the 3 July meeting refer to Mrs Morton and TSA still considering the variation.

[518] Mr Brooks evidence about who actually directed BRC to undertake this extra work does not advance Thallon Mole's case. It was also inconsistent with Thallon Mole's pleaded case (and equally as vague and confusing as Mr Mole's evidence was on this issue), in the following ways:[579]

(a) At first, he said that the works were completed at the direction of "TMG and the owners" and that "[t]he owners had the original directive, and followed up by TMG, and then us."[580]

(b) But later (with apparent reference to both Variation Nos. V033 and V059), he said that BRC were not dealing with the clients directly – "[w]e were dealing with Thallon Mole. So the directive came from Thallon Mole. But - they're not in the business of doing extra work with[out] directive either so…"[581]

[519] The above analysis reveals that the evidence on this issue is replete with inconsistencies, anomalies and gaps; and does not support Thallon Mole's pleadings or submissions. The onus rests with Thallon Mole. On balance, I am not satisfied on the evidence that there was any direction or approval by Mrs Morton (or TSA) for BRC (or Thallon Mole) to carry out the work the subject of Variation No. V033.

Variation No. V059

[520] In August 2018, a further change was proposed by Mrs Morton to the cabinetry in the butler's pantry, by the installation of glass insets into the cabinets.[582] This change is also alleged to have been at Mrs Morton's direction to BRC.[583]

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577 T4-55, l 38.
578 T2-59, ll 38-47; T2-60, ll 1-5.
579 T7-29, ll 35-48; T7-30, ll 44-49; T7-31, ll 1-6.
580 T7-29, ll 36-37.
581 T7-31, ll 1-6. I assume Mr Brooks meant without directive and not "with" as the transcript records.
582 Exhibit 91.

[521] On 11 September 2018, Thallon Mole prepared variation No. V059, for $2,390.85 (incl. GST), to allow for the installation of glass panel inserts in the kitchen pantry doors.[584]

[522] Mr Moles' evidence was that it was agreed that the variation would be signed, but it never was.[585] On 30 November 2018, Mr Andrews sent an email to Mr Morton, requesting that the variation be signed and returned noting that, "once signed I can action these works." [586] There was no response so BRC did not proceed with the variations at that time. Rather, the cabinet doors were installed without the glass insets.

[523] But a few months later (in early January 2019) during an acrimonious meeting between Thallon Mole and Mrs Morton, Mrs Morton was very upset that the work the subject of the variation had not been done, so Mr Mole organised for the glass to be installed because "that was what Mrs Morton wanted."[587]

[524] Senior Counsel for Mrs Morton submitted that the fact that Mrs Morton was upset does not necessarily mean she approved a variation. I reject this submission - by her conduct she was clearly authorising the work to be carried out. This finding is consistent with the following three matters:

(a) First, Mrs Morton's evidence was that TSA changed the scope of works so that the nine cabinet doors would have glass inserts; and that this was what she wanted;

(b) Secondly, at the time Mrs Morton had received the written variation, but had not signed it; and

(c) Thirdly, when pressed about having had the benefit of the work without having paid for it – Mrs Morton conceded that she did not think it should be this way, but she was told she did not have to pay because she had not signed a variation.[588]

[525] In these circumstances, I am satisfied that by her conduct, Mrs Morton directed and authorised the written variation that had previously been provided to her and therefore waived the requirement in Condition 21 that the variation was to be signed by her. [589]

[526] I will therefore allow Thallon Mole's claim for $2,390.85 (incl. GST) as a valid claim owing under the Contract.

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583 Exhibit 92.
584 T2-65, ll 1-21; Exhibit 93.
585 T2-66, ll 1-35; Exhibit 94.
586 Exhibit 95 p. 3.
587 T2-68, ll 1-30.
588 T4-46, ll 25-47.
589 Waiver was not pleaded but arises squarely on my findings; given the small quantum and the lack of apparent prejudice, I am satisfied that the interest of justice warrant this claim being allowed.

Is a Quantum Meruit Claim Available?

[527] Given these findings, it is unnecessary for me to consider the complex question of whether a quantum meruit claim is available on the facts of this case.

The Alleged Defects and Omissions

[528] Appendix 3 to Mrs Morton's amended defence and counterclaim attaches a Scott Schedule which sets out her claim for defective and incomplete works in three parts: work yet to be undertaken; works carried out (as a result of alleged defective work); and miscellaneous items (including cleaning).

Part One: Work Yet to be Undertaken

A: Pool Fence and Newbolt Street Balustrade

[529] The defects relating to the pool fence (or balustrade)[590] and Newbolt Street balustrade[591] have been addressed under those headings earlier in these Reasons. It emerges from these findings that I am not satisfied that any amount should be allowed for the pool fence having been built on spigots, but I am satisfied that the amount of $25,341.51 (incl. GST) should be allowed for the defective Newbolt Street balustrade.

B**:** External Waterproofing

[530] The defects relating to waterproofing have been addressed under that heading earlier in these Reasons. It follows that I am satisfied that there were defects in the waterproofing, and I allow the sum of $54,505.68 (incl. GST) for this claim.

C & D**:** Miscellaneous Uncompleted Defect Work and Preliminaries

[531] Mrs Morton claims the following three discrete items as uncompleted work:

(a) Item 4 – the installation of a pool box;

(b) Item 5 – a box gutter leak in sump; and

(c) Item 6 – a blockage in the strip drain.

The Pool Box

[532] Mrs Morton claimed the sum of $4,334 (excl. GST) for a pool box. This claim was not addressed in her written submissions but was not expressly abandoned. There was no evidence that Thallon Mole was contractually required to supply and install a pool box. I am not satisfied that Mrs Morton is entitled to any amount for this claim.

Box Gutter Leak in Sump

[533] Mrs Morton claims the sum of $1,502.60 (excl. GST) for a defective box cutter leak in sump and holding water. Thallon Mole do not admit this claim.

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590 Item 1 of the Scott Schedule.
591 Item 2 of the Scott Schedule.

[534] The ACOR Inspection Report from March 2019 identified that the awning box gutters along the northern and southern sides on the top level did not have overflow allowances and that Thallon Mole were given a site instruction about this in December 2017.[592] The fix required was identified as an outlet/drain block.[593]

[535] Item 5 of the Significant Defects List dated 7 April 2019 notified this defect to Thallon Mole as follows:[594] "[a]wning box gutters L2 to north and south are missing sumps, overflows, and hail guards - Acor provided site instruction Doc 2 - 8.12.17 re overflows." But Mr White's evidence (sworn on 21 March 2021) was that he subsequently took photographs of the box gutter sump problem and the rectification work – including a photograph showing a sealant being installed.[595]

[536] The rectification work required for this alleged defect is particularised by Mrs Morton as follows:[596]

> "inspection of existing box gutter to determine extent of damage and cause of gutter damage, supply and installation of false bottom to sump outlet to stop water from ponding in bottom."

[537] The onus is on Mrs Morton, but I found her articulated case about this defect difficult to reconcile with the evidence. At best her claim appears to be one for further investigation. I do not consider this claim as either reasonable or necessary in the circumstances where there is no evidence that that sealant is not performing or that there are any ongoing leaks or difficulties with the gutter.

[538] I am therefore not satisfied on balance that that any amount should be allowed for this alleged defect.

Strip Drain

[539] Mrs Morton originally claimed the sum of $1,995 (excl. GST) for the strip drain outside the guest bedroom that "was" blocked. But she now claims the sum of $495 (excl. GST) for the use of a camera to investigate the source of the blockage.[597]

[540] There was no evidence that the blockage in the strip drain still exists. In the circumstances, I am not satisfied that this claim is either reasonable or necessary or that any amount should be allowed for this alleged defect.

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592 Exhibit 327 p. 180983.

593 Mr Cook admitted he knew of issues with the overflow to the box gutter identified in the ACOR Report, but he did not do anything because of an alleged oral direction by the architect (Tim Stewart) not to. T10-21, ll 25-45. This direction was not pleaded and not put to Mr Stewart, so I give no weight to Mr Cook's evidence on this point.

594 Exhibit 149.

595 Exhibit 297 [28](c).

596 Item 5 of the Scott Schedule; In reliance on Mr White's affidavit about the work required. Exhibit 296 [313].

597 Exhibit 314 pp. 270449–270460 [27].

D: Preliminaries for Defects A to C

[541] The parties are now agreed as to the amount for allocation of preliminaries.[598] In light of my findings about Items 1 to 6, the agreed figures are as follows:

(a) Item 2, being 23.22 percent of the total quoted cost: $5,265.01 (excl. GST); and

(b) Item 3, being 49.92 percent of the total quoted cost: $11,320.65 (excl. GST).

[542] I therefore allow the sum of $18,244.23 (incl. GST) as preliminaries for these items.[599]

E: Kitchen Leak and Copper Cladding in Main Entry

[543] The final category of work alleged not to have been undertaken includes: a leak from the box gutter on the northwest corner that is said to have caused damage to the kitchen ceiling; and defective copper cladding in the main entry and on the fireplace flues.

Box Gutter Leak (North-west Corner)[600]

[544] I accept that the Contract required box gutters to be installed on the house and that box gutters were installed (by contractors engaged by Thallon Mole) within the roofline and envelope of the house. I also accept that any leaks or overflows posed a potential risk of causing water ingress into the house resulting in damage.

[545] Mrs Morton claims the sum of $9,850 (excl. GST) for the box gutter replacement (north- west corner).[601] This claimed defect, is distinct from the box gutter sump issue in Item 5 and is denied by Thallon Mole.

[546] Mrs Morton submitted that it is "now an admitted defect" in reliance of Mr Cook's evidence that he was made aware of a leak by Mr White on 26 June 2019.[602] I accept Mr Cook's evidence of what he was told, but I reject the submission that this means the defect is admitted.

[547] The evidence (which I accept), is that Hutchinson Builders obtained details from Thallon Mole of the roofing subcontractor it had used, (apparently) so Hutchinson Builders could avoid unnecessarily incurring additional costs of rectification, (although it was not clear on the evidence what costs were going to be saved by this course).[603] Thallon Mole then provided these details, but that roofing subcontractor refused to carry out the rectification work;[604] so another contractor was required to be engaged to undertake the works, which included the application of sealant in the box gutter sump to fix the leak.[605]

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598 Plaintiff's Submissions in Reply at [120]-[121], with reference to the Defendant's Trial Submissions at [582].
599 Or $16,585.66 (excl. GST).
600 Item 8 of the Scott Schedule.
601 Ibid.
602 T10-22, l 45 to T10-23, l 3; Exhibit 296 [66], [318]-[319].
603 Exhibit 296 pp. 250542-250546; Exhibit 297 [26].
604 Exhibit 297 [27].
605 Ibid [25]-[28].

[548] Mr White described the work done as a minor patch and "to make good works".[606] But, there was no evidence as to why this was so or why major work was required to prevent further leaks.[607] The work done was clearly extensive and there was no evidence of any further issues with leaking from this area.[608]

[549] The onus rests with Mrs Morton. But as with the blockage in the strip drain (Item 6), I found her articulated case about this defect difficult to reconcile with the evidence. The evidence does not establish that there is in fact any outstanding defect or any need for rectification work to take place.

[550] It follows that I am not satisfied that this claim is either reasonable or necessary and I do not allow any amount for this alleged defect.

Internal Ceiling Rectification

[551] Mrs Morton claims the sum of $7,072.50 (excl. GST)[609] for water damage to the internal timber kitchen ceiling caused by Item 8 (leaking box gutter in the north-eastern corner of the house). Mrs Morton relied on the photographs of the kitchen ceiling to show the nature of the damage to the ceiling resulting from the leaking box gutter above.[610] It is difficult to assess the extent of damage from these photographs, but I accept Mr Cook's evidence (under cross examination), that the leaks in the box gutter caused some damage to the timber cladding in the kitchen ceiling.[611]

[552] Thallon Mole denied that the internal ceiling required rectification but adduced no evidence in support of this denial.[612] Rather, it pointed to the photographic evidence that the timber ceiling had been coated;[613] and submitted that the need for any further coating was not explained in the evidence.[614] But, this submission overlooks Mr White's unchallenged evidence that (as at 8 April 2021)[615] the works to rectify the kitchen ceiling damage were not yet complete; and required:[616]

> "… an independent report on the appropriate rectification process. From there, the damaged area of the ceiling will need to be removed and replaced, and then prepared and sealed to match the original."

[553] It is instructive however that this evidence (and the particulars in the Scott Schedule about this item) do not accurately reflect that the Hutchinson Builders Quote of 30 October 2020 (which underpins this claim) refers to testing and reporting on the state of the timber being required first "to determine if replacement is required".[617]

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606 Ibid [28].
607 The Defendant's Trial Submissions at [590]-[591] cite the evidence of Mr White about this issue but those passages in his affidavit (given the quantum of the work claimed at [315]) clearly relate to Item 5, not Item 8.
608 Exhibit 296 p. 582 [DW-90].
609 Including the Hutchinson Builders' margin of 15 percent.
610 Exhibit 296 pp. 251165-251169 [319]. It was not clear when these photos were taken.
611 T10-20, ll 22-29; T10-24, ll 25-36.
612 FARA at Schedule A, Item 9.
613 Exhibit 296 p. 250995.
614 The Plaintiff's Trial Submissions did not seriously engage on this issue at [404].
615 Exhibit 296 [319].
616 Ibid [322].
617 Ibid pp. 251163-251164.

[554] In the circumstances, I am not convinced that it is reasonable or necessary to allow the full amount for this claim, but I will allow half.

[555] I therefore allow the sum of $3,889.87 (incl. GST) for Item 9.[618]

Copper Cladding Treatment (Main Entry and Fire-place Flues)

[556] Mrs Morton claims broadly that the copper cladding installed in the main entry ceiling and fireplace flues was not installed correctly and had marks and blemishes on its surface.[619] She claims a cleaning treatment is required to remove the blemishes, which also requires scaffolding, to properly undertake and complete the cleaning works.[620] The amount claimed by Mrs Morton for Item 10 is $3,323.50 (excl. GST).[621]

[557] The original copper cladding specified in the Contract was an Aurubis Noridic bronze (an aged-finish copper).[622] Condition 2 of the Contract imported the aesthetic standard to be achieved for the interior copper cladding - that is, it was to be in accordance with best industry practice and to meet the design intent as a high-end finish.

[558] After work had commenced using the aged-finished copper, Mrs. Morton signed a variation on 17 November 2017 which changed the finish to a brighter and shinier "mill finish".[623] Given that work had to be redone, Mrs Morton appropriately bore the extra cost of this change.

[559] The evidence (which I accept) about copper is that: it is a highly reactive metal that oxidises over time and forms a natural patina on its surface;[624] mill copper is bright and shiny at the start but will inevitably change as a result of the climate and environment;[625] the oxidisation process occurs much more slowly on internal cladding;[626] and it is generally accepted as a high-end finish, care needs to be taken during and after installation to prevent damage, to enable copper cladding to oxidise consistently over time.[627]

[560] Against this background, Mrs Morton's submissions on this item are confusing and conflate the various installations of copper around the house in the following ways:

(a) First, the submissions refer to the cladding being installed internally but the ceiling complained of under Item 10 is an outdoor ceiling. Therefore, Mrs Morton's submissions do not accurately reflect that this area was subject to weather that could accelerate the patina and cover any blemishes.[628]

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618 $3,536.25 (excl. GST) but including builders margin.
619 Defendant's Trial Submissions at [607]. Exhibit 296 pp. 251172-251174, 251177.
620 Exhibit 296 at [323].
621 This figure includes a builders' margin but not the proportion of preliminaries.
622 Exhibit 4 p. 220069 [CLD02].
623 T4-57, ll 36-45; Exhibit 82 p. 70138 [V017]. The cost was borne by Mrs Morton.
624 T-4-58, ll 4-11; T4-84, ll 33-36.
625 Exhibit 98 [38] - Mr Mole's Affidavit.
626 T4-84, l 38 to T4-85, l 5.
627 T4-58, ll 7-18.
628 Plaintiff's Submissions in Reply at [128] are consistent with the photograph at Exhibit 296 p. 251177; See also Defendant's Trial Submissions at [614].

(b) Secondly, Mrs Morton referred to the copper cladding installed as being heavily marked and scratched. But the referenced evidence relates to the internal stairs – and not the copper described in Item 10;[629]

(c) Thirdly, the remedy for rectification of the blemishes was said to be the application of a sulphur finish to accelerate the patina process and mask the defects.[630] But this evidence relates to the internal stairs.

[561] It is well-established that a purely aesthetic defect can underpin a claim for damages for rectification.[631]

[562] Photographs of the relevant copper cladding as ultimately installed by NFM Roofing and Cladding (the contractors engaged by Thallon Mole) were taken by Mr White on 5 May 2019.[632] I accept that these photographs show some finger marks (but not scratches). However, I also accept as a matter of common sense that some markings are to be expected; and that these photographs were taken at a point in time when the ageing process had not fully darkened the material. But, once the ageing process was complete it is reasonable to assume (as I do), that the markings would be less or not noticeable at all.

