

AUSTRALIA / JUDGMENT

Schmuelly v Elrob Construction Group Pty Ltd (No 3)

[2025] NSWSC 118**COURT**

Supreme Court

DECIDED

06 March 2025

BEFORE

Rees J

CASE / FILE NUMBER

2022/254588

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Medium Neutral Citation:	Schmuelly v Elrob Construction Group Pty Ltd (No 3) [2025] NSWSC 118
Hearing dates:	3, 4 February 2025
Date of orders:	6 March 2025
Decision date:	06 March 2025
Jurisdiction:	Equity - Commercial List
Before:	Rees J
Decision:	Damages awarded.
Catchwords:	CONSUMER LAW — misleading or deceptive conduct — whether builder misrepresented his experience in building luxury homes — represented this was his “passion” — whether representation made — whether representation misleading — “puffery” — principles at [16]-[18]. CONTRACTS — repudiation — principles at [99]-[101] — building ‘stalls’ for a year — owner indecisive about windows and doors quote — builder requests shop drawings for layout and joinery, which are not forthcoming — owner seeks legal advice but does not tell builder of complaints — no response to builder’s follow ups — builder advises intention to remove scaffolding — no reply — scaffolding removed. DAMAGES — rectification of defects — whether entitled to costs to complete works — mitigation — principles at [91]-[97] — overpayments of milestone payments — overcharged variations.

Legislation Cited:	Civil Procedure Act 2005 (NSW) s 100 Competition and Consumer Act 2010 (Cth) ss 2(1), 236, 237, 243 Australian Consumer Law Home Building Act 1989 (NSW), ss 18B, 18BA(1)(b)
Cases Cited:	Aslan v Stepanoski [2022] NSWCA 24 Australian Competition and Consumer Commission v Coles Supermarkets (2014) 317 ALR 73; [2014] FCA 634 Australian Competition and Consumer Commission v Telstra Corporation Ltd (2007) 244 ALR 470; [2007] FCA 1904 Australian Competition and Consumer Commission v We Buy Houses Pty Ltd [2017] FCA 915 Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited (2007) 233 CLR 115 at 135; [2007] HCA 61 Koufos v C Czarnikow Ltd (The Heron II) [1969] 1 AC 350 Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623 McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457 Mediation & Online Dispute Resolution Operating Network P/L [2022] NSWSC 5 Owners SP 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067 Shevill v Builders Licensing Board [1982] HCA 47; (1982) 149 CLR 620 TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd (1963) 180 CLR 130 The Owners – Strata Plan No 89074 v Ceerose Pty Ltd [2024] NSWSC 1494 Watson v Foxman (1995) 49 NSWLR 315 Wenham v Ella (1972) 127 CLR 454 Wesiak v D&R Constructions (Aust) Pty Ltd [2016] NSWCA 353
Texts Cited:	Damien Cremean, Micheal Whitten, Micheal Sharkey, Brooking on Building Contracts (6th ed, 2020, LexisNexis)
Category:	Principal judgment
Parties:	Dror Schmuely (Plaintiff) Elrob Construction Group Pty Ltd (First Defendant) Elia Boujaoude (Second Defendant)
Representation:	
Counsel:	M Pesman SC (Plaintiff)
Solicitors:	Colin Biggers & Paisley (Plaintiff) Elia Boujaoude (Second Defendant in Person)
File Number(s):	2022/254588

JUDGMENT

HER HONOUR: This is a claim for damages in respect of incomplete and defective building work. The plaintiff, Dr Dror Schmuely, seeks damages for breach of contract from builder, Elrob Construction Group Pty Ltd. The plaintiff also brings a claim for misleading and deceptive conduct in breach of section 236 of the Australian Consumer Law against the builder and its sole director, Elia Boujaoude. Mr Boujaoude is said to have misled the plaintiff as to the builder's experience in residential construction. But for those misrepresentations, it is said that the plaintiff would not have entered into the building contract at all.

The plaintiff and his wife, Louise Schmuely, gave evidence together with the plaintiff's solicitor, Gregory Begaud. The plaintiff also relied on the expert evidence of durability consultant Jonathon Dyson, building consultant Geoffrey Matley and quantity surveyor Adam Arden. All but the solicitor were cross-examined. Dr Schmuely was obviously unhappy with the builder and gave long, non-responsive answers. He did not have good recall of how events unfolded. That is not to say that his answers were not given honestly.

Mr Boujaoude was self-represented and appeared, with leave, for the builder. The defendants tendered various documents. They sought leave to rely on a large number of affidavits and expert reports served the day before the trial began. I refused leave: *Schmuely v Elrob Construction Group Pty Ltd (No 2)* [2025] NSWSC 26.

Finding a builder

The plaintiff and his wife bought a property in Bayview. In April 2016, the couple obtained development consent for alterations and additions to the existing building. The works involved the partial demolition of the existing dwelling, construction of a new lower and upper ground floor, together with a swimming pool and spa.

Attention turned to finding a builder. In June 2017, a friend recommended Elrob Construction Group. The plaintiff called Mr Boujaoude to see whether the builder could undertake the project and to the quality of a "high-end" house. Mr Boujaoude said, "Yes, I specialise in luxury high end homes. High end homes are my passion." The plaintiff sent the approved plans to Mr Boujaoude.

In July 2017, the plaintiff met Mr Boujaoude on site. They continued their discussions at a local café. Mr Boujaoude showed the plaintiff some homes on his iPad, which he said that he had recently constructed. Some of the homes appeared to be featured in magazines. Mr Boujaoude said, "I specialise in high-end homes with superior workmanship and finishes." The plaintiff sent further plans and reports to Mr Boujaoude.

The builder submitted a quotation. On 7 September 2017, the plaintiff met with the builder again. The plaintiff advised that he and his wife wanted to see other projects that Mr Boujaoude had built, that were similar to their project. Mr Boujaoude said, "I have built many high-quality luxury houses. This is my passion. I have some houses that I can show you." On 13 September 2017, Mr Boujaoude texted the plaintiff, suggesting that they meet at a property at Blakehurst, following which he would take them to Dural and Kenthurst.

On 20 September 2017, the couple met Mr Boujaoude at his Granville office and followed him to the Blakehurst property. The couple looked at the exterior and interior, but considered that the house was not similar to what they wanted to build; it was a basic project home with "low-end" finishes rather than a bespoke designer home.

The couple then followed Mr Boujaoude to a property in Dural. Mr Boujaoude said there was no one home and, unfortunately, they could not go inside. They viewed the property externally and Mr Boujaoude described the work he had done, "I built this beautiful house at Dural. I installed very high-quality finishes, in particular, the kitchen and bathrooms are spectacular. I built a panic room in this house. The joinery I built in the kitchen was just amazing. I designed the gate myself. ... I also did the landscaping for this property."