[563] The evidence of the (internal) chimney flue markings show that they are relatively uniform markings that are consistent with the long-term fading that would occur.[633] On balance, I accept Mr Mole's evidence that these markings are most likely the result of the choice of material, and are not necessarily determinate of whether the finish is "high-end" or not.[634] Further, having regard to the oxidisation process, I am also not satisfied that two years after the relevant photographs were taken, there is cogent evidence of any ongoing defect that requires rectification.

[564] The onus rests with Mrs Morton. In the circumstances outlined above, I am not satisfied that she has established the reasonableness or need for the rectification work in relation to Item 10. It follows that I allow no amount for this item.

Preliminaries

[565] Mrs Morton claims the estimated cost of builders' preliminaries set out in the Hutchinson Builders' Quote (of 30 October 2020) for the rectification of Item 8 (box gutter replacement), Item 9 (internal timber ceiling rectification) and item 10 (copper cladding treatment (main entry and fireplace flues)). Given my earlier findings, the only amount allowable is for Item 9. The agreed calculation is 32.56 percent of the total quoted costs, being $814.

[566] I will allow the sum of $407 for preliminaries under this heading.

[567] I will therefore allow the total amount of $4,296.87 (incl. GST) for Part E defects.[635]

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629 Plaintiff's Submission in Reply at [128].

630 With reference to Mr White's evidence in Exhibit 297 [33]-[37].

631 Willshee v Westcourt Ltd [2009] WASCA 87.

632 Exhibit 296 pp. 251170-251177 [DW-120]. But the photographs at pp. 251175-251176 relate to Item 54 of the Scott Schedule so are not relevant to this item.: T4-62, l 35-T4-64, l 47.

633 Exhibit 296 pp. 251172-251174.

634 Mr Mole's evidence: T4-60, ll 10-32 (this was in relation to the copper above the stairs, but given he made the same point at T4-61, ll 34-35, his evidence is relevantly applicable to the chimney flues.

635 This figure includes margin and preliminaries.

Part Two: Works Carried Out

F: Epoxy and Painting

[568] Part F of the Scott Schedule contains Mrs Morton's claims in relation to both epoxy and painting works. These matters are addressed under separate headings below (with some discrete overlap in the painting section).

Epoxy Defects

[569] Mrs Morton claimed the sum of $4,354 (excl. GST) for the rectification work that was carried out by Concrete Floor Coatings[636] at a cost of $3,877.50 (excl. GST), plus the Hutchinson Builders' margin of 12 percent, as the total cost of the defective epoxy works.

[570] The epoxy defects claimed relate to Items 12 and 13 (in Part F) and then two other items as set out below:

Item	Area	Alleged Defect	Ex 235/6
12	**Garage / Storage / Workshop**	(a) Floor - Epoxy edges unfinished	1.150
		(b) Store Door – D18 Threshold unfinished.	2.9
13		Garage floor and thresholds required grind and black epoxy coating applied.	3.4
32	**Mud Room**	(f) Floor - Epoxy finish around drain is rough.	1.129
86	**Garage**	Garage door threshold x 2 – Unfinished.	2.6

[571] Thallon Mole admitted that Items 12(b), 13, 32(f) and 86 were not completed but denied that Item 12(a) remained a defect. It also denied the reasonableness of the quantum of the claim for the epoxy defects on the basis that its subcontractor Snazzy Floors would have returned to the house to finish these works at no cost to Mrs Morton.

Item 12(a) – Were the Epoxy Edges Unfinished?

[572] Mrs Morton's submissions do not engage with Thallon Mole's submissions that this work was completed.[637]

[573] Mr Cook's evidence was that the epoxy floor edges were complete. He had a specific recollection of this work having been undertaken.[638] I accept Mr Cook's

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636 A contractor engaged by Hutchinson Builders; Exhibit 296 pp. 251082 [264](d); Exhibit 304 pp. 270245–270246.

637 Their Submissions in Reply at [215] incorrectly state that all of the epoxy defects are admitted.

638 Exhibit 216 p. 260306 [Item 1.150].

evidence on this point. It is consistent with Mr White's evaluation of the epoxy issues which instructively does not make any mention of any edging issues.[639]

Snazzy Floors Issue

[574] Mr John Hunter, the director of Snazzy Floors gave evidence by video-link remotely.[640] His unchallenged affidavit evidence (which I accept) was that:[641] Snazzy Floors completed the epoxy flooring to the garage at the house around August 2018; and was requested by Thallon Mole to return to the house in December 2018 to complete further work at the entrance of the garage; but at this point Mr Hunter told Thallon Mole that further work was required by other subcontractors to complete the driveway before Snazzy Floors could complete any further work. Mr Hunter clarified what he meant by this in his oral evidence in chief, explaining that Snazzy Floors considered it better to have the strip drain installed at the entrance to the garage and the driveway completed, before any further work was performed to complete the entrance.[642]

[575] Mr Hunter's evidence in chief was that:[643]

(a) In May 2019, Hutchinson Builders contacted him to complete further work at the house. Snazzy Floors considered that the work was still not completed to a satisfactory standard for the application of the finish, so Snazzy Floors did not complete the work but rather provided recommendations as to how Hutchison Builders could bring the work up to standard;

(b) Hutchinson Builders did not contact him again;

(c) Snazzy Floors did not refuse to return to the house to rectify any defects in their work; and

(d) If Snazzy Floors had been asked to return to the house to rectify its work, it would have done so at no further cost to Mrs Morton.

[576] Under cross examination, Mr Hunter explained that the recommendation he made to Hutchison Builders in May 2019 was about the edge of the concrete that had been chipped and damaged. His evidence was that he suggested they put an aluminium strip over it to "make it look even and nice".[644]

[577] Mr White's evidence was that in May 2019, Hutchinson Builders asked Snazzy Floors to return to the house to carry out the works and Snazzy Floors attended the house but refused to carry out any further work on the floor other than a buff clean.[645] Mrs Morton submitted that this refusal is directly corroborated by Mr White's contemporaneous weekly diary at the time of the request that: "Snazzy Floors inspected garage epoxy – will buff clean only – will not complete any other repair works."[646]

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639 Exhibit 296 p. 250314 [243].
640 Exhibit 230 - Mr Hunter's Affidavit.
641 Ibid [4]-[6]. I found Mr Hunter to be a frank and credible and witness.
642 T9-15, ll 1-17.
643 Exhibit 230 [6]-[10].
644 T9-18, ll 2-10.
645 T16-81, ll 5-24; Exhibit 296 [247]-[254]; Exhibit 297 [29]-[32].
646 Exhibit 296 p. 250288 [73].

[578] Mr Hunter presented as a genuine and honest witness. But he was very adamant under cross examination that the clear coat that had been applied over the paint flecks had not been applied unevenly and that the garage floor did not require any grinding and recoating. In this context, his evidence that if asked he would have grinded off the coating and applied a new coating (at no cost to Mrs Morton) is not credible. It follows, particularly given his contemporaneous note, that I prefer Mr White's evidence on this issue.

[579] The invoice from Concrete Floor Coatings makes no mention of edging work - it simply itemised the work it undertook as "polyurethane works to garage/ store area as per quote dated 5/07/2019"[647] but it is reasonable to assume (as I do) given that this work is part of Mrs Morton's claim, that some component for the floor edges work (which I have not allowed) was included.

[580] Doing the best, I can, I have deducted one third of the amount claimed. I therefore allow the sum of $2,902.67 (excl. GST) for defective epoxy works.

Painting

[581] Mrs Morton claims the total sum of $43,156.13 (excl. GST) as the reasonable and necessary costs incurred by Hutchinson Builders for rectification of the defective and incomplete painting and some (other) epoxy defects at the house.[648]

[582] On the other hand, Thallon Mole submitted that Mrs Morton's Part F claim should be reduced to $7,328.74 comprising of an allowance for (at most) two days painting and plastering costs (of $2,640) and a builders margin of $494.38.

[583] Addressing the over 30 defect items particularised under this head (for a relatively small quantum) was excruciatingly laborious; with aspects of the claim not strictly characterised as painting work (sanding, plastering and gyprock work said to be preparatory to painting and plumbing work is included too); and otherwise, hard to reconcile with the very global nature of the claim and the array of different figures and disconnect between the various figures bandied around by both parties. Resolution of these discrepancies was not assisted by the different approaches taken by the parties on this issue and therefore the lack of responsive engagement between them.

[584] The overall costs are particularised by Mrs Morton as follows:

(a) Hutchinson Builders supervision and direct and hire labour costs - $7,399(excl. GST);

(b) A&A Painters for painting defects - $20,527.50 (excl. GST);

(c) Northstar Drywall Plasters for plaster defects - $1,600(excl. GST);

(d) Platinum Plastering - $600 (excl. GST);

(e) Rustic Impressions - $311.25 (excl. GST);

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647 Exhibit 296 p. 251082 [264](d); Exhibit 304 pp. 270245-270246.

648 This amount comprises an amount of $38,532.26 (excl. GST) plus the Hutchinson Builders' margin of 12 percent.

(f) For materials at Bunnings, USG and Cannon Hill Paint Place - $2,846.19 (excl. GST);

(g) Zaval Cleaning for cleaning costs relating to painting defects - $4,761.25 (excl. GST); and

(h) Hutchinson margin of $4,623.87 (excl. GST).

[585] These issues have been ultimately resolved with the following principles in mind:

(a) First, the onus of proof rests with Mrs Morton to establish that the work was defective and/or incomplete in the first place;

(b) Secondly, the onus rests with Mrs Morton to establish that the costs of the rectification works are both reasonable and necessary in order to achieve conformity with the requirements of the Contract and to provide a high standard of finish consistent with best industry practice; and

(c) Thirdly, Mrs Morton does not have to show that she has fulfilled her duty to mitigate; but rather, that the onus rests with Thallon Mole to establish that Mrs Morton has acted unreasonably (and the extent to which she has done so).[649]

Points of Difference

[586] There are apparently two aspects to Mrs Morton's claim for the defective painting works:

(a) First, a claim for the unfinished, defective and incomplete painting work notified to Thallon Mole in the Internal Issman Report (and to a lesser extent) the TSA Major Defects Report;[650] and

(b) Secondly, as a consequence of defects "not identified in the Issman Defects Reports as painting defects" including:[651]

(i) The rectification of sub-sill drainage for door D08 required the gyprock bulkhead in the garage below to be cut for access to connect that plumbing, which was then required to be patched and painted. Generally, the bulkhead was required to be removed and replaced due to water damage;

(ii) Repair of water damage to the master ensuite and ground level ensuite; and

(iii) Correcting the height of the bedside lighting in each bedroom."

[587] The first aspect of Mrs Morton's claim is partially underpinned by the general proposition that Thallon Mole were only given the Internal Issman Report on 4 April 2019 and the TSA Major Defects list (dated 7 April 2019) on 10 April, so therefore it did not have time to carry out the defective painting work to the extent

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649 *TCN Channel 9 Pty v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130, 158; *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1986) 161 CLR 653, 673 (per Brennan J).

650 Exhibit 149; The only reference to internal painting defects in this report is a reference at point 9 to Internal painting - damaged defective paint to walls, ceilings, doors-all rooms involved.

651 Defendant's Trial Submissions at [649]. Note, the claims also incorporate cleaning required as a result of the defective/ incomplete painting works.

Mr Hall said he had. But this submission overlooks my earlier findings that Thallon Mole were in possession of the Internal Issman Report shortly after 24 March 2019 and the TSA Major Defects list on 7 April 2019.

[588] Thallon Mole conceded that painting works in the garage, electrical room and guest room had not been completed by 10 April 2019, but it submitted that most of the other painting defects identified in the Internal Issman Report had been rectified by its painting subcontractor Mr Brian Hall; and that on 10 April, when he was excluded from the house, Mr Hall only had about three hours of painting work left to do.[652]

[589] Mrs Morton submitted that even if some additional paint defects were caused by scratches as a result of other rectification work that was required to be carried out (for example the repair of the timber flooring), that is still a cost that has been reasonably incurred by Mrs Morton in having that rectification work carried out.[653] I accept this submission is correct as a matter of law and of common sense. But curiously, in her Submissions in Reply she criticised any suggestion that Thallon Mole were entitled to run this argument – on the basis that it was not particularised or put to witnesses – and that the evidence was that the painting work was required to be carried out after the flooring was repaired, not that the painting work was required as a consequence of the timber flooring remedial work.[654] I reject Mrs Morton's suggestion that this was a new assertion. Thallon Mole's case on the issue of the painting as reflected in the pleadings, submissions and evidence all maintained that none of the painting work in the bedrooms was defective, or to the extent it was incomplete or defective (as identified in the Internal Issman Report) – it had been addressed by 10 April.

[590] Relevantly, Thallon Mole's Submissions in Reply also conceded that:[655]

(a) If Mrs Morton can establish that she was entitled to remove the floor as she did, then she is entitled to claim for any defects caused by rectification work to the floor; and

(b) Mrs Morton is entitled to an amount for rectification work following the leaking in the ensuite of the downstairs guest room that was caused by leaking in the master ensuite upstairs.

Evidence from Mr Hall and Other Relevant Witnesses

[591] Mr Hall is the Managing Director of Brian Hall Painting Contractors Pty Ltd. His company carried out both the external and internal painting works at the house in accordance with its subcontract with Thallon Mole. This was for the sum of $31,000 (excl. GST). Mr Hall's evidence in chief was by affidavit although he also gave some short oral evidence.[656]

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652 FARA at Schedule A, Item 33 (garage), Item 36 (electrical room), Item 48 (guest room defects).
653 Defendant's Trial Submissions at [675].
654 Defendant's Submissions in Reply at [222].
655 Plaintiff's Submissions in Reply at [139]-[140]. The reference to PS[682] in [140] is obviously a mistake and ought to be a reference to DS[682].
656 Exhibit 156.

[592] I accept Mr Hall as a very experienced painter with a QBCC painting and decorating licence and over 39 years' experience in the industry. I find that he did his best to recall events and he made reasonable concessions. For example, that patch painting was unacceptable for a new home;[657] and that the garage, electrical and mud rooms had not been finished when he left on 10 April. But as set out below, his evidence lacked specifics and was confusing in places.

[593] In early 2019, Mr Hall was contacted (I assume by someone from Thallon Mole) and told of some minor paint and plaster defects and damage at the house. His evidence is vague (in terms of what was done and how long it actually took) but I accept that he then arranged for someone from his company to return to the house to complete this work on three or four occasions up to and including March 2019. There were no details of what work was completed or how long this took. Mr Hall explained (and again I accept) that in carrying out this work, normal movement cracks were patched and painted; and several areas of plasterwork were also corrected and painted.

[594] Having carried out rectification of some of the defective painting work, Mr Hall recalled a meeting with Mr Mole (at Thallon Mole's office at Kelvin Grove) on 5 April 2019 to review the Internal Issman Defects List. During this meeting Mr Mole an Mr Hall went through the painting defects in this list and on Mr Hall's advice, Mr Mole marked up which items were "done", "not done" or "partly done."[658] Mr Hall explained that half-done meant that preparation steps needed drying before a later aspect could be finished.

[595] There was some tension in Mr Hall's evidence about the number of days spent at the house leading up to 10 April. In his affidavit evidence he said that he was present for three full days immediately prior to 10 April completing the "minor touch-up" work required – starting from the top of the house and working through to the lower floors.[659] But, in his oral evidence in chief he said that the first day he was with another painter; the second day it was just himself; and on the third day (10 April), he started work at the house around 7.00am but a few hours later (with only about three hours of work left) he was asked by Mr Cook to leave the house - which he did.[660] I prefer Mr Hall's oral evidence on this point. It is largely consistent with his correspondence to Thallon Mole of 12 June 2020 which recorded the painting work his company had carried out. Although as with Mr Hall's evidence there is no specific detail about the defects that were actually attended to on those days.[661]

[596] Mr Hall was cross examined briefly but his evidence that his company had finished nearly all of the rectification work identified in the Internal Issman Report was largely unchallenged. For example, with the exception of the garage, electrical and mud rooms he was not taken to any particular individual items in the Internal Issman Report that were said to be unfinished as at 10 April. He was also not taken

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657 T4-79, ll 14-19.

658 Exhibit 156 [14]-[15] and Exhibit BH1; Mr Mole did appear to have directly observed what rectification painting work had been carried out at this point.

659 Exhibit 156 [14]-[18].

660 T4-75, l 76.

661 Exhibit 156 [BH-2].

though individual items from the Hutchies Defects Report (for example to show that items he said had been completed or had not).[662]

[597] Mr Hall was criticised by Mrs Morton for later refusing to engage with Hutchinson Builders about returning to the house to complete painting work.[663] Mr Hall frankly accepted that he was asked but refused to return to the house.[664] His explanation as to why he did not return was twofold:

(a) First, he thought his work was "good" and not "defective"; and

(b) Secondly, he "wanted to be finished with the job."