The couple were impressed with the Dural house, which they considered to be a "high-end" house, similar to what they had in mind for their new house. Mr Boujaoude then took the couple to another property in Kenthurst, but this was a vacant block of land. Mr Boujaoude described the high-end luxury home he was going to build there. The couple then met a gentleman called "Donnie", who said he had owned the Dural house and now owned the Kenthurst land. "Donnie" described Mr Boujaoude as a fantastic builder, "He is the best. I would not use anyone else."

Mr Boujaoude gave the couple an address for another property to look at in Palm Beach. The couple went to the address but were unable to find the property. On 3 October 2017, the plaintiff sent a text message to Mr Boujaoude, "we couldn't find that house you talked about, could you please text me the address ..." Mr Boujaoude replied, "sorry I gave you the incorrect address. It's been over 10 years. The address is 26 Ocean Rd Palm Beach not Beach Rd. Let me know what you think." The couple went to 24–26 Ocean Road, Palm Beach and viewed the property from outside. The plaintiff said that, although the building at that address was different conceptually to their house, it was "high-end" and of a substantial size, similar to what they had in mind for their house. It included sandstone and other elements that they wanted.

The plaintiff said he relied on the representations made by Mr Boujaoude in respect of his building experience and capacity, including that he had built the Dural and Palm Beach properties. Had he known that Mr Boujaoude did not build these properties, he would not have entered into the building contract.

Misleading and deceptive conduct

The plaintiff submitted that Mr Boujaoude had no involvement with the Palm Beach property and performed only minor renovation works at Dural. Had the plaintiff known the true position, he would not have executed the building contract at all. While Mr Boujaoude denied making the representations, he accepted that, if made, they were made in trade or commerce. The plaintiff submitted that the representations were made by Mr Boujaoude on his own behalf and on behalf of the builder. Alternatively, if the representations were made only by the builder, then Mr Boujaoude was a person relevantly “involved” in the contravention: s 2(1), Australian Consumer Law. As such, the plaintiff submitted that he was entitled to damages and ancillary relief: ss 236, 237 and 243, Australian Consumer Law.

The plaintiff put his claim on a basis of a ‘no-transaction’ case, that is, but for the misrepresentations, the contract would not have come into existence: In the matter of Mediation & Online Dispute Resolution Operating Network P/L [2022] NSWSC 5 at [11]. His loss should be calculated on the basis that the relevant counterfactual is he would have retained a competent builder to construct the works for about the same price as that agreed with the builder (there being no evidence that was not possible). The plaintiff’s damages were \$3,658,792.50 (being the figure to rectify the defective works and complete the project) less the contract sum, being \$2,370,022.50. Alternatively, the plaintiff claimed damages equivalent to the amount paid to the builder (\$1,109,480.82) on the basis that the amount has delivered no value to him at all.

The defendants denied soliciting the plaintiff’s business by misrepresenting the extent of building works undertaken at the three properties. The plaintiff had relied on a recommendation made by his friend, and not anything Mr Boujaoude had said. As for the Dural property, the plaintiff was denied access by the owner and could not have been misled by the defendants as to the fixtures and finishes, when he never went inside. The plaintiff was also aware that the Dural property was a ‘knockdown and rebuild’ project and constructed to a higher standard than the less expensive ‘renovation and addition’ project for which the parties contracted. Further, Mr Boujaoude never claimed he was responsible for completing the residential building project at Palm Beach. The address he gave the plaintiff was for a commercial restaurant.

Consideration

The first step in considering whether a person has engaged in contravening conduct is: was the representation made. Where the representation was oral, “it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases ... the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition”: *Watson v Foxman* (1995) 49 NSWLR 315 at 318 (McClelland CJ in Eq).

A representation may be “puffery”, as described by Gleeson J in *Australian Competition and Consumer Commission v We Buy Houses Pty Ltd* [2017] FCA 915 at [64]-[65]: (citations omitted)

Whether a representation constitutes puffery or marketing exaggeration and, consequently, is not actionable turns on the particular facts considered in light of the ordinary incidents and character of commercial behaviour. A claim will not be regarded as puffery if there is a definitive statement as to a characteristic or consequence of the claim.

By corollary, a characteristic often attributed to puffery is that it is “incapable of being proved to be correct or incorrect” ...

The second step is to consider whether the representation made was false, misleading or deceptive or likely to mislead or deceive, this being a “quintessential question of fact”: *Australian Competition and Consumer Commission v Telstra Corporation Ltd* (2007) 244 ALR 470; [2007] FCA 1904 at [14]-[15] per Gordon J. In attending to this task, “It is necessary to view the conduct as a whole and in its proper context”: *Australian Competition and Consumer Commission v Coles Supermarkets* (2014) 317 ALR 73; [2014] FCA 634 at [41] per Allsop CJ.

The alleged misrepresentations were said to have been made by Mr Boujaoude on 7 September 2017, followed by his text messages on 13 September 2017 (arranging the inspection of Blakehurst, Dural and Kenthurst) and 3 October 2017 (providing the address for Palm Beach). As such, Mr Boujaoude’s earlier descriptions of his expertise may be put to one side. By his oral representations and text messages on these dates, Mr Boujaoude is said to have represented that he had built many high-quality luxury homes and that this was his “passion”. Further, he represented that he had built the properties at Blakehurst, Dural and Palm Beach. For the Dural property, Mr Boujaoude also represented that he had installed very high-quality finishes and that the kitchen and bathrooms were “quite spectacular”.

Whether building high-quality luxury homes was Mr Boujaoude’s “passion” or not is unknown. Nor does a statement that something is your “passion” amount to a representation that you are any good at it. Such a representation falls into the category of “puffery”, being “incapable of being proved to be correct or incorrect”: *ACCC v We Buy Houses* at [65]. I accept that, when said in combination with the statement that Mr Boujaoude had built many high-quality luxury homes, it could be taken as a representation that this was his particular area of interest and professional focus, and he had expertise in this field. The plaintiff was not misled by such a representation; he was not prepared to engage the builder on this basis but asked to see examples of the builder’s work.

There is no evidence whether Mr Boujaoude built the house at the Blakehurst property or not. Nor was the plaintiff misled by a representation that the builder had built the house. Rather, the plaintiff considered that the Blakehurst house was not similar to what the couple wanted to build, being a basic project home with “low-end” finishes. The plaintiff was not thereby induced to enter into the building contract. If anything, the attributes of the Blakehurst property suggested that the builder may not be the right person for their job.

So far as the Dural property is concerned, Mr Boujaoude does appear to have been substantially responsible for that build. Documents obtained by the plaintiff's solicitor from the council indicate that, in 2006, Mr Boujaoude's then company, Elrob Corporation Pty Ltd, undertook "structural improvements to an existing residential dwelling" in Dural. The work involved rendering and painting the existing house, erecting a double garage, front fence, gates, cabana room for a swimming pool, retaining wall, rural shed and a tennis court. But Elrob Corporation's quotation for the work totalled some \$1.2 million, and appears to have included a substantial renovation of the existing house as well. Whether the Dural house had high quality finishes, including a "spectacular" kitchen and bathrooms, is not known. Thus, nor can it be said that a statement to that effect was misleading.