[598] After being excluded from the house on 10 April 2019, Mr Hall was allowed to collect his equipment after which he returned to his truck. There, he subsequently witnessed Mrs Morton's distressed rant as she kicked Thallon Mole off the site.[665]

[599] As a matter of human experience, given the volatile circumstances in which Thallon Mole's representatives and contractors were excluded from the house on 10 April, I do not consider it unreasonable or unsurprising that Mr Hall was not inclined to ever return.

[600] I am satisfied on balance that the painting defects identified in the Internal Issman Report were being addressed by Mr Hall in the days leading up to 10 April 2019 and it is reasonable to infer (as I do), that apart from the items that have been conceded, most if not all of the "part done" or "not done" items had been (or were) about to be rectified by Mr Hall on 10 April.[666] It follows that Mrs Morton's submission to the effect that Mr Hall had not attended to any or most of the items in the Internal Issman Report is rejected as implausible, unlikely and unsupported by the evidence (which I accept).

[601] However this finding does not mean that I reject the balance of Mrs Morton's claim under this heading. Thallon Mole submitted (and I accept) much of the extensive painting work across the house was a consequence of two things. First, the significant floor work that was undertaken and secondly, the moving of the light switches in the bedroom.[667] Thallon Mole conceded that if this work was necessary and reasonable then it follows that Mrs Morton is entitled to the reasonable costs of any consequential painting rectification work.

Various Estimates of the Costs of Painting Defects

[602] The effect of Mr Hall's evidence was that despite outstanding work in the garage, mud and electrical rooms, there was still only about three hours of painting work left to do. But, given: the lack of particularity around this estimate; and that Mr Hall's evidence about the number of hours/days he had actually spent fixing up the items in the Internal Issman Report was confusing; and Thallon Mole's concessions about work being required in the guest room and arising from the leaking into the ensuites, and that Mr Hall accepted another three rooms needed painting work as at

662 Exhibit 296 [DW 101-102]
663 Defendant's Trial Submissions at [670].
664 Exhibit 156.
665 This recording is Exhibit 71.
666 In this sense, I largely accept the matters set out the Plaintiff's Trial Submissions at [558].
667 Plaintiff's Trial Submissions at [568].

10 April; I am not satisfied that this estimate is a reliable one. Mr Cook, the site supervisor who was at the house on 10 April 2019, accepted there was outstanding painting work in the garage and that there may have been other painting work to be done throughout the entire house. But he generally relied on second-hand information from others.

[603] Thallon Mole submitted that overall, a small amount of labour costs to fix the miscellaneous defects that remained outstanding on 10 April (estimated at 20 percent of the costs incurred), and any consequential painting costs, which would not have exceeded two days (or $2,640) ought to be allowed. This evidence was underpinned by: Mr Hall's evidence of there being limited painting work left to do; and Mr Cook's evidence that if he had needed to engage a painter "like Mr Hall" to complete the painting in the garage and other (undefined) defect work, it would have required three painters working eight hours a day over two days. Using Mr Hall's usual rate of $55 per hour, Mr Cook estimated this cost as $2,640 (excl. GST).[668]

[604] On the other hand, Mrs Morton submitted that Thallon Mole's estimate to carry out the remaining painting work (of $2,000) is unreasonably low and should not be accepted.[669] She pointed to the estimate for painting works at the house of $20,000 (excl. GST) obtained by Hutchinson Builders from A & A painters (on 6 June 2019). This estimate was based on 240 hours work (three painters for at least two weeks) for $18,000 (excl. GST) plus materials of $2,000 (excl. GST) and was argued as being more reasonable. Under cross examination, Mr Hall was also asked to comment on the proposition that when Hutchinson Builders took over the job, there were 240 hours of final painting defect work requiring three people for two weeks. He described this proposition as "so wrong."[670] This was a reasonable response in my view given Mr Hall was not told what the full extent of the defective painting work requiring this number of hours was.

[605] It is instructive to observe at this point that Mrs Morton's case on this issue was difficult to unravel because it conflated matters. For example, the following submission was made:

> "Given the number and scale of defects in the painting work recorded in Mr White's photographs taken in May and June 2019, it is incomprehensible that the outstanding defects could be rectified in one day as suggested by Thallon Mole. Thallon Mole's estimate of one day simply has no basis and does not take into consideration the defective plastering works that were required."

[606] This submission overlooks three important matters:

(a) First, that there was a period of six to eight weeks between when Thallon Mole left the site, and when the photos were taken. In the interim, Hutchinson Builders were working at the house;

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668 Exhibit 216 [46].

669 Defendant's Trial Submissions at [678]; On the basis that estimate does not include any plastering work nor does it account for "the other significant work" that was required to be carried out as a result of defect rectification work other than defective painting work itself, which was identified after Hutchinson Builders assumed supervision of the rectification .

670 T4-83, ll 21-37.

(b) Secondly, my findings at paragraph 599 above that Mr Hall had addressed most of the items in the Internal Issman Report by 10 April; and

(c) Thirdly, I am not satisfied that the claim for defective painting work is all attributable to Mr Hall's work. For example, as Mrs Morton submitted, (and I accept), subsequent defects were discovered. It is also reasonable to infer (as I do) as a matter of common sense, particularly given the imprecise nature of Mrs Morton's case about the defects in the painting, that scratches and marks and damage to completed painting works occurred after 10 April.

[607] Thallon Mole broadly asserted that Mr Hall "was there" (I assume on 10 April – not later), willing and able to complete the painting that needed to be done; and he should have been allowed to complete that work which would have avoided any of the costs incurred by Mrs Morton.[671] This submission overlooks my findings that Mrs Morton was entitled to terminate the Contract on 10 April 2019 and as Thallon Mole rightly conceded, some of the outstanding/ defective painting work claimed, arose as a result of other rectification work that was required to be carried out.[672] Most particularly from the need to lift the timber floorboards. For the reasons discussed under that heading below, I am satisfied that the lifting of the timber floorboards was both necessary and reasonable. It therefore follows that the reasonable painting works that arose from this defect are recoverable.

A & A Painters Invoices

[608] Mr White, the Site Manager employed by Hutchinson Builders gave evidence that A & A Painters replastered and repainted "all of the damages noted in the internal TSA Defects Register."[673] Mr White's evidence was that the items listed in the Hutchies Defects List were mainly taken from the TSA Defects Register[674] because he had observed these items during his walk through the house with David Asplin (from TSA) on 29 April.[675] But this broad assertion of "all damage" is unhelpful, and not supported by the evidence, particularly given that apart from areas such as the garage, electrical room and mud room that Mr Hall conceded were not finished, Mr Hall was not shown other specific defects in the list (which were alleged by him to have been completed) or any other subsequent defects to contradict his assertions or to show they were defective.

[609] Mrs Morton relies on invoice 0004016 dated 15 July 2019 from A & A Painters to support its claim for $19,652.50 and invoice 00004032 in the sum of $375 to support its claim for $375 for what she describes as the "major repairs to the painting and sealant works"[676] In doing so she submitted that "[e]ach invoice identifies the labour and materials costs in accordance with the estimate provided in the quote issued by A & A Painters on 6 June 2019."[677]

[610] Before turning to consider the invoices, it is instructive to observe a number of things about the quote of 6 June 2019. First: that it is for $20,000 excl GST which

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671 Plaintiff's Trial Submissions at [568].
672 Plaintiff's Trial Submissions at [567].
673 Exhibit 296 [260].
674 This register was compiled by TSA (from the internal Issman Defect Report).
675 Exhibit 296 [29], [242]. See also Defendant's Trial Submissions at [661].
676 Defendant's Submissions in Reply at Annexure A.
677 Exhibit 296 pp. 251025-251027.

comprises three painters for at least two weeks- totalling approximately 240 hours [though not stated on the face of the quote this equates to $75 hour] plus an additional $2,000 for materials; and is qualified as "just an estimate, as it's almost impossible to put a figure on other painters 'defects.'" Secondly: that whilst the author refers to an inspection (of unknown date or length), it is apparent that the quote is largely based on the defects list he had been given (I assume given the way Mrs Morton has run her case on this issue) which is a reference either to the Internal Issman Defects List or the Hutchies Defects List.

[611] A review of invoice 00004016 dated 15 July 2019 contains no description of the painting work actually carried out.[678] Only the date, number of hours undertaken and the hourly rate of $75 per hour are identified. There is reference to day labour sign off sheets but none of these are in evidence; there is also no reference to the number of painters who undertook the work. The work is carried out on various dates starting on 3 June – on which day 24 hours is claimed, then on 4 June 14 hours is claimed and from 5 to 11 June 9.5 hours are claimed. The final date is 2 July 2019. In all, 236.50 hours of painting (or I assume associated painting work) is claimed for work carried out between 3 June and 2 July.

[612] Similarly, invoice 00004032 dated 31 July 2019 refers to labour of 5 hours but does not detail the defect or work carried out.[679]

[613] Mrs Morton submitted that the costs claimed are similar to the quote that was given before that work commenced and so this demonstrates the painting work was carried out efficiently, as that cost was comparable to the original estimate, but included the additional repairs to the main bedroom and guest bedroom ensuites as a result of the mixer leak; the additional work required in the garage; and that the bedroom walls were required to be repainted where the height of the bedside lighting originally installed was required to be lifted.

[614] The onus lies with Mrs Morton to satisfy me that the rectification work was both necessary and that the costs were reasonably incurred.

[615] I accept that where painting rectification is required it may be necessary (depending on the extent and type of damage) to require a whole area to be repainted in order for the work to satisfy the Contractual requirements for a new high-end home finish, consistent with best industry standards. But the difficulty in this case is that apart from the general assertion made by Mr White, there is no cogent evidence of exactly what work was carried out by A & A Painters.

[616] For this reason and for the four reasons that follow I am therefore not satisfied on balance that the full amount of invoices 00004016 and 00004032 from A & A Painters have been shown to be necessarily and reasonably incurred:

(a) First, because of the unexplained considerable difference of $20 per hour charged by A& A Painters and Mr Hall's company;

(b) Secondly, the quote from A & A post-dates some of the painting work carried out (in the first invoice);

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678 Ibid p. 251055.
679 Ibid 296 p. 251081.

(c) Thirdly, I am satisfied that much of the painting work identified as defective in the Internal Issman Report had been carried out by Mr Hall as at 10 April; and

(d) Fourthly, the invoices are not supported by any documentation to show exactly what work was undertaken. Therefore, it is not possible to identify exactly what costs are in fact associated with the defective work as claimed.

[617] This does not mean Mrs Morton has not satisfied that some allowance ought to be made for overall defective painting (and associated work). Each painting defect cannot be looked at in isolation. Thallon Mole fairly conceded that there was unfinished and defective painting work in the garage, mudroom, electrical room. They also conceded that as a result of leaks and the height of the bedside lighting being changed, repainting of some of the bedroom walls was required.

[618] Recognising the difficulties in making an entirely accurate assessment but with the above observations and findings in mind and doing the best I can, I am satisfied that that Mrs Morton is entitled to payment of 50 percent of Invoice 00004016 (including half of the amount for materials) and invoice 00004032. I therefore allow the sum of $10,013.75 (excl. GST) for these invoices.

[619] A third invoice from A & A Painters no 00004032 for $500 is also claimed.[680] The evidence (which I accept) is that this invoice is for subsequent works required for coats of new varnish to the entry stairwell handrail once replaced. There was also evidence from Mr White (which I accept) that there was painting required for door frames (including the main bedroom door frames).[681] I am satisfied that this amount ought to be allowed.

[620] It follows that I allow the total amount of $10,513.75 (excl. GST) for the three A & A invoices.

[621] Hutchinson Builders claim the sum of $7,399 (excl. GST) for work carried out by its labour to rectify painting related defects.[682] These amounts are said to be underpinned by Mr White's Weekly Diary from 13 May 2019 to 19 July 2019. Again, these diaries are not substantiated by any labour records identifying the precise work being undertaken. Based on its assessment of the painting work left to be rectified TMG conceded that 20 percent of the costs incurred for labour are payable. Given my findings about the extent of the painting work undertaken by A & A Painters that was necessary and reasonable it follows that 50 percent of the claim for labour ought to be allowed. I therefore allow the sum of $3,699.50.

[622] These figures and my findings in relation to the balance of the quantum (based on my acceptance of the invoices) as supported by the evidence referred to in Annexure A to Mrs Morton's Submissions in Reply, are set out in the table that follows:[683]

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680 Exhibit 298 p. 270358.

681 Exhibit 296 [20].

682 This sum is comprised of $6,208.44 for direct labour and $1,190.56 for hire labour. Exhibit 305 p. 270307; Exhibit 296 pp. 250288-25029, 250295–250296 (at Item 5 in the Table at [102]); Exhibit 305 p. 270307.

683 I have done this for ease and efficiency, particularly given the small amounts of some of the invoices. Having considered the respective written and oral submission, I have allowed the claims as

Item	Amount allowed as reasonable
Labour	$3,699.50
Concrete Floor coatings	$2,902.67
A & A invoices	$10,513.75
Northstar Dry Wall Plasterers; Cannon Hill Paint and Platinum Plastering No. 945	$2,685.85
Seal'em Solutions	$486.50
Bunnings	$2,342.40
USG	$17.94
Rustic Impressions	$311.82
Zaval Cleaning[684]	$2,714.56

[623] I will therefore allow the sum of $34, 824.52 (incl GST) for Part F defects.

G:Timber Flooring Issue

[624] Mrs Morton submitted that the timber flooring on the upper level was defectively installed and/ or defectively affected by water damage resulting in significant capping, shrinkage, and gapping.[685] She also alleged the timber flooring in "Bedroom 2" (at the end of the hallway of the Newbolt Street end of the house) had a large hump or peak and did not provide a level finished floor.

[625] Consequently, Mrs Morton arranged for areas of the timber flooring in the hallway and the bedrooms on the upper level to be removed and replaced by a specialist timber flooring installer.[686] She claims these and associated costs in the sum of $55,205.30 (excl. GST) but including the Hutchinson Builder's margin.

[626] Thallon Mole admitted that there was minor gap filling required in the bedrooms but otherwise denied: (other than in one location in bedroom 4), that the observable gapping in the floor constituted a defect that required all the floor to be replaced; or that there was a hump in Bedroom 2 that required any rectification. At the relevant time, Thallon Mole refused to carry out any rectification on the basis that the defects (that it accepted existed) were minor and could be addressed by installing

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set out on the basis that I am satisfied on balance, that they have been proven to be necessary and reasonable costs on the various bases articulated in the relevant item numbers (and underpinning evidence) as set out in **Annexure A** of the Defendant's Submissions in Reply.

684 Mrs Morton claimed $4,761.25 for cleaning costs related to painting defects. Defendant's submissions at para 698 (g). It is not clear at all how this figure has been calculated cf para 691. Giving my findings as to the extent of the painting defects, I have allowed over half of these costs claimed that is the sum of $2,714.56 as conceded by Thallon Mole.

685 Scott Schedule time 49; with reference to Bedroom 2, 3 and 4.

686 Queensland Timber Flooring.

filler in the gaps once Mrs Morton accepted that Practical Completion had been achieved.[687]

[627] Thallon Mole now submitted that the reasonable costs for the necessary work is $2,080 (excl. GST) as all that was required was minor gap filling or some (unidentified) lesser replacement of some parts of the floor boarding.

[628] These competing contentions must be considered in the context of the Contract and the relevant facts.

The Contract

[629] The Contract specified the supply and installation of 130 x 19mm solid spotted gum "tongue and groove timber board flooring."[688] This was to be laid on the upper-level bedrooms, hallway, stairs and in the ground floor guest bedroom.[689] The Contract did not specify the method by which the timber flooring was to be fixed in place, but as discussed earlier in these reasons at Condition 3.1 incorporated the statutory warranties found in Schedule 1B of the *QBCC Act*. Most relevantly that:[690]

> "all materials supplied will be of good quality and suitable for the purpose for which they are used having regard to the **Relevant Criteria**, and that all materials used will be new unless the Contract expressly provides otherwise."[691]

[630] The term "Relevant Criteria" is defined in Condition 1.1(x) to mean as follows:

> "(i) generally accepted practices or standards applied in the building industry for the material; or
>
> (i) specifications, instructions or recommendations of manufacturers or suppliers of the materials."

[631] Additional Condition 2 of the Contract provided for Thallon Mole's workmanship to be of a high standard of finish consistent with best industry standards for work of a nature similar to the works and which were at least fit for purpose.[692]

[632] It follows that by these conditions, Thallon Mole warranted that the timber flooring installed would be suitable for its intended purpose, having regard to best industry standards or practices or the recommendations of the manufacturer as to the method of installation. Complementary to this, the architectural drawings required Thallon Mole to allow for and anticipate, required approved methods of fixing and installation of all materials, fixtures and appliances.[693]

Relevant Facts about the Installation of the Timber Flooring

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687 Exhibit 81.
688 Exhibit 4 p. 220077; T5-37, l 30-46.
689 Ibid pp. 220106-220107.
690 Exhibit 4 p. 220007 [Condition 3.1(b)].
691 Ibid.
692 Exhibit 4 p. 220018.
693 Exhibit 4 p. 220066 "general notes".

[633] The timber flooring was installed by Thallon Mole employees in early 2018, before the building was watertight (windows on the upper level had not yet been installed).[694] It is not in dispute that Thallon Mole fixed the boards in place by way of "secret nailing"[695] and beaded adhesive to a 15mm plywood substrate.[696] Face nailing was not possible, as the thickness of the boards and plywood would not allow a 50mm nail to be driven home to the board surface.[697]

[634] The supplier of the boards did not recommend a particular method of installation but the Australian Timber Flooring Association Guidelines,[698]recommended that 19mm thick boards of 130mm width or more were to be top/face nailed to the subfloor in conjunction with a full bed of flooring adhesive.[699] This relies on the adhesive providing much of the fixing for boards of that size. [700]

[635] Mr Mole did not confirm the manufacturers' requirements for the method of installing the 130mm boards before installation.[701] Mr Cook did not know what the industry standard was for the installation of 130mm wide "tongue and groove" flooring with secret nailing.[702]

[636] In late February 2018, there was water damage to the flooring installed in the upper-level bedrooms.[703] The master bedroom, ensuite and Bedroom 2 (at each end of the hallway) were worse affected by the water damage.[704] As a result, Thallon Mole repaired and replaced some of the damaged flooring in the Master Ensuite and parts of Bedroom 2.[705]

[637] On 26 March 2019, the Issman Internal Defects Report identified significant gapping and cupping in the timber flooring, in particular in the upstairs bedrooms.[706] These defects were confirmed by site inspections shortly after by Mrs Morton, Mr Stewart and Mr Asplin (the author of the Issman Defect Reports).[707] Mrs Morton submitted that the evidence established that approximately one-third to one-half of the floor had noticeable gaps between the floorboards, including some cupping which was spread throughout the bedrooms and hallway.[708] Thallon Mole submitted that this over described the extent of the defects but on my review of the evidence it is a fair analysis which I accept as accurate.

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694 Exhibit 269 [26]; Exhibit 216 [16].

695 Where the nail was driven at a 45-degree angle through the tongue, so the head of the nail was not visible.

696 Exhibit 321 p. 280495 [4.11.1]; Exhibit 296 pp. 250695, 250725, 250729-250730.

697 Exhibit 321 p. 280496 [4.11.2].

698 Exhibit 321 p. 280494-280495 [4.10.7]; Exhibit 322 (AFTA Guidelines).

699 Exhibit 321 p. 280493-280494 [4.10.0]-[4.10.6].

700 Exhibit 321 p. 280494 [4.10.6]; T17-114, ll 23-29.

701 T5-44, l 1-5.

702 T9-123, l 1-19.

703 Exhibit 247 [28]-[31].

704 Exhibit 216 [20]-[21]; Exhibit 296 p. 250692 (plan of the upper-level bedrooms).

705 Exhibit 160 pp. 110036 (TSA Meeting Minutes #26 at Items 24, 17, 25, 17, 26.8), 110044 (TSA Meeting Minutes #28, Item 26.08); Exhibit 269 pp. 251628-251658.

706 Exhibit 294 [25]-[27]; Exhibit 269 p. 251393 [15](d); Exhibit 235 [1.5], [1.13],[1.22]. The Defects Report referred to "Boards cupping/gaps, confirm/fill gaps".

707 Exhibit 269 [28]; Exhibit 247 [33].

708 Exhibit 269 [28]; T9-114, l 28 to T9-115, l 6; T10-12, ll 8-24 (Mr Cook admits the gap filler would not rectify the cupping).

[638] The uncontroversial evidence (which I accept) is that the gaps were generally next to the window in several of the upstairs bedrooms,[709] although gaps were not uniformly wide across the width of each window,[710] and generally narrowed in the middle of the room.[711]

[639] Mr White also inspected the timber flooring in April 2019. He considered the condition of the timber flooring to be poor and that significant rectification work was required. Mr White's observations at the time were that that there was shrinking and gapping in the floorboards in the bedrooms on the top level of the house, including cupping in the floorboards in Bedroom 2.[712] He also identified a hump in the flooring installed in Bedroom 2, which he said ran in an approximate north-south direction from the window to the study desk.[713] Thallon Mole accepted that a hump was visible when the floor was lifted but submitted that it was not in fact discernible prior to that happening.[714] On balance, I prefer and accept the evidence of Mr White both about the state of the flooring and the existence of the hump. These findings are consistent with the photographic evidence;[715] Mr Hilston's evidence about the flooring (as further discussed below); and the fact that a hump was later found in the underlying plywood substrate once the floorboards were removed; and that the photographs of the straight edge over the hump in the plywood which reveal its existence.[716]

[640] On 9 May 2019, Mr White requested that Mr Cook confirm when Thallon Mole would rectify the defects in the timber flooring, as part of the works that had been installed by Thallon Mole.[717] Mr Cook agrees that the request was made (although Mr Cook says he was never aware of the hump).[718] He agreed he did not respond in writing, but initially said that he attended the site on 3 June 2019 and offered to assist with rectification work on the timber flooring,[719] but he later recalled the conversation occurring on a different day.[720] Mr White disputed any such offer was made,[721] but his evidence was that had Thallon Mole offered to repair the flooring, he would have accepted that offer.[722]

[641] Mr White's evidence (which I accept) as generally consistent with what in fact happened as discussed below is that he wanted confirmation from an expert about what aspects of the timber flooring required fixing and what was required to fix it. Consequently, in early May 2019, he approached the Australia Timber Flooring

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709 Exhibit 235 [1.2], [1.5], [1.13], [1.22].
710 Exhibit 234; T17-103, ll 18-24.
711 See Mr Hilston's evidence and the photographs in the Issman Internal Defects Report; Exhibit 235 [1.2], [1.5], [1.13], [1.22]; Exhibit 234; T17-103, ll 18-24.
712 Exhibit 296 pp. 250706-250715.
713 Exhibit 296 [104]; Exhibit 299; T15-67, l 7 to T15-68, l 26; T11-6, ll 32-44.
714 Relying on a lack of photographic evidence and the fact that Mr Hilston, made no observations about a hump despite taking measurements in that room. T17-116, ll 1-7.
715 Exhibit 269 pp. 250706-250756 [123] at Exhibit DW-68.
716 Exhibit 296 pp. 250706-250715; Exhibit 299.
717 Exhibit 296 [125].
718 Exhibit 216 [105].
719 Ibid.
720 T10-10, l 10 to T10-12, l 30.
721 Exhibit 297 [9]-[14].
722 Ibid.

Association and obtained the name of Jim Hilston, an inspector with more than 22 years' experience in the timber flooring industry.[723]

[642] Mr Hilston was subsequently engaged by Hutchinson Builders to inspect and report on the timber flooring at the house. He conducted inspections on 16 and 29 May 2019 and prepared a written report dated 20 May 2019 ("**First Hilston Report**").[724]

[643] Mrs Morton submitted that in reliance on "that independent advice" (with express reference to the First Hilston Report), the timber flooring in the hallway and bedroom on the upper level was removed and replaced.[725] But these submissions overlook that Queensland Timber Flooring was engaged on 3 June 2019 to supply new timber and to replace the timber flooring, but Mr White's evidence was that he did not receive this report until 5 June 2019.[726] I therefore accept Thallon Mole's submission that Mrs Morton and Hutchinson Builders made the decision to rip up the floors prior to the receipt of the First Hilston Report.

[644] Mr White's evidence about the date he received this report is curious and most likely the result of a mix up of dates. But nothing turns on this given that: Mr Hilston was engaged (and provided oral advice to Mr White about the state of the upstairs floors)[727] prior to the extensive rectification work commencing;[728] Mr White also relied on the opinion of Mr Asplin and Mr Stewart about what was required to rectify the timber flooring;[729]ultimately, (and as discussed below), the rectification work undertaken was consistent with, and justified by, the First Hilston Report (and other identified evidence which I also accept).

[645] Mr White's evidence was that on 29 May 2019, Mr Hilston returned to the house and arranged with Mr White for a portion of the flooring to be removed in order to see the substate underneath; and that this occurred on 31 May 2019 (when a sample was removed in the junction between the wardrobe and the window of the south-eastern bedroom facing the back corner). These investigations revealed that the plywood in this area was dark and damp in appearance.

[646] The evidence (which I accept) is that:[730]

(a) On 29 May 2019, after discussions with Mr White, Mr Stewart and Mr Diamond Mr Asplin prepared a marked-up floor plan showing the flooring to be replaced;

(b) Around 3 June 2019, Hutchinson Builders labourers removed the existing timber floor in the areas identified by Mr Hilston, Mr Stewart and Mr Asplin and prepared and the sanded the subfloor in preparation for the new flooring; and

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723 Exhibit 296 [108]-[123]; T16-96, l 1-3.
724 Exhibit 296 [113], [119], [120]; A copy of this report is pp. 250694-250767.
725 Defendant's Trial Submissions at [733].
726 Ibid at [120].
727 Exhibit 296 [113].The evidence (which I accept) is that right from the outset, Mr Hilston told Mr White (on 16 May 2019) that the timber flooring on the upper level of the house would require significant rectification
728 T16-41, l 40 to T16-42, l 6.
729 Exhibit 296 [124].
730 Exhibit 96 [124]-[144].

(c) Queensland Timber Flooring then supplied and installed the new timber flooring from between 4 June 2019 until 14 June 2019.

[647] The evidence (which I accept) is that the timber flooring in the hallway and bedrooms on the upper level was removed and replaced;[731]and that based on on-site discussions and a marked-up plan received from TSA, some areas in the hallway opposite bedrooms 2 and 3 were also replaced.

[648] I accept that none of the bedrooms could be used during this rectification time, as the work included sanding which generated a large amount of dust, and the varnish was required to cure before the house could be cleaned and occupied.[732] I therefore find that the house could not be occupied while the timber flooring rectification works were being carried out.

[649] Apart from the First Hilston Report, two further expert reports were tendered at trial relevant to this issue: a further report from Mr Hilston dated 28 March 2021;[733] and a joint expert report by Mr Hilston and Donald Dixon dated 9 May 2021.[734]

Analysis

[650] Overall, I am satisfied on balance that an analysis of all the relevant evidence supports the following findings (which I make):

(a) First, only one manufacturer permitted boards of the size required to be fixed with secret nailing by applying fully trowelled flooring adhesive, which achieves a greater surface contact area and a degree of elasticity to accommodate expansion or contraction in the timber boards over time;[735]

(b) Secondly, no manufacturer recommended secret nailing and bead adhesive for installing 130 x 19mm boards due to the high risk of ongoing performance concerns such as cupping, peaking, buckling, and the possibility of subsequent issues that may be related to board shrinkage, such as gapping at board edges;[736]

(c) Thirdly, that the thickness of the subfloor did not allow face nailing; [737]

(d) Fourthly, only beaded adhesive had been applied by Thallon Mole in conjunction with secret nailing;[738]

(e) Fifthly, the floorboards installed by Thallon Mole were subject to moisture absorbed into the plywood substrate beneath, likely due to water ingress in

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731 Exhibit 296, [124]; T16-41, l 40 to T16-42, l 47; T16-44, ll 31-33; T16-45, ll 15-28; T16-96, ll 15-36.

732 Exhibit 296, [138]-[144]; T5-47, ll 9-26; T10-43, ll 1-14, Exhibit 309 [93], [105].

733 Exhibit 321.

734 Exhibit 171. Mr Dixon did not inspect the flooring before it was repaired, and mainly deferred to Mr Hilston's technical knowledge and expertise.

735 Exhibit 171 pp. 280762-280763, 280766-280767; T6-73, ll 11-22; Exhibit 321 pp. 280512-280515 (Boral Installation Guidelines).

736 Exhibit 171 p. 280764.

737 Exhibit 171 pp. 280764-280765; Exhibit 321 [Items 4.11.1-4.11.7].

738 Exhibit 171 pp. 280758, 280764; T5-45, ll 12-14 (Mr Mole agreed that the beaded adhesive (photo in Exhibit 296 p. 250726 was typical of the beaded adhesive used for the floor).

February 2018, which was a contributing factor to the damaged flooring (particularly in the Master Ensuite and Bedroom 2);[739]

(f) Sixthly, when inspected by Mr Hilston the flooring exhibited significant gapping;[740] and

(g) Finally, the boards in the upper level exhibited more significant gapping which was more noticeable in those areas exposed to direct sunlight, which Mr Hilston confirmed was attributable to boards being significantly undersized at time of measurement, indicating they had contracted since installation.[741]

[651] Thallon Mole maintained that the installation method was entirely orthodox and common in the building industry. I reject this submission for two reasons:

(a) First, it finds no support in either the manufacturer's recommendations or the expert evidence; and

(b) Secondly, the evidence was that in the upstairs area, where the greater sunlight and thermal interaction occurred, there were significant gapping and cupping occurring within the short period that the floor had been in situ. In circumstances where the life of the house is (uncontroversial) at least 50 years, this is unsatisfactory (and supports a finding that the rectification of the defective installation that was carried out was therefore reasonable).

[652] I am therefore satisfied that the installation method used by Thallon Mole was defective. It clearly did not meet the manufacturer's requirements and was not in accordance with best industry and the manufacturer's recommended practice.[742]

[653] Thallon Mole also submitted that the method of installation would not have affected the ongoing performance of the floor. I reject this submission as it is not supported by the following evidence of Mr Hilston which I accept:[743]

> "Having observed the floors and assessed the evidence gathered on site we consider the gapping to be significant and exceeding that which should be expected in a newly laid floor and therefore remedial work should be considered.
>
> ….Evidence was assessed indicating the flooring to have been laid into areas of damp sub-floor conditions causing expansion at that time and increased board widths, and the climate produced by the glass exterior surfaces causing subsequent moisture egress and board shrinkage resulting in extensive gapping between the boards. The flooring has been laid by beaded adhesive and secret nailing, a method not in compliance with documented standards and likely to cause further ongoing performance concerns.

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739 Exhibit 171 pp. 280760-280769.

740 The boards in the upper level exhibited more significant gapping which was more noticeable in those areas exposed to direct sunlight (Exhibit 296 pp. 250700-250701), which Mr Hilston had confirmed was attributable to boards being which were significantly undersized at time of measurement, indicating they had contracted since installation (Exhibit 321 p. 280492 [4.9]).

741 Exhibit 296 pp. 250700-250701; Exhibit 321 p. 280492 [4.9].

742 Exhibit 171 pp. 280758, 280764, 280771.

743 Exhibit 296 p. 250705.

> Consideration should therefore be given to uplifting and replacing the timber floors noting that irrespective of installation practice, it is likely that some gapping between boards should be accepted, particularly in those locations exposed to direct light."
>
> [Emphasis added].

[654] I am therefore satisfied that the defective installation method created ongoing and unaccepted risks for the manifestation of further defects in the flooring into the future;[744] and that in itself was defective work which needed to be rectified in the upstairs rooms.

[655] Thallon Mole also submitted that the defective installation method did not warrant the floor being entirely removed. I reject this submission for five reasons:

(a) First, it was impractical to remove individual boards;[745]

(b) Secondly, it was not the entire floor that was removed. It was only that part of the floor that was not performing; and it was that part of the floor that was at risk of deterioration due to the defective method of installation employed by Thallon Mole;

(c) Thirdly, in order to repair the defective timber flooring on the upper level, it was necessary to not only remove the floorboards, but also prepare the subfloor sheeting surface before the new floorboards were installed;[746]

(d) Fourthly, the limited repair proposed by Thallon Mole would not have overcome the defective installation of the entire floor in the first place, but I accept that patching would also result in an inconsistent appearance due to difficulties in blending existing boards;[747]and

(e) Fifthly, the rectification work carried out is supported by the expert opinion evidence of Mr Hilston.

[656] I am therefore satisfied that the rectification work carried out by Mrs Morton to the upstairs timber flooring was both necessary and reasonable.

Timber Flooring – Quantum

[657] The costs claimed by Mrs Morton for having the timber flooring replaced on the upper level of the house total $55,205.73.[748] This figure is (roughly) calculated as follows:

(a) About $27,000 (excl. GST) is attributable to the invoices paid and received by Queensland Timber Flooring;[749]

(b) Amounts for Hutchinson Builders supervision and direct hire labour costs (of $16,080.63) based on the estimates provided by Mr White from his site

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744 Exhibit 296 p. 250704.
745 Exhibit 269 [28].
746 Exhibit 96 [124].
747 Exhibit 69 [28].
748 Including a builder's margin but excluding GST.
749 Exhibit 296 pp. 250301- 250302 [150](j)–[150](k), [150](n). Copies of the relevant invoices are at pp. 250792–250793, 250797.

diaries and the apportionment of labour to the allocated defect rectification work;[750] and

(c) Third party costs (including Bunning invoices) totalling around $5,000 allocated by Mr White to the timber flooring issue;[751] and

(d) The Hutchinson Builders margin of 12 percent on invoiced costs incurred in the amount of $33,276.27, total $3,993.15. The total figure then, including a builders margin, is $37,269.42.[752] and

(e) The invoice dated 7 June 2019 of $1,200 (excl. GST) which was incurred as a result of his inspections and preparing The First Hilston Report.[753]

[658] On the basis that "substantial damages" are found to be recoverable, Thallon Mole makes a few minor attacks on the quantum. The first is that the cost of the First Hilston Report is a cost associated with the counterclaim and not an amount claimable by way of damages in this proceeding. I reject this submission. On balance, I am satisfied that the cost of this report (which includes a site inspection) was properly incurred to investigate and confirm the extent of the defects and the nature of any rectification work. It was incurred well before proceedings were commenced.