In 2009, the Master Builders' Association of NSW published a magazine, "Excellence in Housing Awards Annual". In the category "House additions/alternations/renovations - \$550,001-\$700,000", Elrob Corporation was included for a project undertaken with Tri-Star Professional Services Pty Ltd, which appears to be the Dural property. (It looks the same as the photograph of the house obtained by Mrs Schmuely from a real estate website.) An occupation certificate was issued for the Dural project in February 2013 and provided by the certifier to Mr Boujaoude.

I note that the owner of the Dural property is referred to in the documents as Don or "Doms" Sarkis. Either way, it is likely that the person who introduced himself to the couple as "Donnie" was, in fact, the owner of the Dural property. It would appear from "Donnie's" comments to the couple that he was happy with the builder's work. In sum, I am not satisfied that any representation in respect of the Dural property was misleading.

So far as the Palm Beach property is concerned, documents obtained by the plaintiff's solicitor indicate that the builder did not construct the building at 24-26 Ocean Road, Palm Beach. The approved drawings depict a substantial development with basement car parking, retail / commercial on ground level and nine townhouses, in a "shop top housing development". That building was constructed by AJ&AM Gleeson trading as "Ant Building" in 2004.

In October 2006, Mr Boujaoude's then company, Elrob Corporation Pty Ltd, entered into a contract with the owner of a café in the Palm Beach development to fit-out the café for \$177,980. Presumably, this was one of the ground floor retail spaces. The photograph obtained by Mrs Schmuely from website RP Data depict an indoor/outdoor restaurant space.

It is noteworthy that Mr Boujaoude gave the plaintiff the address for 26 Ocean Road, Palm Beach, not the whole development at 24-26 Ocean Road, Palm Beach. Mr Boujaoude's text message did not represent that he had built the development. I am not satisfied that this representation was made.

This claim fails.

The building contract

On 28 October 2017, the plaintiff and the builder executed the standard Residential Building (BC4) contract for the extension and alteration of the Bayview residence, involving demolition of part of the house and building a double-storey full brick lower and upper ground floor with swimming pool and spa. Annexed to the contract were the approved plans, which comprised architectural house plans (3 pages) and engineering plans and details for footings, stairs, slabs and an in-ground pool.

The builder agreed to perform building works at the property for \$1,288,770 plus GST, subject to adjustments for inter alia variations. The owner was obliged to provide written instructions to the builder, where required, in a timely and proper manner so as to avoid delay to the works. This specifically related to variations, directions and instructions in relation to the work under the contract: cl 2(d).

The builder was required to proceed with due diligence and achieve practical completion within 265 days of the contract date, being 13 November 2018, subject to any valid claims for extension of time: cl 10(b). On practical completion, a defects liability period commenced, being 13 weeks. If the builder failed to bring the works to practical completion by this date, as extended, then the builder was to pay liquidated damages: cl 10(c).

Clause 11 dealt with delays and extensions of time. In particular, cl 11(a) provided that the builder must receive a fair and reasonable extension of time if the progress of the works was delayed by:

“v) any act, default, delay or omission on the part of the Owner including, but not limited to, providing instructions, making payment or doing a thing necessary to allow the works to proceed (including signing instructions concerning variations);

...

vii) an instruction by the Owner to stop the works;

In that event, the owner was obliged to pay compensation to the builder for the delay: cl 11(f).

The contract provided for progress payments on the completion of milestone stages of the works but for “minor omissions, incompleteness or defects”: cl 20. A claim could be made when the relevant milestone was 95% complete: s 4, Sch 2. All payments to the builder were taken as payments on account: cl 20(e).

In the event of a dispute, the party asserting the existence of a dispute was obliged to give written notice of the dispute: cl 26(b). The parties were obliged to meet and seek to resolve the dispute within 10 days of the notice, or to agree to methods of resolving the dispute by other means such as mediation, expert determination or arbitration: cl 26(c). In the absence of such a meeting, a party was not entitled to terminate the contract: cl 26(e).

Subject to compliance with the dispute resolution clause, the building contract provided that the owner or the builder may terminate the contract. As to termination by the owner, cl 28 provided that the owner was entitled to terminate the contract if the builder failed to remedy a default specified in a notice within 25 days of the notice. The owner could terminate the contract on the basis inter alia that the builder had failed to proceed with the works with due diligence or in a competent manner, the builder had wholly suspended carrying out the works before practical completion, the builder refused or persistently neglected to remedy defective work, or the builder stated in writing that they were unable or unwilling to complete the works or abandon the contract: cl 28(a). The owner could also terminate the contract in circumstances provided by the general law: cl 28(b). In the event that the owner terminated the contract under cl 28(a) and engaged another builder to carry out the works, the owner was entitled to recover from the builder the costs of the new builder to the extent that it exceeded the amount otherwise payable under the contract: cl 28(c).

Work begins

The builder commenced work. In January 2018, the builder issued an invoice for completion of the first milestone, being “Completion of Demolition Works & Site Prep”. There is no dispute that the builder was entitled to this payment, which was paid.

In May 2018, the builder issued an invoice for the completion of the second milestone, “Completion of Ground Slab and Steel Structure”, which was also paid. The plaintiff now contends that the builder was not entitled to that payment.

In August 2018, the builder issued an invoice for the completion of the third milestone, “Completion of House framing and brickworks”, which was also paid. The plaintiff contends that the builder was not entitled to this either.

The builder also issued a series of variations, albeit not in accordance with the provisions of the contract. Notices of variation were generally issued after the work had been done, accompanied by an invoice for the work. Most of the variations were paid.

By 13 November 2018, the works were not substantially complete. The remaining milestones were the fourth milestone, “Completion of Roof cover / Electrical & Plumbing Rough-In”, and the final milestone, “Completion of Internal & External finishes”.

The plaintiff was not familiar with the building process. He prepared hand drawings of the internal layout and joinery, which he gave to the builder. The plaintiff asked the builder to use these drawings as shop drawings for the joinery. By mid 2019, however, the builder said that he could not work with the drawings and needed something more specific. The builder wanted the plaintiff to hire a designer or architect to prepare shop drawings. Presumably, these details were necessary to complete the fourth milestone, which included “Electrical & Plumbing Rough In” and the final milestone, “Completion of Internal & External Finishes”.

Problems emerge

On 15 July 2019, the plaintiff received an email from the home building warranty insurer, “your builder has advised us that the building work covered by [the policy] is ready for your final occupation or possession. We have been advised that the project has reached practical completion ...”. The period of insurance cover for loss or damaging arising from “Major Defects” and other defects had now commenced. The plaintiff was asked to contact the builder or the insurer if they did not agree that this was the case.

The project had clearly not reached practical completion by that date, and was not ready for occupation. Rather, an email from the couple’s architect – commissioned to prepare proper drawings of the layout – on 30 July 2019 noted that the couple needed her to progress their project, including “Confirm the windows, types, openings, directions on drawings for builder so they can be ordered”. Further, finalise the interior layout including “Draw up all services including electrical points ... Draw up plans and elevations of carpentry/cabinetry ... Finalise the plumbing and services for the laundry ... Finalise design for the exterior, render and external decoration ... Draw up kitchen layout plans and elevations, including looking at other location options on the ground floor ... Draw up the Sauna layout ... services and finishes detail for building, adjoining ground floor bathroom locations. [D]raw up bathrooms”, and the list goes on. The architect suggested that they finalise the windows first, so that the windows could be ordered, “that will take a while, do you know when the builder will be back on site to prepare the openings and supervise the fitting?”. The architect suggested that they should then finalise the ground floor layout and the kitchen. The architect estimated that she had “a good week worth of work” ahead of her to complete these details.

The plaintiff had asked to be provided with another glazing option, so that he and his wife could make an informed choice as to whether they wanted to upgrade to double glazing or not. The plaintiff acknowledged that double glazing was not included in the building contract, but he understood from the builder that double glazing would only add about 25% to the cost of the windows. On 6 August 2019, the builder obtained a quote for windows and doors. Mrs Schmuely was taken aback by the quote, “It’s clearly a lot more than I was hoping for. What would be the ‘extras’ price if we went with this (not sure what you quoted for exactly).” The builder replied that he had allowed \$47,300 for external windows and doors and he had asked the supplier “why so high”. The builder suggested that he could get another quote. On 20 August 2019, the builder provided the couple with a revised quotation for windows and doors. The couple began to source another quote. On 27 August 2019, the builder sought instructions as to how to proceed.

The couple arranged to meet with the architect on 6 September 2019. The architect was then “just drawing up the sketches. ... I have stopped working on the kitchen ... I will have the front drawn up from the sketches”. On 15 September 2019, the builder sought the plaintiff’s instructions on changing the windows to double glazing and the colour of window and door frames. On 23 September 2019, the plaintiff asked the builder to send him through the window quote “so I can double check things like the window and door schedule, double glazing as per revised BASIX ... etc.”

On 25 September 2019, the builder emailed a revised window/door schedule, together with contract variation VA16, for aluminium windows and doors with double glazing, in the amount of \$139,999.50. An invoice for this amount was also attached. The client was asked to check the quote and revised schedule and, if he was happy to proceed, to sign the contract variation and pay the invoice so that the builder could proceed. The plaintiff promptly provided the signed variation. However, later that evening, the couple emailed the builder, “We’ve got a lot going on at the moment. We are not in a position to proceed with the aluminium window and door order ... Until we have things sorted, we requested you to not proceed with this order. We will call [the supplier] first thing in the morning to tell him to not proceed. ... Sincere apologies for the inconvenience.”

On 27 September 2019, the builder emailed the plaintiff, asking him to confirm whether he wished to proceed with the approved windows quote “or use someone else. I need to know what you have decided so I can organise the render because they are starting to get more busy before Christmas.” The plaintiff replied, “It’s unlikely that we will be in a position to spend an additional \$150,000 for windows and doors. So really all I can do is repeat ... not to proceed. As I said yesterday, it will clearly take at least several business days before other window and door quotes are obtained. As for the cement renderers, there are a lot of things that need to be done before they can do anything.”

On 28 September 2019, the builder suggested that the clients revert to single glazing, as it would be cheaper. The builder advised that he was keen to progress rendering, which was difficult to do when the windows and door frames had yet to be installed. The builder also requested the new kitchen layout, so that he could mark out the floor penetrations and water lines for the plumber, “I am still hopeful that we can achieve complete lockup stage by end of year.”

On 10 October 2019, the plaintiff sought legal advice in relation to the builder. The plaintiff said that he was concerned that the builder was going to charge the couple for the full price of windows and doors, as if these items were not included in the build at all. The plaintiff said he came to the conclusion that he could no longer work with the builder, as he was trying to charge him for something that was part of the contract “and I’ve arrived at the red line”.

Also on 10 October 2019, the plaintiff emailed the builder, apologising for not having been in contact, “but as you know I’ve got a lot going on at the moment.” The plaintiff advised that he was still awaiting further window and door quotes. The builder replied that he would wait for the client in respect of the window quote, “When you’re able to meet on site to give us some directions pls let me know. ... I am concerned the longer you leave the windows and doors to order before Christmas the longer the lead time will be.” The plaintiff replied that the architect was overseas.

On 12 October 2019, the builder asked to meet with the plaintiff on site to show the electricians anything he wished to adjust or add. The builder also reported difficulties in arranging delivery of a special order bathtub and vanity, where the plaintiff had not paid a deposit. The plaintiff replied that he was not in a position to do so, nor were there any changes or additions to the

electrical work, “However, as you know, there are mistakes that have been done which I’m not ok with (as we discussed, at times in the presence of the electricians)”. The bathtub would await the return from the architect from overseas. Further, “I’m at a loss to understand your message regarding the scaffolds, especially when on multiple occasions you told me that you owned them?”

The builder replied, “The mistakes we discussed was rectified when we last met them on site with electrician which you were happy with but few days later you indicated there was other mistakes and Since then I have tried to meet you on site several times but you were not available. If you can let me know where and which ones to be fixed I can sen[d] them out on Monday.” The builder was also concerned that the scaffolding, which had been erected on site to install the windows, could not remain there indefinitely, where there was no clear indication when the clients would select windows. The builder advised that from 1 December 2019, he proposed to charge the plaintiff rent on the scaffolding of \$350 a week and sought his agreement. The builder complained that his hands were tied, waiting on the plaintiff, who was waiting on the architect, “Quite frankly I am not sure what [the architect] has to do with our dealing. I am yet to meet her. I need you to be open with me, If you wish to wait further or delay the project works due to financial or personal issues or you don’t wish to continue with the project with us please let me know ... I just need to know what is happening.”

The plaintiff further replied that the builder was “re-writing history”, where the builder had “insisted months ago that you cannot progress the building any further without [the architect’s] drawings” where the plaintiff’s drawings were “totally inadequate”. The builder rejoined that he had simply asked the client to have proper design plans by a designer or architect rather than hand sketch concept plans lacking detail and information. The builder advised that he would wait for the plaintiff’s call as to when he was ready to meet on site with the architect.

This email exchange on 12 October 2019 is the only contemporaneous reference to any “mistakes”, which I take to be defects. The plaintiff said that he had a long and heated discussion with the builder, complaining about defects. He demanded that the builder fix the defects and complete the works under the contract. The builder replied, “Don’t worry about it, we will fix it. We will sort it out.”