[659] The second issue raises various matters about: the cost of a painters tape ($350) which is not a pleaded defect; a small amount for Powerade, chocolate bars and coffee which are obviously not costs Thallon Mole are liable for (totalling $11.18). I accept Thallon Mole's submission in relation to these items.[754] It follows that I have reduced the amount claimed by $403.92 (this includes a $42.74 adjustment to allow for the 12 percent margin claimed).

[660] I therefore allow the sum of $60,281.99 (incl. GST) as the reasonable cost of rectifying the defective timber flooring at the house.

H: Driveway

[661] Mrs Morton claims the sum of $32,686.30 (excl. GST) as the necessary and reasonable costs of rectifying the defective driveway built by Thallon Mole.[755] The defects alleged are twofold:[756]

(a) First, that the levels of the driveway were non-compliant; and

(b) Secondly, that the height and level of the architectural drawings were not met, and the driveway was shaped inconsistently with those drawings.

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750 Exhibit 296 pp. 250287-250291 [73], [92]–[102]; Exhibit 304 pp. 270245, 270247 [9] ; Exhibit 30.
751 Exhibit 96 [150].
752 Exhibit 304 pp. 270245, 27024.
753 Exhibit 296 p. 250785.
754 $54,801.81 (excl. GST); Plaintiff's Trial Submissions [433]-[444].
755 This figure includes the 12 percent builder's margin and amounts for Hutchinson Builders supervision and direct and hire labour costs. It is less than the $37,261.64 claimed and correctly allows a credit of $4,575.34 for stage 2 of V060 for the widening of the driveway – for which Thallon Mole had not claimed.
756 Item 50 of the Scott Schedule. Exhibit 236 Items [2.2], [2.4], [2.7], [2.8].

[662] Thallon Mole denied that the driveway was built defectively but submitted that if it was, this was a design defect - not a construction defect.

Relevant Facts

[663] By VO 60 issued in May 2018, the **Driveway Plan** was as follows:

(a) The width of the driveway was to be doubled and constructed in accordance with TSA drawing FD-22 Revision 4;

(b) The driveway was to be built in stages, with the first stage to occur prior to Practical Completion being achieved, and the second stage afterwards.[757]

(c) The required levels and falls were for the driveway to rise from the kerb to a high point on the property boundary before gradually falling to the garage entrance.

[664] Subsequently, the concrete substrate was constructed by Thallon Mole for the entire driveway and tiled with cobblestones, except for "stage 2" [758] After the first stage of the driveway was completed, Mr and Mrs Morton became concerned because Mr Morton's car would "bottom out" on an apparent hump in the driveway. The evidence (which I accept) is that a large hump was visible on the driveway as it had been constructed. This finding is consistent with the survey levels, photographs and eyewitness accounts at the time.[759] The issue was raised with Mr Mole and Mr Cook who offered no useful solution, maintaining that the driveway had been constructed in accordance with the Driveway Plan.

[665] Between 13 March 2019 and 7 April 2019, Thallon Mole were provided a number of written reports alleging defects with the driveway (and incomplete kerbside works).[760] But Thallon Mole maintained the problem was not with its construction.

[666] After 10 April 2019, attempts were made by Mrs White to arrange for Thallon Mole's concreting subcontractor to return to the site. To no avail. So, Hutchinson Builders engaged different subcontractors to rectify the driveway levels and complete the kerbside works.[761]

[667] On 28 May 2019, a survey of the driveway requested by Hutchinson Builders revealed that it had not been constructed in accordance with the Driveway Plan in the following ways:[762]

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757 There appeared to be no contest in the evidence that this is what was intended, and that the "incomplete" section of the driveway was therefore not a defect. See Mr Mole's affidavit; Exhibit 98 p. 261111 [51]; T12-42, ll 39-47. The plans for that staging can be seen at BM-18 of Exhibit 98 p. 261201.

758 Identified on the Driveway Plan, in the extended portion between the kerb and the property boundary which was to be completed following the certifiers final inspection; Exhibit 247 [39]-[40].

759 Exhibit 296 p. 250926 [215]–[216]; Exhibit 247 [39]–[40].

760 The Handovers.com Report of 13 March 2019 (Exhibit 201 Item 57); the Issman External Defects Report of 24 March 2019 (Exhibit 148 pp. 70049-70050); and the TSA Major Defects List dated 7 April 2019 (Exhibit 149 p. 70147).

761 Exhibit 296 [217].

762 Accepting the relevant evidence references are as set out in Defendant's Trial Submissions at [764].

(a) The high point of the driveway was 300mm in front of the boundary line, making the as-constructed driveway steeper from the kerb to that high point, which was in a different position to that shown in the Driveway Plan (before falling to the garage);

(b) The contour lines on the as-built survey plan show the high point was in front of the boundary;

(c) The Driveway Plan at Section C (middle of driveway) indicated a rise and then a flattening out but that the survey plan didn't show the flattening out, nor did the photographic evidence;

(d) The height of the driveway (from the kerb) was greater than designed by about 40 mm; and

(e) Photographs also show a steep rise or lip to the left edge of the driveway, which was not shown on the Driveway Plan.

[668] The evidence of Mr White (which I accept) is that between 23 May 2019 and early July 2019, Hutchinson Builders carried out rectification work to correct the shape and level of the driveway.[763] This work carried included the following:[764]

(a) The cobblestones being removed, and the concrete substrate sawn and removed;

(b) The substrate being excavated deeper to provide more consistent levels before a new concrete slab was laid and cobbled, and then sealed;[765]

(c) The driveway from the kerb to the property boundary was not level so a spirit level was used to ensure the level at the property boundary was higher than that at the kerb, to ensure water did not flow into the garage;[766]

(d) The Telstra pit to the southern end of the driveway being lowered. The required levels were to ensure the driveway was fit for purpose and to provide consistent levels;

(e) A new conduit being placed under the driveway to connect that Telstra pit to the Telstra pit on the corner of Newbolt and Otway Street;[767] and

(f) The asphalt between the road and the driveway being repaired.

Was the Driveway Constructed Defectively?

[669] Against this background, Mrs Morton submitted that: the levels and heights of the driveway were not compliant with the architectural drawings, which required consistent falls and levels; and the large hump that was evident on the left-hand side

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763 Exhibit 296 [217]–[236].

764 Exhibit 96 pp. 250932 (photograph 10), 250934 [15]–[16], 250936 (photograph 19), 250937; Exhibit 98 p. 261211; T15-87, ll 14–18; T4-91, l 29–38; Exhibit 98 p. 262212; T15-85, ll 19–25, l 45; T15-86, ll 1-9; T16-102, l 6–9.

765 The connections running under the driveway (including connections to a Telstra pit) to be installed.

766 The Driveway Plan showed a driveway following the gradient of the road. The driveway required an incline to stop water travelling down the road into the garage, so there was an incline.

767 Required in order to install an operational phone line to the property, including for the lift. Exhibit 296.

of the driveway meant the crossover was not in accordance with those plans or the minimum clearance requirements in AS 2890.

[670] On the other hand, Thallon Mole maintained that the heights and levels complied with Driveway Plan; that a rise towards the left-hand side of the crossover needed to be taken into account;[768] and that in any event, the driveway was able to be used.

[671] I reject Thallon Mole's submissions as they are not supported by the following evidence including that of the joint experts (which I accept):[769]

(a) The defect arose from the underlying concrete substrate to which the cobblestones were fixed;[770]

(b) The moment the front wheel of a standard car went over the high point, it would ground almost immediately.[771] This applied to almost the entire driveway, as the only point of the driveway compliant with the Standard (minimum clearance) was at the left-hand side of the driveway (nearest Otway Street);[772]

(c) The driveway could not reasonably be used for vehicle access to the garage at the time Thallon Mole claimed Practical Completion;[773]and

(d) The driveway did not comply with the requirements of AS 2890 which required a minimum 1200mm clearance for a vehicle.[774]

[672] Mrs Morton is entitled to have the driveway constructed in accordance with the requirements of the Contract including (relevantly) that it be built fit for purpose and in accordance with the relevant Australian Standards. But as the evidence in the preceding paragraph reveals – it was not.[775]

Reasonable Cost of Rectification

[673] The rectification works must be necessary to achieve conformity with the requirements of the Contract and be a reasonable course to adopt.

[674] The onus is on Thallon Mole to identify any exceptional circumstances that reveal the rectification costs as unreasonable and unnecessary.[776] The rectification work

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768 Exhibit 98 [47]–[55].

769 That is the evidence of Donald Dixon and Garry Carpenter; Their joint report is Exhibit 170.

770 T6-65, ll 4–34.

771 T17-32, ll 17-43.

772 Exhibit 170 p. 280724; T17-33, l 15 to T17-34, l 2.

773 Exhibit 170 pp. 280724-280727; T6-63, l 31 to T6-64, l 33; T5-71, ll 22-40. What is considered by the Australian Standards to be a standard vehicle couldn't traverse the driveway as it was built see T17-31, l 36 to T17-32, l 15.

774 Ibid.

775 Thallon Mole does not dispute that Australian Standards formed part of the legal requirements the works were required to be constructed to, in accordance with Condition 3.1 and Additional Condition but did not address the breach of contract caused by the defective driveway, namely that it failed to provide the minimum clearance of 120mm for a fully loaded vehicle required by AS2890.1

776 *Bellgrove v Eldridge* (1954) 90 CLR 613, 618-619; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 [13] – [20].

has been carried out and the actual cost is known. Ordinarily that provides sound evidence of the reasonable costs and a sound basis for damages.[777]

[675] Thallon Mole submitted that if it is found (as I have) that the work was defective and required rectification, in addition to the sum of $4,575.34 (which Mrs Morton now conceded needs to be deducted), further allowance should also be made for the following:

(a) First, the cost of obtaining the survey plan in the sum of $1,086 (plus a 12 percent margin) on the basis that this is a cost associated with establishing the alleged defect (and so claimable as costs in the proceeding), not a cost of rectifying the defect;

(b) Secondly, the sum of $990 as there was no obligation in the Contract to repair asphalt; and

(c) Thirdly: A broad-brush reduction of approximately $10,000 (plus 12 percent on account of margin) to reflect that, even if there was a defect, Mrs Morton required further work to be done to lower the driveway, which was work beyond the scope of Thallon Mole's work.

[676] I reject the first and second contentions on the basis that I am satisfied that:

(a) The cost of obtaining the survey plan is properly recoverable as a cost necessarily incurred in determining whether the driveway built by Thallon Mole complied with Australian Standards; and

(b) The repair to the asphalt arose as a direct consequence of the necessary repair of the driveway.

[677] But, for the reasons discussed in the following paragraphs, I accept that there is some force to the third contention – although not to the extent Thallon Mole contends.

[678] It was uncontroversial that the driveway constructed by Hutchinson Builders has reduced relative levels to the Thallon Mole driveway and complied with AS 2890 making it less likely that vehicles will "bottom out." [778] Mrs Morton submitted that the fact that the levels of the remedied driveway may have increased the clearance beyond the minimum clearance requirements required under the Australian Standard is irrelevant. But this submission also overlooks that the levels were greater than those stipulated under the Driveway Plan. In this sense I accept that the Driveway Plan changed.[779]

[679] I accept as Mrs Morton submitted that I should assess the damages payable in a robust manner, relying on the presumption against Thallon Mole having breached the contract, and resolving doubtful questions against Thallon Mole.[780]

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777 *Hyder Consulting (Australia) Pty Ltd v Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313, [99] (per Giles J).

778 Exhibit 170 p. 280724.

779 Exhibit 98 p. 261212.

780 *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, 59. *McCartney v Orica Investments Pty Ltd* [2011] NSWCA 337, [158].

[680] But the starting point remains that I am must be satisfied in the first instance that the damages claimed are reasonable and necessary. In this case, I am not satisfied all of the damages claimed under this heading are so. Contrary to Mrs Morton's submissions, I am satisfied that Thallon Mole are entitled to complain that the damages are at the upper end of the range (a fact Mrs Morton accepted) particularly given the following circumstances:

(a) First, it is obvious the Driveway was ultimately built with increased levels to those stipulated in the Driveway Plan and those required by AS 2890;

(b) Secondly, it is reasonable to infer (as I do), as a matter of common sense, that this required extra work to be carried about such as excavating lower than originally required; and

(c) Thirdly, Mr Diamond said that the driveway work could have been carried out better or more efficiently.[781]

[681] I am satisfied that these matters form a sufficient evidentiary basis for a reduction in what Mrs Morton claims are the reasonable and necessary costs of the rectification works. If I am wrong about this approach, I am otherwise satisfied that these matters demonstrate exceptional circumstances justifying a reduction in the costs that should be awarded as damages.

[682] On either view, I am satisfied it is appropriate to take a broad-brush approach to the reduction that ought to be made.[782] In doing so, I am satisfied that a small reduction of $7,840 (excl. GST) should be made.[783]

[683] I am therefore satisfied that the reasonable and necessary cost of the rectification of the driveway is $27,330.93 (incl. GST). [784]

I: Joinery

[684] Mrs Morton claims the sum of $34,758.57 (excl. GST) as the reasonable and necessary costs (actually) incurred by her in rectifying the defective and incomplete joinery works.[785] The Scott Schedule particularises this part of Mrs Morton's claim as for "joinery works undertaken by Hutchinson's Builders to rectify the defective and incomplete work identified in the Issman Defects Report."[786] Mrs Morton's Written Submissions also rely on alleged defective work in the Handovers.com report of 13 March 2019 and the TSA Major Defects List – but concede "as likely" that "some defects" identified in the various reports were rectified by Thallon Mole prior to Hutchinson Builders commencing on site. [787]

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781 T17-11, ll 37-39.

782 Such an approach is consistent with the approach I have taken to Mrs Morton's claims for Hutchinson Labour. See discussion and authorities under the Residual Labour Claim heading in these Reasons.

783 That is an amount of $7,000 plus the 12 percent builder margin.

784 Or $24,846.30 (excl. GST). This amount includes the Hutchinson Builder's supervision costs claimed and the 12 percent builders margin.

785 I have taken this figure from the latest version of the Scott Schedule. Mrs Morton's written submissions refer to the total claimed as $33,117.97.

786 Although Mrs Morton's written submission refer to the defective work in the Handovers .com report of 13 March 2019 as well as the Issman Internal Defects report and the TSA Major Defects list.

787 Defendant's trial submission at [790]-[791].

[685] Thallon Mole accepted there were some "minor" joinery issues to be corrected (being 15 of the approximately 49 defects alleged by Mrs Morton under this heading) at a cost of $8,447,50 (or $10,071.50 if copper cladding is found to be recoverable.)[788] But it otherwise denies any liability to pay further damages for a variety of reasons including that the balance of the alleged joinery defects had already been rectified or completed or are not items claimable under the Contract.

[686] My observations at paragraph 582 of these Reasons concerning the "excruciating laborious" task this court has been required to undertake (at times) for a relatively small quantum are equally apposite to this claim.

BRC Cabinets

[687] **BRC** Cabinets were engaged by Thallon Mole to undertake the extensive cabinetry work (over $800,000 worth) at the house.[789] This work (including variations) was completed around February 2019. The managing director of BRC, Kenneth Brooks (a highly experienced cabinet maker with the relevant qualifications and licenses and with over 38 years in the industry) gave evidence at trial. His unchallenged evidence which I accept is that BRC received a defects list from TSA in March 2019 and subsequently Mr Brooks arranged for two BRC tradesman to rectify these defects (at no charge to Thallon Mole or Mrs Morton).[790]

[688] Mr Brooks' evidence was that sometime after 10 April 2019, BRC were asked by Hutchinson Builders to rectify some minor defects and to complete extra work at the house. Mr Brooks also explained that: any work arising as a direct result of BRC's defective work would have been attended to regardless but as the work BRC was being asked to carry out by Hutchinson Builders was either not caused by BRC or was outside the scope of its original works, BRC insisted on being engaged directly by Hutchinson Builders.[791]

[689] On the other hand, Mr White's evidence was that he contacted BRC to rectify the joinery defects on the Hutchies Defects List in later May 2019 and that he only agreed to engaging BRC directly because he considered it to be more efficient than engaging a new joiner.[792] Overall I prefer Mr Brooks evidence that the majority of joinery defects or works did not arise from BRC's defective work. This finding is not only consistent with the fact that BRC was engaged directly but also with the following matters:

(a) First, the express premise upon which Mr Brooks was cross examined: namely that the reference to joinery defects was not a suggestion that all of them were "certainly" the fault of BRC – they were just "joinery defects" ----- at the time that Hutchies took over the project."[793]; and

(b) Secondly, the email exchange between BRC's Project Manager Jason Cherry and Mr White on 30 May June 2019 in which:

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788 As identified in footnote 306 of the Plaintiff's Trial Submissions. The joinery defects are those set out in Items 51 to 55 of the Scott Schedule.