On 16 October 2019, the builder followed up the plaintiff as to how he was progressing with the doors and windows, “Please if you don’t think you will be ready for us to continue work this year just let me know so I can organise other work.” The plaintiff replied that he expected to have another quote for windows and doors in the next few days, “There’s plenty of work to be done externally and internally regardless of windows and doors. We’ve reminded [the architect] that we need a meeting as soon as she returns.” The builder replied that his workers had finished everything that they could and suggested a site meeting to go through the works. The builder also asked what “external and internal works” the client was referring to, “happy to action the works that you suggest.”

On 5 November 2019, the builder emailed the plaintiff, following up a site meeting with them and their architect and enquiring as to the plaintiff's progress on windows and doors. The builder enquired how the architect was progressing with her work.

The plaintiff's solicitor retained a building consultant, David Hall, who attended on site on 6 November 2019. As the plaintiff described it, "his jaw dropped and he informed us how severe the defects and non-compliance issues were and informed us that in no way we should actually allow anything to be installed ... and that we should demand that you ... fix all the defects." On 20 November 2019, an engineer retained by the plaintiff's solicitor visited the site as well. On 2 December 2019, the engineer completed his report.

On 13 January 2020, the builder followed up the plaintiff again, noting the scaffolding was still on site, which was "a waste of money ... if you don't wish to complete the work." The builder advised "the electrical and plumbing rough is almost done [but] we need your instructions to where you want the drains, that's all. I still have not received any of the custom plans for your kitchen or house features from your architect yet." The builder enquired as to how the plaintiff had gone with selecting windows and asked to meet on site to go through the remainder of the works and "so I can book the Renders".

On 15 January 2020, Mr Hall attended the site again. On 20 February 2020, the plaintiff received another quote for windows from Magic Glass, for \$141,800. On 26 February 2020, Mr Hall's report was to hand.

On 4 March 2020, the builder followed up the plaintiff as to his progress with the architect and the windows and doors, "If there is other issues that is preventing you from proceeding with the project please let me know. It's pointless waiting endlessly without instructions from you which way you wish to proceed." On 12 March 2020, the couple met with new solicitors.

In April 2020, the builder asked whether the couple would be continuing with the Bayview project. The builder noted that it had been a while since he had heard anything; he was interested to remove the scaffolding "which is dead money" and where the scaffolding could be used on other projects "and [when] you're ready we can always provide scaffolding when needed."

In May 2020, the builder sent a message to the plaintiff in respect of various items on site. On 25 May 2020, Mr Schmuely emailed the builder providing instructions on these items, "there is quite a bit of building rubble/rubbish that has been onsite for a long time that you are welcome to clean." On 22 June 2020, the plaintiff retained new solicitors.

On 12 July 2020, the builder followed up the plaintiff again, "I am hoping to get an indication when we can meet on site to discuss the works to be done and outstanding RFIs. Please let me know when we can finalise this project. ... If you don't want me to continue please just let me know and I will pack up and leave or if we can do some deal let me know. I would love to finish your house before the new year, but I cannot be waiting indefinitely."

On 21 July 2020, the plaintiff asked whether the builder would be interested in purchasing the Bayview property. The builder was open to discuss the matter and also enquired “i would really like to know wholeheartedly why you lost interest in completing the project ... I would really like to get closure and amicably resolve any outstanding monetarily and non-monetarily issues.” The builder also enquired whether any purchase price would allow for the unpaid invoices and incomplete work. Mrs Schmuelly replied, “But the house is almost finished, all you need is the windows, doors and the internals.” The builder disagreed, “it’s not almost finished. The Finishes is taking more time than building the shell per se.” The builder listed the incomplete aspects of the work.

Termination

On 13 August 2020, the builder followed up the plaintiff and his wife, asking what their intentions were regarding the Bayview project, “Please give me the courtesy to know what your intentions are regarding the Bayview Project. I have been waiting almost a year and I need to know [whether] you wish us to continue waiting on you or not? If you wish to sell it let me know how much? If you wish to finish the project let me know when we can meet with your & your architect? If you wish us to stop construction completely pls advise me asap so I can organise to remove our materials and equipment off-site so we can use it elsewhere.” The couple were asked to respond by 5.00 pm the next day “so we can plan accordingly”. No reply is in evidence.

On 25 August 2020, the builder removed the scaffolding from the site. As it happened, the plaintiff was then onsite with building consultant, Geoffrey Matley. The plaintiff told the builder that it was up to him what he did with the scaffolding, barriers and construction, “You are the builder – go ahead and build.”. The plaintiff said there was still plenty of work to be done on the site prior to the approval of new plans and the installation of doors and windows. The builder asked the plaintiff to show good faith by paying an outstanding invoice, that was now a year old. He offered to meet with the plaintiff and his architect to enable them to move forward.

On 28 August 2020, the plaintiff’s solicitor wrote to the builder, advising that, without the couple’s authority or consent, the builder had entered their property and removed site rails and security fencing without warning or prior notice, thereby making the site unsafe and exposing the general public to risk. Further, the builder was said to have made various misrepresentations, including of the standard and quality of the works and the degree of progress which had been achieved (apparently) to the home warranty insurer. The couple were said to be entitled to terminate the contract and now did so. The builder disagreed and, on 26 October 2020, purported to accept the plaintiff’s repudiatory conduct and terminate the contract. There matters lay.

In August 2022, the plaintiff commenced these proceedings. In December 2022, the builder filed a cross-summons, seeking \$575,561.76 for unpaid works and variations under the contract or on a quantum meruit basis.

Incomplete and defective works

There is no doubt that the building works are incomplete. The builder acknowledged as much in his email on 21 July 2020: see [65]. Mr Matley inspected the site in August, September and October 2020 and June 2023; he agreed said that the job was incomplete, “It certainly was.” The photographs attached to his report record that the building was a concrete and brick shell. Mr Arden also observed that the works were incomplete, “Very much so.” What was missing was most, if not all, of the finishes, the carpentry, joinery, windows and glazing. Similarly, Mr Dyson agreed that the works in the pool area “certainly wasn’t complete”. The photographs accompanying Mr Dyson’s report record that the pool walls, stairs and spa area were unfinished concrete, without tiles, finishes or landscaping.

As to how much of the building works was done, Mr Arden assessed whether the milestones in the contract had been substantially completed. He considered that the second and third milestones had not been achieved, where significant items of work had not been completed. (Further, the defects identified by Mr Matley affected the completeness of the work.) Mr Arden considered that 89.43% of stage 2 had been completed, before taking into account the significant defects identified by Mr Matley. For stage 3, 84.35% of the value of work had been completed before noting the significant defects identified. Nor had the project reached “lockup” stage, being stage 4. Only 42.57% of the value of work in stage 4 had been completed. No work had commenced in respect of stage 5, being “completion of internal and external finishes”. Overall, the works were 61.29% complete. Of the contract sum, the value of the completed works was \$790,389 excluding GST.