789 Exhibit 187 [8].

790 Exhibit 187 [18]-[21]; Exhibit 188. The defect items listed by Mr Brooks are directly referable to the Issman Internal Defects Report.

791 T7-13 , l 30; Exhibit 187.

792 Exhibit 296 [158]-[160].

793 T7-13, ll 15-21.

(i) Mr White stated that: "[d]efects list attached (copied from TSA defects list- I appreciate some items are completed & some may not be BRC – please comment on status): and

(ii) Mr Cherry responded by marking up the defects list with most of the relevant joinery defects items ticked as completed.[794]

[690] In early June 2019, Mr White issued a work order to BRC Cabinets in accordance with BRC quote 9880 (for $3,910.50).[795]

[691] On 26 July 2019 BRC issued two invoices to Hutchinson Builders: invoice 11059 in the sum of $3,555 (excl. GST) (the main item being $1,950 for the lamination of the existing sliding doors to the butler's pantry); and invoice 11059-B in the sum of $3,610 (excluding GST) with the main items being matt black panels to the butler's pantry ($790) and spotted gum and rubber handles totalling $1,500.[796] On 27 September 2091 BRC also issued invoice 11144 in the sum of $3,560 (excl. GST) for the installation and supply of a blackbutt handrail to replace the handrail on the stairs.

[692] It is uncontroversial that these invoices were subsequently paid by Hutchinson Builders.

[693] Against this background it is instructive to consider Mrs Morton's case particularly in the context of the pleaded joinery defects at Items 51 to 55 of the Scott Schedule.

Analysis of Evidence About Joinery Defects and Costs

[694] The starting point is that the onus is on Mrs Morton to satisfy the court that the defects she relies on existed as at 10 April or subsequently arose as a result of necessary and reasonable rectification of defective / incomplete work by Thallon Mole (or is contractors); and that the costs incurred were reasonable and necessary.

[695] The costs claimed by Mrs Morton are broken into two parts: first, the sum of $10,750 (excl. GST) being the total of the three invoices from BRC invoices referred to in paragraph 690 above;[797] and secondly, the costs of Hutchinson Builders labour for the installation of those items and rectification of "numerous other joinery defects."[798]

[696] I found Mr White's evidence about the joinery defects generally unhelpful (as I did Mrs Morton's case on this issue) as it lacked detail, engaged with only some of the pleaded defects and was unreliable in places. For example:

(a) In his first affidavit Mr White referred without discernment to "all other" carpentry work identified in the Internal Issman Report and Hutchies Defects List that were not included in BRC's work order as being undertaken by Hutchies direct labour and hire labour. But overall, he did not identify what

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794 Exhibit 297 pp. 270169-270172.

795 Exhibit 296 p. 250814. This quote is confusingly (I assume because it was printed for trial on this day) dated 1 April 21. Instructively it has a strike though the laminate existing sliding doors – with the words – please confirm scope.

796 Exhibit 296 p. 250816

797 Plaintiff's Trial Submissions at [502]. This refers to the total being $9,725 - I assume this is an error.

798 Defendant's Trial Submissions at [783].

these defects were, who rectified them or how long each item took;[799] but later after reviewing Mr Cook's comments in respect of joinery defects he conceded that it is likely that a number of defects in the Hutchies Defects List that had been identified by Mr Cook as "done" had indeed been rectified by BRC before Hutchinson Builders commenced on site.[800]

(b) Mr White contended that he observed "mirrors sticking on tracks", as one of the obvious defects but this and several other defects initially pleaded by Mrs Morton were subsequently abandoned;[801]

(c) Mr Brooks was taken to each item of invoice 11059 and agreed that the first item [replace door to kitchen] was for a damaged edge of a door in the kitchen.[802] But there was no pleaded defect about the door to the kitchen to which the charge of $65 relates or any evidence that this defect existed on 10 April;

(d) Mrs Morton claims the sum of $384 in respect of an invoice from Altro which Mr White alleges relates to the failure of some hinges during rectification work[803] – but there is no pleaded allegation that the alleged hinges required replacing. Similarly, the invoice of $151.08 from Bunnings is said to relate to door hardware in respect of the service gates.[804] It is hard to understand how this is a joinery issue but regardless, it not a pleaded defect.

[697] In justifying all of BRC Invoices Mrs Morton relies generally on Mr Brooks evidence under cross examination of what each of the items charged concerned.[805] But this submission does not: establish the requisite causative link to establish liability for Thallon Mole's to pay these costs; address the identified lack of pleading; how the defect or work was within the scope of BRC (or Thallon Mole's) original scope of work; existed as at 10 April; or, (with two exceptions as discussed below) was causative of other rectification work for which Thallon Mole is responsible.

[698] In relation to invoice 11059: on balance, I am not satisfied that:

(a) There is a pleaded defect about the door to the kitchen to which the charge of $65 relates;

(b) The sum of $130 in respect of the handle for the inside of the ensuite door is within within the original scope of the Contract;[806] and

(c) The lamination of the butler pantry door was within the original scope of the Contract .

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799 Exhibit 296 [165].
800 Exhibit 297 [42]-[45].
801 Exhibit 296 [161]; See the table identifying the items subsequently abandoned by Mrs Morton at [463] of the Plaintiff's Trial Submissions.
802 T7-18, l 34.
803 Exhibit 298 p. 7.
804 Exhibit 298 p. 7.
805 Defendant's Trial Submissions at [795]; Defendant's Submissions in Reply at [Item 25 of Annexure A].
806 Exhibit 98 p. 261131 [134](c)(ii).

[699] It follows that I do not allow these claims. But I do allow the balance of invoice 11059 ($1,350) as it (as Thallon Mole conceded) relates to the cost of damage to the joinery during the floor upheaval. Given my findings under that heading earlier in these Reasons [that the uplift of the entire timber floor is found to have been reasonable], I will allow this sum as both reasonable and necessary. It follows from this finding that I reject Thallon Mole's submission of sufficient evidence of "poor construction practices" by Hutchinson Builders,[807] such that this defect "ought not be sheeted home to it." [808]

[700] In relation to invoice 11059B: having considered the relevant evidence of Mr White, Mr Mole (and Mr Brooks) about these items (and the parties' respective submissions), with the exception of the costs of $350 for the sanding and recoating of the balustrade for the stair handrails as discussed in the following paragraph, I am not satisfied that any of the items are for defects for which Thallon Mole ought to be held responsible. Rather they appear to be variations outside of Thallon Mole's scope of works. [809]

[701] In relation to invoice 11144: I am not satisfied that these amounts which relate to the installation of the solid blackbutt handrail are a necessary and reasonable response to what appears to be relatively minor cracking in the timber which could adequately be addressed by sanding back the handrail and repainting it with a clear cost. This finding is consistent with the image in the Internal Issman Report which on its face depicts the handrail being wiped down to clear it of dust.

[702] I therefore allow the sum of $1,700 for the BRC invoices.

[703] Mrs Morton also claim the sum of $3,450 for the acoustic panel that Mr White replaced.[810] But I am not satisfied on the evidence that this panel needed replacing. I therefore do not allow this sum. I am also not satisfied that Mrs Morton is entitled to claim the following minor items:

(a) The invoice of $82.10 from Bunnings is said to relate to the cost of obtaining catches for the doors[811] but it has not been established by Mrs Morton that the installation of additional magnetic catches was within the original scope of the Contract.

(b) The sum of $371.66 is claimed by Mrs Morton in respect of an Energex padlock, which is said to relate to item 2.14 in the TSA Defect Report (which is Item 44 in the Scott Schedule).[812] I accept that the evidence established that the pleaded defect, being that the meter store walls was unfinished.[813] But the additional claim that a padlock was required, has not been shown to be within Thallon Mole's scope of work nor is it pleaded

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807 Ibid.

808 Plaintiff's Trial Submissions at [502](c)(iv); Exhibit 98 p. 261131 [134](c)(iii)] (Mr Mole's Evidence).

809 Plaintiff's Trial Submissions at [502](a)-(b).

810 Exhibit 297 [55]-[57].

811 Exhibit 298 p. 7.

812 Ibid.

813 Exhibit 98 p. 261121 [90]; Exhibit 216 p. 260311.

[704] Mrs Morton also claims the sum of $2,590 for the NFC Cladding invoice which Mr White explained related to items 2.40, 2.45 and 2.58 in the TSA Defects List.[814] But her submissions about this claim overlook the following matters:

(a) First, Mr O'Dell's evidence was that the cladding materials were in fact to address the holes that had been created in the copper cladding around the pool.[815] That in fact relates to Item 67. The evidence in respect of this item was that there were holes in the façade because Mrs Morton removed speakers from the scope of work.[816] It follows that I am not satisfied this is a defect.

(b) Secondly, I am not satisfied that Items 2.40 or 2.45 were joinery defects. Item 2.40 relates to item 80(c) in the Scott Schedule which is a painting issue;[817] and there was already a copper light fitting on site as required to fix item 2.45, which regardless is not a pleaded defect.

(c) Thirdly, the work relating to Item 2.58 is said only to concern the pickup and return of the custom clothesline (which relates to Item 85(d) in the Scott Schedule).

[705] It follows that I am not satisfied that any of this invoice (apart from that which relates to the clothesline) is in respect of work inside the scope of Thallon Mole's Contractual requirements. But the evidence is that there was no charge for the clothesline.[818] I therefore do not allow any amount for the NFC Cladding Invoice.

[706] Mrs Morton also claims the sum of $5,056.36 for the Star Scaffolds charges. These costs relate to various things including the acoustic panelling, copper cleaning, and electrical works in the main stairwell. On balance, I am not satisfied that scaffolding was required for all of these items. But I will allow the sum of $2,528.18 as conceded by Thallon Mole.

[707] Finally, Mrs Morton claims the Hutchinson Builders labour costs of $4,883.90 as direct labour costs. Given the above findings about the extent of Thallon Moles' liability for the BRC invoices (and other specific invoices); the lack of specific evidence about the pleaded defects by Mrs Morton, and in light of the detailed summary of the alleged defects by Thallon Mole (including those conceded),[819] I am not satisfied that the defective joinery was as extensive as Mrs Morton's claimed. I therefore find that the labour costs claimed by Hutchinson Builders on this issue ought to be reduced by half.

Quantum Findings re Joinery

[708] By way of summary, I therefore allow the sum of $10,955.50 (incl. GST) for defective joinery on the following basis:

Item	**Quantum**

814 Exhibit 298 p. 7.
815 T9-11, ll 8-14.
816 Exhibit 98 p. 261110 [42](b).
817 Exhibit 216 p. 260319.
818 Exhibit 296 p. 250483.
819 Plaintiff's Trial Submissions at [465]-[497].

	Recoverable
Labour	$2,441.95
Acoustic Panels	$0.00
BRC	$1,700
Flooring Corp	$0.00
Altro	$0.00
Bunnings	$123.46
John Barnes	$620.07
NFC Cladding	$0.00
Star Scaffolds	$2,528.18
Zaval Cleaning[820]	$1,478.75
Margin	$1067.08
Total	**$9,959.50**

J: Sliding Doors

[709] Mrs Morton claims the sum of $28,991.31 (excl. GST) as the necessary and reasonable costs of rectification work arising from the omitted Schucco (sliding) doors.[821] The pleaded claim is underpinned by the following two categories of allegedly defective work:

(a) First, that the drain outlets were incorrectly located; the track recesses were not waterproofed; and the track plumbing was incorrectly set out;[822] and

(b) Secondly, the decals were incomplete; there was a statutory requirement for glazing; and window tinting was a necessary requirement under the Contract.[823]

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820 Given that I am not satisfied of the extent of the joinery defects as claimed, I have allowed half of the amount for cleaning as claimed by Mrs Morton.

821 The issues surrounding the ultimate omission of the Schucco doors D07 and D08 and their replacement with Vitrocsa doors are discussed in some detail under that heading earlier in these Reasons.

822 Item 56 of the Scott Schedule. Thallon Mole conceded that it did not undertake any waterproofing of the door rebate but an amount for this had been allowed as a reduction in the Contract Price. It would be "double dipping" to allow a further claim for damages here.

[710] The issues of decals, glazing and window tinting arising associated with the Schucco Doors are addressed earlier (under that heading) in these Reasons.[824] The real issue is whether the drains were installed correctly.

[711] The Door & Window Schedule in the Contract required each of the Schucco sliding doors to have an "integrated drainage below sill" and "fully concealed frame with in-line drainage below sill". No architectural designs in the Contract detailed how this was to be done. But the Contract required Thallon Mole to "verify all dimensions on site prior to commencing work and/or shop drawings and procurement" and to prepare and submit shop drawings for approval before any procurement and fabrication occurred.[825]

[712] Mrs Morton conceded that Thallon Mole constructed the drainage pipes for door D07 (which faced the rear) within the correct rebate. But she maintained that:

(a) The drainage points for door D08 (facing the pool) were constructed outside of that rebate and were in an inconsistent alignment with what was required under the Contract; and

(b) To rectify this work, Hutchinson Builders needed to core drill new vertical drainage points within the rebate for Door D08 (through the structural slab) and connect these points to existing PVC drainage plumbing installed by Thallon Mole in the garage below.

[713] On the other hand, Thallon Mole submitted that:

(a) It performed the work that it was required to do under the Contract, up until there was a decision to change the scope of work in relation to the doors; and

(b) The additional costs were occasioned by Mrs Morton deciding not only to install the Vitrocsa doors, but to use a different drainage solution to the one Thallon Mole intended to use had it installed Vitrocsa doors.

[714] I prefer Thallon Mole's submissions on this issue as it is supported by the following evidence (which I accept):

(a) The drainage system design for the sliding doors contemplated by the Contract (and as substituted) was for the drains to sit within the rebate in which the doors were located, virtually under the tracks, so as to allow water to drain without being visible;[826]

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823 Item 57 of the Scott Schedule.

824 Under their respective sub-headings in the Schucco Doors section of these Reasons. It is not clear why the full amount was pressed given that Mrs Morton also claimed the Contract Price should be reduced for window tinting and waterproofing. Again, these reductions are discussed under their respective sub-headings in the Schucco Doors section of these Reasons.

825 Exhibit 4 p. 220094, 220141.

826 Exhibit 28 illustrates this by showing a side on view of the doors in the tracks and on the left hand side, a location for an external drain out the side of the subsill; T1-55, ll 5-26; Exhibit 29 shows that in this case, the intention was to use a drain of this kind, but for it to be placed inside the rebate itself, rather than off to the side; T1-56, ll 1-8.

(b) In order for the drainage system to be constructed in the way contemplated, the drains needed to be in place when the slab for the house was poured in mid-2017;[827]

(c) At the time the slab for the house was poured, the Contract specified that Schucco doors were to be installed; and so, the drains were required to be placed in a location that was suitable for those doors;[828]

(d) At the time the drains were placed, it was envisaged that a stainless-steel trough would later be placed over the top and the doors would sit on top of that trough;[829]

(e) By the time the topping slab was poured, the dispute about the doors had arisen, and Mr Cook expected that Mrs Morton would decide to install a Vitrocsa door (which is in fact what occurred); and so, Mr Cook formed the rebate for the doors to the width of that door (180mm) rather than to the width of the Schucco doors (270mm). The reason being that it is easier to cut back and expand a rebate than to make a rebate smaller;[830]

(f) The drain which was to be placed in the rebate was a wholly custom-made drain that was to be manufactured for the Schucco door rebate – with the drains placed in it exactly where they sat in the concrete. In these circumstances the drains did not need to be perfectly straight; and

(g) Had the scope of work not been changed, Thallon Mole planned to connect the drainpipes to the base of the rebate with a single bend, in a manner was consistent with how drains on this type of door are regularly positioned.[831]

[715] On balance, I am not satisfied on the evidence that it has been established that the drainage system for the Schucco doors that was installed by Thallon Mole was defective. This finding is consistent with the concession by Mr Carpenter that the initial placement of the drains was appropriate for the Schucco doors and would have worked. [832]

[716] I therefore dismiss Mrs Morton's claim for damages for Item J.

K: External Defects

[717] Mrs Morton claimed the sum of $23,092.59 (excl. GST) as the reasonable and necessary costs for the external works to be fit for purpose and in compliance with the Contract.[833] Thallon Mole submitted that any damages for this work ought to be assessed at $8,511.92 (excl. GST).

827 T1-54, ll 36-42; Exhibit 23 p. 930.
828 T1-56, ll 28-9.
829 T1-56, ll 36-43.
830 Exhibit 23 p. 932.
831 The drainage systems for the Schucco doors show drainage running out the side of a rebate, rather than out the bottom.
832 T17-25, ll 26-30; T17-26, ll 1-4.
833 Including Hutchinson Builders reasonable margin of 12 percent.

[718] Nine categories of defective items of work were pleaded by Mrs Morton under this heading.[834] It was difficult to reconcile the parties' submissions on this issue but doing my best, these defects are most conveniently dealt with in the table below:

Basis of claim	Amount	Analysis
Direct Labour	$4,988.11	The labour costs claimed are based on Mr White's Weekly Diary for the dates from 13 May 2019 to 19 July 2019 and claimed as apportioned costs for the supervision required for the defective works. Thallon Mole conceded some amount for labour costs were properly incurred but submitted that the costs claimed should be reduced by 50 percent to allow for external defects which were already rectified by Thallon Mole or have not been pleaded or proved by Mrs Morton under this head. I accept Thallon Mole's submission. It is unreasonable to allow all of the amount claimed as I am not satisfied the apportioned costs claimed relate to all of the pleaded external defects claimed by Mrs Morton and that all of these costs were both reasonable and necessary and in compliance with the Contract.[835] Doing the best I can, I will allow 65 percent of the amount claimed. I will therefore allow the sum of **$4547.34** for Hutchinson Labour.
Hire Labour	$2,007.80	
Centenary Landscapes No. 400535751-1	$111.49	Mrs Morton submitted that this cost was for the supply of drainage gravel and top soil around the verge and gas store areas (Items 2.1 and 2.5 of the Hutchinsons Defects List.) Mrs Moton conceded that landscaping items in 58(a) and 63(a) were not completed. I will therefore allow the sum of **$111.49.**

834 The original claim in the Scott Schedule was for $49,242.03 including preliminaries and margin (excl. GST). These defects are particularised at Items 58 to 66 of the Scott Schedule. Thallon Mole ultimately admitted Items 58(a) and (c), 59, 60 (on the basis it is the lawn rather than the pebble court garden) and 65(d).

835 For example, Mrs Morton's reference to the Telstra pit to the southern end of the driveway being lowered (Defendant's Trial Submissions at [864]) is not pleaded as part of the verge works nor is it clear why it is being categorised as such; other defects relied upon by Mrs Morton under this heading (for example 2.10, 2.17 and 2.18) are not pleaded.

Boss Gardenscapes No. INV-3192	$1,828.18	Mrs Morton submitted this invoice was for the supply of turf which was required for the rectification of the footpath verge works; and that these costs were reasonably incurred by Mrs Morton.[836] Thallon Mole's case was confusing – on the one hand it submitted that it paid Boss Gardens for its work but it otherwise admitted that the claim in respect of Item 58 (verge works adjacent to the crossover and main entry were not completed). On balance, I am satisfied that this invoice relates to a pleaded defect, and I will therefore allow the sum of **$1,828.18.**
Mayfair Steel & Aluminium No. 00010936	$3,420	Mrs Morton submitted that this invoice is for the bin and gas enclosure works, which required the gates to the bin and gas store area to match the existing works.[837] I am not satisfied that this claim is part of Mrs Morton's pleaded case or a pleaded defect. I am therefore satisfied that it would be unreasonable to allow this claim.
Mayfair Steel & Aluminium No. 00010994	$780	Mrs Morton submitted that this invoice was for rectification of Item 2.74 and 2.75 of the TSA External Defects List.[838] The invoice refers to the folded channel cover works to the gates and posts. I am not satisfied that this was what was required by either of these items. What was required by Item 2.74 was a mailbox – which on balance I am satisfied had been installed by Thallon Mole.[839]
Paige Stainless No. 61293	$400	The defective work for this work is related to the installation of the grated Paige Stainless Heelguard grate, outside the sliding door external to the guest bedroom.[840] I am not satisfied that this invoice is related to a pleaded defect, and I am therefore satisfied it would be unreasonable to allow this claim

836 The submissions were confusing. Mrs Morton also submitted that was to complete landscaping work at the rear planter Item 66 (Defendant's Trial Submissions at [873]).
837 With reference to Item 3.5 of the Hutchinson Defect List and Item 58 of the Scott Schedule.
838 Items 58(b)-(c) of the Scott Schedule.
839 Exhibit 216 p. 260327.
840 Exhibit 236. Photo 2.29.2 shows this defect, but I am not satisfied it is a pleaded defect.

Paige Stainless No. 61575	$950	Thallon Mole admit this claim. I will therefore allow **$950**.
Aussie Sheet Metal No. 540573	$140.91	Thallon Mole admits the amount claimed. I will therefore allow **$230.47.**
Aussie Sheet Metal No. 540867	$89.56	
Stone Nation no. 1402442	$560	Thallon Mole admits the amount claimed. I will therefore allow **$560.**
Bunnings No. 8199/00169088	$123.46	Thallon Mole does not make submissions as to this invoice but appears to admit the amount claimed. I will therefore allow **$123.46.**
Bunnings No. 8171/01164521	$146.82	This Invoice is said to relate to the supply of five gully pits with grates required for rectification works undertaken in the external works. I am not satisfied this invoice relates to a pleaded defect and I am therefore satisfied that it would be unreasonable to allow this claim.
Bunnings no. 8199/00101882	$388.17	This invoice is submitted to be for the supply of five further gully pits with grates required for rectification works undertaken in the external works, as well as further (unspecified) materials to perform additional external rectification works. I am not satisfied this invoice relates to a pleaded defect and I am therefore satisfied that it would be unreasonable to allow this claim.
Bunnings No. 8103/00198482	$167.79	Thallon Mole does not make any submissions about this invoice and I assume admit this claim. I will therefore allow **$167.79.**
Bunnings No. 8191/01339100	$97.46	This Invoice refers to the purchase of fasteners, gate latches, screws and hinges, clearly required for rectification of gate locks on the front gate entry. I am satisfied this invoice relates to a pleaded defect and should be allowed in full. I will allow **$97.46.**

Mahara No. 1563	$1,615	This invoice relates to a pleaded defect[841] and is for works undertaken to rectify what is described by Mrs Morton as a defective roof gutter, which was undertaken as a result of pooling water outside the bedrooms. Thallon Mole denied this was a construction defect but rather claimed it was a design defect. There is no cogent evidence about this being a construction defect as opposed to the consequence of a design defect. I cannot be satisfied this is a defect attributable to Thallon Mole. In these circumstances I am satisfied that it would be unreasonable to allow this claim.
Zaval Cleaning No. 5988	$3,185	Cleaning costs have been claimed as an apportionment across the different areas. I am satisfied that given my findings about the extent of the defects under this heading that the costs claimed should be reduced by 65 percent **$2,070.25** .

[719] Damages for the external defects are therefore assessed as follows:

Item	**Amount allowed**
Labour	$4,547.34
Centenary Landscapes	$111.49
Boss Gardnescapes	$1,828.18
Mayfair Steel & Aluminium	$0.00
Paige Stainless	$950.00
Aussie Sheet Metal	$230.47
Stone Nation	$560.00
Bunnings	$388.71
Mahara	$0.00
Zaval Cleaning	$2,070.25
Margin	$1282.37
Total	**$11,968.81**

[720] I therefore allow the sum of $13,165.69 (incl. GST) for defective external work.

L: Electrical and Communications

[721] Mrs Morton submitted that various aspects of the electrical and communications work at the house were incomplete or defective. Mrs Morton (through Hutchinson

841 Item 64 of the Scott Schedule.

Builders) engaged Thallon Mole's electrical subcontractor (SEQEL) to return to site to carry out the required works. This work included not only the rectification of items of defective electrical works but also additional work consequent on repairing painting defects throughout the house and the supply of replacement lighting. SEQEL completed some rectification work at no cost but required payment for additional work for which it issued six invoices to Mrs Morton. Mrs Morton claims the sum of $30,500.90 (excl. GST) as damages under this heading.

[722] Thallon Mole submitted that damages should be assessed at $8,274.60 (excl. GST).[842] In doing so, it relied extensively on the evidence of Gabriel Yates (the director of SEQEL) that the further invoices SEQEL issued were for work beyond its original scope.[843]

[723] The most convenient way to deal with this issue is with reference to the various invoices claimed under this head, cross referenced (when possible), to a pleaded defect in the Scott Schedule.

SEQEL Invoice 3105

[724] Invoice 3105 for $3,738.78 (excl. GST) is for the work required to rewire the bedhead lights; and for the switching and installation of the power supply to the pool control box.

[725] Mrs Morton submitted that this invoice related mainly to Item 67(a) but it obvious the work to the bedhead light is a reference to Item 67(b).[844]

[726] It is not in dispute that the bedside lights were installed at a height of only 650mm. Mrs Morton submitted, (and I accept) as a matter of common sense, that this did not allow for any bedside tables and was a completely impractical location for such lights. Thallon Mole was subsequently instructed to reinstall the lighting at a specified height of 1100 mm but refused without a signed variation to do so.[845]

[727] On the other hand, Thallon Mole submitted that the bedside lights were installed in accordance with original plans and a direction from Mr Stewart[846] but for the reasons that follow, I reject that either of these contentions are supported by the evidence:

(a) First, Mr Cook was unable to identify any plan that specified the height for the bedside lighting.[847] Mr Yates referred to a specified height in the plans. But no such plan (or any plan with the height of the bedside lights) was

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842 This concession was made on the basis of a finding that the removal of the Timber Flooring was justified (which for the reasons discussed under that heading I have made). Otherwise, Thallon Mole submitted that the award is limited to $185.16.

843 Mr Yates who was involved with the electrical work at the house. His statement is Exhibit 191.

844 I am satisfied that Item 67(a) (the faulty electrical switch) was corrected by SEQEL without charge; Exhibit 191 [8]-[10](c). Item 67(b) refers to the reposition of bedside GPO's and bedside lamps.

845 Thallon Mole issued a variation claim (V075) in March 2019 claiming that direction amounted to a variation. This variation included the cost of electrical works, plastering and for the painter to repaint the entire wall in each of the four bedrooms

846 During a 'rough-in walk around' with Tim Stewart and personnel from SEQEL.

847 T10-46, ll 1–16.

adduced at trial – or it seems existed. Under cross examination, Mr Yates was not sure that such a plan existed; and

(b) Secondly, Mr Yates originally said that he was present at the house when Mr Stewart conducted a walk through but later admitted he was not with Mr Stewart at this time. Mr Stewart's evidence which I accept was that he never gave any direction as to the height of the bedside lighting.[848]

[728] On balance I am satisfied that SEQEL installed the reading lights and power points at a height of 650mm from the floor without a plan or confirmation from Mr Stewart or Thallon Mole. Common sense dictates that a competent contractor would have ensured that the height of the over-bed lights was such that they could be used for the purpose of night reading.

[729] I am satisfied it was both reasonable and necessary for the height of the bedside lighting to be lifted to ensure the lights were able to be used.

[730] Mrs Morton submitted that it follows that all this invoice should be allowed in full because the only other work in that invoice was the provision of a power supply to the pool control box which was "clearly necessary to deliver the pool specified in the Contract".[849] But this work is not part of Mrs Morton's pleaded case under this heading.

[731] Mr Yate's general but unchallenged evidence was that the further invoices he issued were for work outside the original scope of work. I am therefore not satisfied that the costs of for the installation of the power supply to the pool control box arise as part of any defective or incomplete work.

[732] Accepting Invoice 3105 on its face, I will allow the sum of $1,869 (excl. GST) being half of the amount of the invoice.[850]

SEQEL Invoice 3106

[733] Item 67(c) concerned the removal of all light switches and GPO and reinstatement for the purpose of painting defect rectification. This was not part of SEQEL's original scope of work, but Mrs Morton submitted that this invoice is justified if it is accepted that substantial repainting of the house was required as a consequence of removing the timber flooring.

[734] Given my earlier findings,[851]I will therefore allow invoice 3106 in the sum of $2,779.20 (excl. GST) in full.[852]

SEQEL Invoice 3107

[735] Invoice 3107 for $176.81 (excl. GST) relates to the work required to install a missing GPO in the gym and the connection of the phone outlet for lift services.[853]

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848 T-14-26, ll 3-13; T14-21, ll 15-45.
849 Defendant's Trial Submissions [at footnote 1045].
850 Exhibit 191pp. 260238-260239.
851 Under heading "F: Epoxy and Painting".
852 Exhibit 191 pp. 260240-260241.
853 Exhibit 191 pp .260242-260243.

[736] I will allow half of this invoice as it relates to the telephone for the lift, but the balance relates to an item that is not pleaded and for which I am otherwise not satisfied ought to be allowed.

[737] I will therefore allow $88 for Invoice 3107.

SEQEL Invoice 3108

[738] Invoice 3108 for $305.40 (excl. GST) is for the installation of a power outlet for the blind in living area.[854] This item is not pleaded nor is there any cogent evidence that this work arises from defective or incomplete work under the Contract. I will therefore not allow any amount for Invoice 3108.

SEQEL Invoice 3165 and 3192

[739] Invoice 3165 for $2,375.32 (excl. GST) relates to various electrical works such as the pre-wire of light fittings and sensors to the entrance above the lift lobby, the installation and replacement of various light fittings and the supply and installation of a recessed C-BUS Passive Infrared motion detector.[855] The commission to the CBUS at the front gate is a pleaded defect.[856] But Thallon Mole submitted this commissioning was outside of the scope of work and that otherwise, this work included a supply of power not previously required under the Contract.[857] I am satisfied that CBUS was specified in the Contract for the control of external lighting and that the Contract required an access control system fully integrated with the intercom system and garage door control.[858]

[740] On balance I am satisfied that the full amount of invoice 3165 ought to be allowed.

[741] Invoice 3192 for $2,219 (excl. GST) relates to installation of wall lights, a CBUS sensor, investigating options for the back gates and the replacement of a faulty LED driver installation.[859] Apart from those relating to the front gate CBUS commissioning, I am not satisfied that the rest of this invoice relates to a pleaded defect or incomplete work under the Contract.

[742] I will therefore allow $555 being one quarter of invoice 3192.

KODA Invoices

[743] Part of Mrs Morton's pleaded case under this heading is that there was a defect with the pendant lighting to the master robe and stairway and track lighting to the stairs.[860] It is uncontroversial that a 'halo' ring was missing from each of two pendant lights (main stairwell and main walk-in robe); and that Mr White ordered additional halo rings from KODA lighting (at a cost of $2,192.66 (excl. GST) each and the pendant lights were repaired by SEQEL at no cost.[861]

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854 Exhibit 191 pp. 260244-260245.
855 Exhibit 191 pp. 260246-260247.
856 Item 67(d).
857 Exhibit 191 [10](f).
858 Note 81 of the Wildeisen & Associates Electrical Services Plan required Thallon Mole to fully test and commission the complete system; Exhibit 4 p. 220219 (Project Note 81).
859 Exhibit 191 pp 260248–260249.
860 Item 67(e).
861 Exhibit 296 [62].

[744] Mrs Morton claimed the costs of the two KODAS invoices and for necessary scaffolding (the latter which she included under her Item 54 (copper cladding) claim). For the reasons discussed under that heading earlier in these Reasons, I did not allow that claim. But I accept otherwise that under the Contract, the supply of light fittings and materials is a Prime Cost item and installation is not. So, it follows that any necessary cost of hiring scaffolding to carry out defective work should be allowed.

[745] Thallon Mole submitted that the claim for the KODA invoices is misguided as the evidence is that Mrs Morton was never charged for the ring light that was required.[862] But this submission overlooks that Mr Mole conceded that Mrs Morton had already been billed by Thallon Mole for these lights.[863]

[746] I will therefore allow the sum of $4,385.32 for the two KODA lighting invoices together with the sum of $505 (excl GST) for the cost of one day of scaffolding hire. I have made this allowance because it is reasonable to assume (as I do), that this is enough time for the defective work requiring scaffolding under this heading to have been undertaken.[864]

Labour Costs

[747] Mrs Morton also claimed the sum of $8,886.23 for the costs of Hutchinson Builder's labour under this head. Thallon Mole submitted that if the removal of the timber flooring is found to be justified (as it has been) then allowance for half of this work would be appropriate. But it otherwise submitted that no allowance should be made in respect of these labour costs.

[748] I accept Thallon Mole's latter submission for two reasons:

(a) First, the electrical work was almost entirely undertaken by SEQEL; and

(b) Secondly, as my findings above reveal, I am not satisfied that all of the claims for damages relate to work pleaded as defective or incomplete or is work within the original scope of work under the Contract.

[749] I am satisfied half of the full amount claimed being the sum of $4,443.12 ought to be allowed as the reasonable and necessary supervision costs under this heading.

Other Invoices

[750] Invoices from Cuchi and Superior Electrical, in the sums of $560.45 and $1,260 are said to relate to blinds defects.[865] I am not satisfied that this work is part of any pleaded defect in the electrical section of the claim (or anywhere else). I am not satisfied that payment of the amounts of these invoices ought to be allowed.

[751] Mrs Morton submitted that two invoices from Austep Lighting are submitted to be for the replacement of flickering SHX Downlights.[866] This is not a pleaded defect,

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862 Exhibit 216 [90], with reference to Mr Cook's evidence.

863 T4-92, l 7 to T4-93, l 2; Exhibit 82. The Contract allowed $169,456.84 for supply of electrical items. Progress Claim 26 claimed the remaining $3,000 of that total amount.