Mr Arden also assessed the 18 variations submitted by the builder totalling \$382,946.10. He considered that three of the variations were not valid as the work was noted on the original drawings or the builder should have consulted with the engineers when preparing their tender. Three of the valuations were not considered, as the work was not carried out. Of the remaining 12 variations, a quantum meruit assessment of the value of these variations was \$139,896.89, excluding GST. That is, the value of the work performed by the builder including variations was \$930,286 excluding GST.

Turning then to the quality of the building work undertaken, Mr Matley identified extensive defect rectification work needed in respect of blockwork, brickwork, concrete, roof framing, electrical, plumbing, the garage wall and roof and driveway. Mr Matley concluded that there were major defects in the works constructed by the builder.

In June 2021, Jonathon Dyson, a durability consultant, investigated the swimming pool. He concluded that the pool concrete construction was non-compliant and may not achieve the required design service life. Mr Dyson explained that the concrete used in the swimming pool was strong enough, but the cover to the reinforcement in the concrete was non-compliant, being too low. The depth to the reinforcement in the walls of the pool was insufficient and did not comply with Australian Standards, nor did it comply with the cover specified on the engineering drawings. Mr Dyson also observed significant voids in the concrete, “quite a number of different

voids and they were quite large voids in some instances ... sometimes quite deep and exposing the reinforcement within the concrete.” Mr Dyson agreed that the voids could be repaired, but said the problem with the cover to the reinforcement was such that the pool would probably have to be demolished and rebuilt.

In June 2023, quantity surveyor Adam Arden visited the site with Mr Matley, who pointed out the defects identified in his earlier report. Whilst he relied on Mr Matley’s identification of defects, certain defects were “quite obvious to the eye”, including honeycomb in the concrete and the swimming pool, and missing cavity ties in the brickwork.

I accept the expert opinion of Mr Matley and Mr Dyson as to the building defects identified in the building works and swimming pool. Their views were not seriously challenged in cross-examination.

Costings

As to the cost of remedying the defects, Mr Matley described the steps needed to rectify the building defects and calculated the associated cost at \$927,600 including GST. Mr Arden reviewed the rectification costs prepared by Mr Matley. He considered these costings to be fair and reasonable but made additional allowances for the increase in building costs since then and a contingency of 10% for unforeseen works relating to rectification, with a resulting figure of \$964,703.48 excluding GST.

Mr Matley also calculated that the cost to complete the contract works was \$1,981,088 including GST. Mr Arden reviewed the costs to complete prepared by Mr Matley. He considered these costings to be fair and reasonable but made additional allowances for the increase in building costs since then. Mr Arden also allowed for additional builder’s overheads and margins which a third party builder would be likely to charge for taking over a project under construction. He also allowed for an external project manager to supervise the works on behalf of the plaintiff. The total costs of completion of the outstanding works, including these additional allowances, was \$1,571,588 excluding GST.

Contractual damages

The plaintiff claimed that, in breach of the building contract, the builder did not carry out and complete the works in accordance with the contract. Further, the works contained defects which amounted to breaches of the express terms of the contract and the statutory warranties implied by the Home Building Act 1989 (NSW). The plaintiff claimed that that the builder repudiated the building contract by:

advising the home warranty insurer that the project had reached practical completion (when it had not),

repeatedly demanding that the plaintiff pay monies, otherwise building work would cease, and abandoning the site from 16 September 2019 once it became apparent that no further monies could be extracted from the plaintiff, and

removing the scaffolding, security fencing and safety handrails without notice to or agreement from the plaintiff.

The plaintiff was said to have accepted this repudiation by the letter from his solicitor's letter of 28 August 2020, bringing the contract to an end. The plaintiff sought loss and damages, including the reasonable cost of rectifying and completing the defective and incomplete works and the cost of administering contracts for the rectification and completion of the defective and incomplete works. Alternatively, the plaintiff sought overpayments in relation to variations and milestone payments and the costs to complete the works after the builder said to have abandoned the works and its repudiation was accepted. In sum, the plaintiff sought damages of \$3,658,792.

The builder agreed that the works attracted the operation of the Home Building Act and contained the implied statutory warranties in section 18B of that Act. The builder denied that the work contained defects, that the rectification works were necessary and that the expenditure on rectification was reasonable.

The builder denied repudiatory conduct on its part. Rather, as a consequence of conversations and emails from August 2019 to August 2020, the parties agreed to vary the building contract. Specifically, the plaintiff intended to have further works carried out on site, including works on windows, doors and additional electrical works. The plaintiff needed to finalise plans, drawings and other designs in respect of this work with his architect and consultants. To facilitate these extra works, the parties agreed to reduce the balance of works under the building contract to those works that had been substantially completed by the builder as at August 2020. They agreed that the works forming part of the last payment milestone, and any other works required after August 2020 under the building contract, were removed from the scope of works. The parties were said to have agreed that practical completion had occurred as at August 2020, taking into account the reduced scope of works. The builder agreed to give possession of the site back to the plaintiff to enable him to carry out the extra works.

The builder contended that the works had reached practical completion as at August 2020, taking into account the reduced scope of works. Alternatively, the builder adopted an assumption that it was no longer required to complete the balance of the works and relied on that assumption when proceeding to remove the scaffolding, security fencing and safety rails from the site and permitting the plaintiff to take possession of the property to carry out the extra works. The parties conducted their relationship on the basis of this assumption. The plaintiff was now estopped from suggesting otherwise.

The builder contended that the date for practical completion was extended, where the builder had carried out at least 14 variations to the works. The builder denied being absent from the site, or doing no building work, from 16 September 2019 to 28 August 2020. The builder admitted removing the scaffolding, security fencing and safety handrails on 25 August 2020 but maintained

that the plaintiff was not entitled to terminate the contract, as he purported to do on 28 August 2020, either under the contract or at common law. In particular, the plaintiff failed to issue a notice of dispute under the contract or meet as required by cl 26 of the Conditions of Contract.

The builder denied that the plaintiff had suffered loss and damage attributable to the builder's conduct. Further, the plaintiff was said to have failed to mitigate his loss, where the builder was at all times ready, willing and able to rectify any defective works. Such rectification works would have ameliorated any loss that the plaintiff had suffered. The plaintiff had unreasonably prevented the builder from identifying the existence of any alleged defects, or remedying such defects. In the event that the plaintiff was entitled to any damages, then the builder claimed a set-off for monies owed under the building contract.