864 This figure is calculated as one tenth of the scaffolding invoice at Exhibit 297 p. 270398.

865 Exhibit 298 pp. 9-10.

866 Exhibit 298 p. 10. With reference to Item 1.69 of the Issman Internal Defects Report.

and the referred item is the defective halo ring discussed under the previous heading. I am not satisfied that any amount ought to be allowed for these two invoices.

Overall Amount Allowed for Electrical and Communications

[752] I therefore allow the sum of $21,039.21 (incl. GST) for electrical and communication defects.[867]

M: Tiling and Stonemasonry

[753] Mrs Morton submitted that various aspects of the tiling and stonemasonry at the house were incomplete or defective. She claims the sum of $8,532.06 (excl. GST) as damages for these items. Thallon Mole conceded that aspect of the tiling and stonemasonry were defective but that damages should be assessed at $3,582.81 (excl. GST).

[754] The main points of contention between the parties are the reasonable apportionment of the Hutchinson Labour costs claimed and the payment of two invoices for the supply of material.

[755] The first contentious invoice is Six Star Tiling Inv. 131 for $1,728 (excl. GST). With reference to Mr White's evidence, Mrs Morton submitted that this relates to the necessary tile replacement work performed for the powder room tile walls because of the leak in the ensuite. I reject this submission (and the claim). The evidence referenced does not sufficiently substantiate that claim and the necessity for replacement tiles in the powder room is not a pleaded defect.

[756] The second is from Ace Stone Inv. 13955 for the supply of Bianco Statuario Venato 5mm polished tiles in the sum of $1320 (excl. GST). Thallon Mole submitted that this item was already supplied. Mrs Morton submitted that the stone has not been. There is insufficient evidence for me to resolve this impasse. The onus rests with Mrs Morton. I am therefore not satisfied that this claim should be allowed.

[757] Thallon Mole conceded that some amount ought to be allowed for the Hutchinson Builder's labour costs but submitted that the amount claimed should be reduced by 30 percent. Given my findings above and the number of defects admitted under this head (which although minor, were rectified by Hutchinson Builders), I am satisfied that 90 percent of the amount claimed [$4,569.91(excl. GST)] should be awarded.

[758] I will therefore allow the sum of $5,067.11 (incl. GST) for Tiling and Stonemasonry defects.[868]

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867 That is $19,126.55 (excl. GST). This figure comprises the total of the invoices I have allowed under this heading plus an additional one from Bunnings (of $77.32 - conceded in the Plaintiff's Trial Submissions at [544]) – totalling $17,077.28 plus the 12 percent builders margin (of $2,049.27) on that sum.

868 Or $4,606.47 (excl. GST). This figure comprises the sum of $4,112.92 plus a 12 percent margin of $493.55.

N: Residual Labour Not Allocated To a Particular Claim

[759] The final claim from Mrs Morton is an ambit claim for $73,229.30 (excl. GST) for unallocated labour costs.[869] This sum is alleged to comprise of the following:

(a) Hutchinson Builders Direct Labour in the amount of $52,887.43 (excl. GST); and

(b) Other Hire Labour in the amount of $20,341.97 (excl. GST).

[760] Alternatively, Mrs Morton submitted there is sufficient evidence for the Court to apportion these labour costs in accordance with the total amount of damages awarded to Mrs Morton in respect of the costs incurred (acknowledging such a method is inexact).[870]

[761] Thallon Mole submitted that no amount should be allowed for these costs as they have not been proved and were otherwise not reasonably incurred.

The Evidence Supporting the Residual Labour Claim

[762] The premise underpinning Mrs Morton's claim is that these were labour costs that cannot be attributed to any particular defect but are recoverable because Mr White and Mr Diamond's evidence is that they were reasonably incurred as part of the overall rectification work carried out at the house.[871] For example:

(a) The Hutchinson Builders direct labour claimed is on the basis of Mr White's evidence that he was on-site full-time (five days a week, hours a day) and oversaw all of the remedial works as a supervisor; and that the total cost of his supervision was $34,894.84 (excl. GST);[872] together with Mr Steele's supervision and site foreman services (in Mr White's absence) of $14,497.69 (excl. GST);[873] and

(b) The hire labour not been allocated to any particular defect is claimed on the basis that there is "sufficient causal connection" between the widespread nature of the defects identified to support the award of these costs as damages.[874]

[763] The methodology for the calculation of this part of the claim (and indeed all of the labour costs claimed in this case) is premised on the following:

(a) First, Mr White making an estimate of the time that was spent by labourers on site on each category of defect by making an estimate of the time associated with performing all the major categories of work that was done;[875]

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869 Including the 12 percent margin.
870 That is, excluding the claims in Parts A to E of the Scott Schedule.
871 Exhibit 296 [92]-[96]; Exhibit 305 pp. 270301-270310.
872 This is the total of the amount of his costs claimed in respect of particular defects of $31,156.11 (excl. GST) plus the 12 percent margin of $3,738.73 (excl. GST).
873 Including the 12 percent margin.
874 Defendant's Trial Submissions at [923].
875 T16-85, ll 16-20.

(b) Secondly, Mr Diamond then, by reference to the invoices that were issued, performed a mathematical exercise that simply multiplied out each invoice by that estimate;[876] and

(c) Thirdly, Mr Diamond then calculated a value for the labour that could not be allocated to a particular task.

[764] The necessity and justification for such an approach is found in the evidence of Mr White as follows:

(a) He did not keep detailed records regarding the number of men who worked on what defect; and

(b) He cannot show with certainty the costs of each defect in terms of the Hutchinson direct labour and hire labour; and

(c) A key reason why not all labour costs were able to be allocated accurately to particular defect work was because a "time and motion" administrator was not engaged; and whilst that would have ensured detailed records of labour and what work had been carried out, it would have added significant cost to the work.

[765] I accept that any exercise to calculate such costs will be imperfect. But the true extent of the unreliability of the broad-brush approach taken by Mr White and Mr Diamond was revealed when the following three matters came to light under their respective cross examinations: [877]

(a) First, not all of the time in respect of the three invoices to Mrs Morton can be accounted for;

(b) Secondly, even allowing for the allocation of the tiling invoices, only 50 percent of the labour invoiced on seven out of 58 invoices can be accounted for; and

(c) Thirdly, in total, half of the labour costs incurred by Hutchinson Builders cannot be accounted for.

Analysis of the Residual Labour Claim

[766] It is well established that the lack of precision or difficulty in calculating damages does not nullify the right to damages or the Court's assessment of those damages.[878] In these circumstances a "broad brush approach" can be taken.[879]

[767] But of course, there must be some evidentiary basis underpinning the claim so the court can be satisfied (on balance) that the amount claimed is substantiated. Despite some concern about the overall approach to the allocation of labour costs in this case, I accept there cannot be any great precision. And as my Reasons reveal

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876 Exhibit 305.

877 Under cross examination, a document reproducing the work that was done by Mr Diamond was shown to both Mr Diamond and Mr White (MFI-R). A slightly amended copy of that document, which allocates the invoices in respect of tiling and stonemasonry (which page was missing from a version of the affidavit), was attached to the Plaintiff's Submissions in Reply.

878 *Fink v Fink* (1946) 74 CLR 127, 143 (per Dixon and McTiernan JJ).

879 *Queensland Ice Supplies Pty Ltd v Anco Australasia Pty Ltd* [2000] QSC 72, [26] (per Chesterman J) with reference to *Commonwealth v Ammann Aviation Pty Ltd* (1991) 174 CLR 64, 83, 102 ,125, 153.

elsewhere (under the relevant headings in the Alleged Defects and Omission section), despite the obvious weaknesses in the labour costs calculation, I have adopted a practical and reasonable approach by allowing some labour costs where defective work has been proven and shown to have been reasonable and necessary.

[768] But the difficulty with all of the residual costs claimed is not necessarily a lack of precision but rather that because the costs are not allocated to a particular defect it is difficult to ascertain how they are all causally connected to the cost of rectification. This is particularly so when Mrs Morton has not been successful on all of her claims for defective work.

[769] Overall, I am not satisfied to the requisite standard that there is sufficient direct (or indirect) cogent evidence to support Mrs Morton's submission that "a large part" of the residual costs that have not been directly allocated to a particular defect claim were reasonably incurred in carrying out the rectification work.

[770] Doing the best, I can, and adopting a broad-brush approach, I am satisfied that a small amount (five percent of the overall amount claimed) should be allowed for the various unaccounted supervisory roles and some minor unparticularised but general defects.

[771] I therefore allow the sum of $4027.62 (incl. GST) for residual labour costs.[880]

Summary of Mrs Morton's Defects and Omissions Claim

[772] The table below summarises my findings under this section as follows:

Cost of Correcting Each Defect or Omission (incl. GST)[881]	
A. Pool fence/balustrade (spigots) and Newbolt Street balustrade (cap handrail)	$25,341.51[882]
B. External Waterproofing	$54,505.68
C. Miscellaneous	$nil
D. Preliminaries for A to C	$18,244.23
E. Kitchen Leak/Copper Stain	$4,296.87
F. Painting & Epoxy	$34, 824.52
G. Timber Flooring	$60,281.99
H. Driveway	$27,330.93
I. Joinery	$10,955.50
J. Sliding Doors	$nil
K. External	$13,165.69
L. Electrical & Communications	$21,039.21

880 $3,661.47 (excl. GST)
881 These figures include any builder's margin claimed and allowed.
882 Claim for Newbolt Street balustrade only allowed.

M. Tiling and Stone Masonry	$5,067.11
N. Residual Labour	$4,027.62

[773] I therefore assess Mrs Morton's claim for defective and incomplete work at $279,080.86 (incl. GST).

Overview of Claims that Emerge from my Findings

Thallon Mole's Claim

[774] Thallon Mole is entitled to payment of the following amounts under the Contract:

(a) First, the sum of $55,517.74 (incl. GST) together with simple interest under Condition 20.1 of the Contract from 29 March 2019 until the date of the Final Orders; and

(b) Secondly, the sum of $2,390.85 (incl. GST) for variation VO59, together with simple interest calculated under Condition 20.1 of the Contract, from the date payment of this invoice was due until the date of the Final Orders.

Mrs Morton's Claim

[775] Mrs Morton is entitled to payment of the following amounts under the Contract:

(a) First: liquidated damages in the sum of $5,100;[883] and

(b) Secondly: damages for incomplete and defective work in the sum of $279,080.86 (incl. GST) together with interest pursuant to s 58 of the *Civil Proceedings Act* from the date the various invoices comprising this figure became due and payable until the date of the Final Orders[884] less the sum of $220,997.66 being the notional unpaid balance of the Contract Price.

[776] I have arrived at the figure of $220,997.66 as the relevant "notional unpaid balance of the Contract Price" by deducting the undisputed amount of Progress Claim 25 ($55,517.74) that I have found due and owing to Thallon Mole from the unpaid balance of the Contract Price as I have found it to be ($276,515.40).[885]

[777] In bringing in the Final Orders it is relevant to note that under Condition 26.1(c) of the Contract, Mrs Morton is entitled to set off any payment she is found to owe Thallon Mole against any amounts assessed as being owed to her following Termination.

[778] I am satisfied that the notional unpaid balance of the Contract Price must be deducted from the amount of $277,080.86, for two reasons:

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883 This is the sum of $16,100 less the amount of $11,000 allowed for Thallon Mole's liquidated damages claim.

884 The applicable pre-judgment rate is the nationally uniform rate prescribed under District Court of Queensland Practice Direction Number 6 of 2013. The parties agreed that these interest calculations could be undertaken by them after the delivery of Reasons

885 For obvious reasons, it is not necessary to include the amount I have allowed for VO59 in these calculations (as it would lead to the same balance of $220,997.66) because it would be added to the unpaid balance – and to the amount I have found to be due and owing.

(a) First, the measure of damages in Contract is to put the claimant in the position as if the Contract was performed as far as money can do.[886] If the Contract was performed in this case, Thallon Mole would have completed the house and Mrs Morton would have paid the Contract Price;[887] and

(b) Mrs Morton cannot have both the reduction in the Contract Price and have Thallon Mole pay for the works she had completed and or rectified by someone else (being work she had not paid Thallon Mole for). That is, (as Thallon Mole submitted) - effectively double dipping.

Retention Monies

[779] Mrs Morton has a right of recourse to the retention moneys to pay amounts due to her including to meet any damages for defective works as set out in the "MORTON ADDITIONAL CONTRACT CONDITIONS" as follows:

> **RETENTION MONEYS**
>
> 1.1 **Purpose**
>
> Retention moneys are for ensuring the due and proper performance of the Contract.
>
> 1.4 Recourse to Retention Moneys
>
> The Owner may have recourse to retention moneys where –
>
> (a) the Owner has become entitled to exercise a right under the Contract in respect of the retention moneys; and
>
> (b) the Owner has given the Contractor 5 day's written notice of the Owner's intention to have recourse to the retention moneys; and
>
> (c) days have elapsed since the notice was given.
>
> **1.6 Recourse for Unpaid Moneys**
>
> Where, the Contractor fails to pay the Owner an amount which the Owner assesses to be due and payable under the Contract, the Owner may have recourse to retention moneys, if any, and, if those moneys are insufficient, any deficiency remaining may be recovered by the Owner as a debt due and payable.

[780] Mrs Morton has established various contractual rights to damages which are due and owing. I am satisfied that her pleading acts as a notice of her intention to have recourse to the retention moneys and that this right survived termination.[888] I am satisfied that Mrs Morton is entitled to recourse to the retention moneys to satisfy the amount assessed as due and payable under the Contract (to be calculated in accordance with paragraph 775 above). This will leave a balance of retention moneys sitting in trust.

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886 Mrs Morton accepted this as the appropriate measure of damages: Defendant's Closing Reply Submissions at [299].

887 *Robinson v Harman* (1848) 1 Exch 850, 866; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [13].

888 *Southern Cross Constructions (NSW) Pty Ltd (Administrators Appointed) v Bucasia Pty Ltd* [2012] NSWSC 1419, [5], [22], [27].

[781] Condition 1.5 of the Contract proved that "within 6 months of the date of Practical Completion, the Owner will release to the Contractor any balance retention moneys, if any, then held by the Owner."

[782] In the present case I have found that Practical Completion was not achieved by Thallon Mole. Mrs Morton appeared to suggest that in such a case Thallon Mole has no entitlement to any of the withheld retention moneys. If that is her submission, I reject it as it is inconsistent with the natural and ordinary reading of the Contract a whole. Additional Condition 1 does not deal with the situation where Practical Completion has not been achieved. But the purpose of the clause is expressly stated to be to ensure the due and proper performance of the Contract – with Condition 1.6 expressly providing the circumstances in which Mrs Morton may have recourse to the retention monies. That is to cover amounts found to be due and payable under the Contract. It does not contemplate Mrs Morton having recourse to the balance of the retention monies once this exercise has been undertaken. The Contract contemplates that the balance remaining should then be released to Thallon Mole. An alternative reading would lead to an absurd result with Mrs Morton receiving a windfall. This conclusion is consistent with the fact that parties included the amount of retention monies as part of the monies paid under the Contract.

Costs

[783] Under s. 15 of the Civil Proceedings Act and UCPR r 681, costs are in the discretion of the court, but follow the event, unless the court orders otherwise. The authorities establish that "the event" is not determined merely by reference to the overall result or outcome but is to be determined by reference to "the events or issues, if more than one, arising in the proceedings."[889] Of course, the purpose of an order for costs is not to punish the party against whom it is made. It is to compensate the successful party for the expense that it has incurred in bringing or defending the proceeding.[890]

[784] With these principles in mind, I urge the parties to attempt to agree the appropriate costs orders that follow from: the relevant legal principles applied in the context of my findings; and bearing in mind that on any view they have both enjoyed some success and encountered some defeat with aspects of their case; and that the costs expended in this case are disproportionate to the value of their respective claims in a number of instances.

[785] These factors suggest that the appropriate order as to costs is that each party bear their own costs. However, there may be other factors that warrant another order being made. I will therefore allow further submissions to be delivered addressing this issue.

Final Orders

[786] By 4.00pm Thursday 26 October 2022, I direct that the parties:[891]

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889 *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd* (No 3) [2003] 1 Qd R 26, 60; See too the observations of Muir JA in *Alborn v Stephens* [2010] QCA 58, [8].

890 *Oshlack v Richmond River Council* (1998) 193 CLR 72.

891 These documents are to be emailed to my Associate.

(a) Bring in Final Orders including relevant interest calculations and provision for the release of the Retention Monies consistent with my findings;[892] and

(b) Exchange and deliver written submissions as to costs (if necessary), no longer than four pages.

892 These orders should include an order that Thallon Mole's quantum meruit claim is dismissed and that that Mrs Morton's claim for specific performance is dismissed. Mrs Morton sought specific performance of obligations to provide certificates and "as built "drawings for the mechanical, gas, and hydraulics services, but she did not press for any order for specific performance. The evidence was that the BCC plumbing certificate was eventually provided to Mrs Morton (Exhibit 292); and a compliant Form 16 was tendered by Mrs Morton at trial (Exhibit 293).