Submissions

As for building defects, the plaintiff submitted that the unchallenged expert evidence indicated that the defects were substantial, extensive and systemic. The defects were said to go to matters of safety, where walls needed to be demolished, other walls were out of plumb, the roof could collapse and other slabs and roofs were not adequately supported. The work had been so poorly constructed that, for some \$1 million paid, there was no value at all. Mr Matley had provided a rectification scope and costing of \$927,599 which demonstrated, when compared to the contract sum of \$1,288,770, just how poorly the works had been performed. Mr Matley's rectification costs had been provided to Mr Arden for verification. Mr Arden determined that the costs were "fair and reasonable". His figure was slightly higher (\$964,703.48), mainly due to the increase in building costs from July 2022 to June 2023. The actual cost was probably higher now.

As for overpayments in relation to variations, the builder raised 16 variation claims in the course of construction. Two of those claims (VA8 and VA12) related to deletions from the works, resulting in deductions from the contract sum. The plaintiff paid 10 of the balance of the claims but did not pay VA13 to VA16, which were issued in August and September 2019. VA 16 was not carried out. In total, the plaintiff paid \$274,371.30 in respect of variations. Mr Arden analysed the variations and opined that VA2, 4 and 6 related to works already provided for in the contract. As such, the plaintiff was overcharged \$100,279.15 excluding GST. Mr Arden also concluded that the works in VA1, 3, 5 and 7 to 15 had been partially completed so that works with a value of \$139,896.89 had been performed. In the result, the builder overcharged \$120,484.72 inclusive of GST. (This sum was not sought if damages were awarded for building defects, as it was subsumed within that award.)

As for overpayments in relation to milestone payments, the builder claimed (and was paid) three milestone payments, being in January 2018 (\$212,769), May 2018 (\$214,769) and August 2018 (\$303,744). The second and third claims were made at a time when the works had not reached completion for those stages. According to Mr Arden, stage 2 was only 89.43% complete (subject to the substantial defects identified by Mr Matley). Stage 3 was 84.35% complete (again, subject to defects). That is, even were the defects to be ignored, the stages were not complete. Once the defects were included, it was nowhere near the relevant stage. The builder was not entitled to

claim or receive payment for those stages. (This sum was not sought if damages were awarded for building defects, as it was subsumed within that award.)

As for the cost to complete, the plaintiff submitted that the contract was terminated when he accepted the builder's repudiation of the contract by his then solicitors' letter of 28 August 2020. By then, the builder had been absent from the property since 16 September 2019, and no work was performed after that date. The particular matter provoking termination was that the builder had removed fencing and site rails from the property without notice, rendering it unsafe. Although the letter did not use the word "repudiation", the factual assertions it contained were consistent with the legal conclusion that the builder evinced an intention not to be bound by the terms of the contract. The plaintiff was also entitled to terminate the contract for gross breach at common law and on the basis that no extension of time claims had been made and the parties were now a year past the date for practical completion. Mr Arden summarised the costs to complete unfinished works under the contract as being \$1,571,588. A substantial part of this amount was taken up by builder's preliminaries and overheads, which was an unfortunate but necessary component of retaining a new builder for partially completed and defective works.

The defendants submitted that aspects of the building works were left incomplete as the plaintiff's variation requests needed to be finalised by him before any second stage could commence. There was said to be a lack of any contemporaneous complaint about defects in the emails passing between the plaintiff and Mr Boujaoude. Instead, the plaintiff discussed selling the property to Mr Boujaoude. In August 2020, when Mr Boujaoude returned to site to remove the scaffolding, he discovered that the plaintiff had others trades onsite performing various works (the person on site was likely Mr Matley). It was only once the scaffolding was removed that the plaintiff expressed dissatisfaction with the defendants' work. Finally, the suggested defects were disputed in expert reports which the defendants had sought leave to rely, but leave was refused.

Consideration

I have already found that the building works contained defects. As the learned authors of *Brooking on Building Contracts* (6th Ed) (2020) observe at [10.1]:

"Building work which is not in conformity with the contract is defective work. Defective work is a breach of the contract and, in the absence of contractual provisions to the contrary, gives rise to an entitlement in the proprietor to rectify the defective work and claim damages against the builder. Where defects are discovered during the progress of the works, standard form contracts typically provide a process by which the builder can be directed to rectify the works."

The building contract did provide for a defects liability period, during which the plaintiff could list any defects and the builder was obliged to fix the defects. As events unfolded, however, the parties never got to that stage of the contractual regime. So far as the contemporaneous records reveal, the builder was amenable to addressing any problems identified by the plaintiff. When the plaintiff complained about defects, the builder offered to fix them: see [55]. But as matters presently stand, the building work does contain defects. Such defects are a breach of contract,

entitling the plaintiff to damages.

The general measure of damages is the amount, so far as money can provide, necessary to put the plaintiff in the position they would have been if the contract had been performed: *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350; *Wenham v Ella* (1972) 127 CLR 454 at 460 (per Barwick CJ); *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653; [1986] HCA 81. The fact that the contract has since been terminated does not extinguish accrued rights: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-7 (Dixon J).

Mr Arden put the cost of rectification at \$964,703.48. Quite fairly, Mr Arden volunteered that “there was quite a major deterioration in the conditions on the worksite between ... 2018 when I think that work was stopped and my visit in 2023.” Four years did pass between when building work appears to have stopped, and when Mr Arden visited the site. Where the works were exposed to the elements over that time, it is likely that some of the defect rectification costs is due to environmental factors, but I have no evidence that would enable me to adjust Mr Arden’s calculations to reflect those matters.

Where it is contended that a plaintiff should have taken steps by way of mitigation, the onus of proof is on the defendant: s 18BA(1)(b), Home Building Act; *TC Industrial Plant Pty Ltd v Robert’s Queensland Pty Ltd* (1963) 180 CLR 130 at 138 (Kitto, Windeyer and Owen JJ). As Ball J summarised the principles in *Owners SP 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067, “In the case of building contracts, it is also generally accepted that the owner must give the builder a reasonable opportunity to rectify any defects. ... the owner is required to give the builder an opportunity to minimise the damages it must pay by rectifying the defects, except where its refusal to give the builder that opportunity is reasonable”: at [44]. An owner’s refusal to give the builder an opportunity to rectify defects may be reasonable having regard to: the extent and seriousness of the defects; the quality of any repairs effected by the builder; whether the builder responded in a timely manner to the owner’s complaints, took the complaints seriously and acted fairly; and the efficacy or perceived futility of continuing to negotiate with the builder: *The Owners – Strata Plan No 89074 v Ceerose Pty Ltd* [2024] NSWSC 1494 at [51].

It does appear that the plaintiff did not squarely inform the builder of his concerns about building defects at the time: see [108]. The plaintiff did not issue notice to remedy a default under the contract, nor a notice of dispute. The builder does appear to have been willing to rectify defects: see [55]. Against this, the owner did have to hand reports from a building consultant and engineer (albeit not in evidence in these proceedings) which may have indicated extensive and serious defects, such that it was reasonable not to give the builder the opportunity to remedy the defects. Suffice to say that the onus of proving failure to mitigate is on the builder and it was not discharged.

Turning then to the costs to complete the outstanding works, there is no dispute that the works are incomplete. Whether the builder is liable for the cost to complete the building works turns on whether the builder repudiated the building contract, entitling the plaintiff to terminate the contract on 28 August 2020. As the learned authors of *Brooking on Building Contracts* observe at [11.8]:

“Where the contractor repudiates the contract and that repudiation is accepted by the proprietor, the proprietor is entitled to damages flowing from the breach. That would include the cost of completing the works and rectifying any defects, but the outstanding contract balance will be taken into account.

Where the proprietor repudiates the contract and that repudiation is accepted by the contractor, bringing the contract to an end, the contractor has an option [to] recover damages, or ... sue on a quantum meruit.”

In the context at hand, repudiation is “conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. ... The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it”:

Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited (2007) 233 CLR 115 at 135; [2007] HCA 61 at [44].

As Brennan J explained in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 647:

Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way. ...

And in *Carswell v Collard* (1893) 20 R (HL) 47 at 48, Lord Herschell LC stated the question precisely:

Of course, the question was not what actually influenced the defender, but what effect the conduct of the pursuer would be reasonably calculated to have upon a reasonable person.

... The question whether an inference of repudiation should be drawn merely from continued failure to perform requires an evaluation of the delay from the standpoint of the innocent party. Would a reasonable person in the shoes of the innocent party clearly infer that the other party would not be bound by the contract or would fulfil it only in a manner substantially inconsistent with that party's obligations and in no other way?

Repudiation is “a serious matter and not lightly to be found or inferred”: *Shevill v Builders Licensing Board* [1982] HCA 47; (1982) 149 CLR 620 at 633 per Wilson J. This does not mean that anything other than the civil standard of proof is involved: *Wesiak v D&R Constructions (Aust) Pty Ltd* [2016] NSWCA 353 at [91]. Where the plaintiff asserts that the builder repudiated the building contract, the onus of proof rests on the plaintiff: *Aslan v Stepanoski* [2022] NSWCA 24 at [76]. The question is one of fact, involving the characterisation of the conduct to see whether it meets the requisite standard: *Wesiak v D&R Constructions* at [92].

Whilst the onus is on the plaintiff, it is convenient to first consider the builder’s pleaded response to the contention that it repudiated the building contract. The pleadings prepared by the builder’s former solicitors were not closely related to the case which Mr Boujaoude sought to advance at trial. Mr Boujaoude frankly acknowledged, “I didn’t even read the pleadings.”

There is no evidence that the parties agreed to vary the building contract in the manner set out in the Commercial List Response, that is, reducing the balance of the works under the building contract to those works that had been substantially completed by the builder as at August 2020. Further, whilst the builder did refer in its pleading to provisions of the building contract which permitted an extension of time in the event of delays attributable to the plaintiff’s failure to give instructions or an instruction to stop work, the builder did not then plead that the plaintiff had failed to give any instructions, or had instructed the builder to stop work. The builder did not make out the matters pleaded in its defence.

Turning to the conduct on which the plaintiff relied as repudiatory, the first matter is the email from the home warranty insurer of 15 July 2019. As earlier mentioned, the project had clearly not reached practical completion by that date, and was not ready for occupation. Rather, the couple had recently engaged an architect at the builder’s request to put their hand drawings of internal layout and joinery into a form that could be used to complete the remaining milestones. Notwithstanding the builder’s instructions to the insurer, the builder continued to progress the building project. Even on the plaintiff’s case, the builder continued to work on site for a further two months.

Second, the plaintiff said that, prior to 16 September 2019, Mr Boujaoude made numerous written and verbal demands for money or else he would refuse to build the works. The builder would only recommence works on being paid the moneys demanded. From 16 September 2019 until 28 August 2020, the builder was said to be absent from site and did no building work after it became apparent that Mr Boujaoude “could not extract further moneys not in fact due under the Building Contract”.

I take the plaintiff’s reference to 16 September 2019 as being to the parties’ communications on the variation to install double glazed windows and doors for an additional sum. Beyond this, the plaintiff’s summary of the builder’s actions is not well supported by the contemporaneous documents. The emails which passed between the couple and the builder make no demands for money, nor threaten to walk off the job. Rather, the project appears to have stalled by reason of three events: first, the variation for more expensive windows and doors; second, obtaining shop

drawings for layout and joinery; third, the plaintiff obtaining legal advice and consultant's reports on building defects.

As to the first event, the couple approved the variation but then changed their mind, informing the builder "We've got a lot going on at the moment. We are not in a position to proceed with the ... window and door order. ... Until we have things sorted, we request you to not proceed with the order." When the builder sought confirmation as to how he should proceed, the plaintiff again instructed the builder, "All I can do is repeat ... not to proceed." It may well be that the plaintiff decided at that point that he could no longer work with the builder, as he thought that the builder was charging the full price of the windows and doors rather than the portion of the price which was not already included in the contract sum. But the plaintiff did not squarely raise these concerns with the builder, who proceeded to follow up the plaintiff from time to time in the months which followed.

As to the second event, the plaintiff was apparently displeased with the builder's request that shop drawings be prepared for the layout and joinery, but proceeded to instruct an architect to prepare the drawings. This task does not appear to have been progressed. Indeed, Mrs Schmuely could not recall whether the architect ever provided the drawings for joinery and internal finishes. Where the plaintiff was not familiar with the building process, and wanted a bespoke, "high-end" luxury home, it is unsurprising that the builder was not prepared to proceed without proper drawings.

As to the third event, in parallel with these two 'stoppages', the plaintiff was seeking legal advice and obtaining reports from a building consultant and engineer. But the plaintiff does not appear to have given any clear indication to the builder that the plaintiff was dissatisfied with the building work, beyond the site meeting referred to in the email exchange on 12 October 2019: see [52]-[55]. The plaintiff said he had at least two very long and heated conversations with Mr Boujaoude, during which the plaintiff raised with the builder that he was not at the site building and that he needed to come back and build the job further. Further, the plaintiff raised that the work had many defects that needed to be fixed. The first of these conversations likely occurred in October 2019 and the second conversation almost a year later, when the builder was removing his scaffolding from the site. In the meantime, the plaintiff gave no indication that he was dissatisfied with the builder's work and, by and large, did not respond to the builder's efforts to follow up the building works. As to why the plaintiff did not respond to the builder's enquiries, the plaintiff said that he was advised by the solicitor not to communicate with the builder in any way.

For the builder's part, he had no instructions as to how to proceed in respect of windows and doors and no proper drawings for layout and joinery. The contemporaneous emails indicate that the builder's workers had finished everything that they could and the works came to a standstill. The builder followed up the plaintiff periodically in an effort to advance the project, to no avail. Overall, the second instance of repudiatory conduct pleaded by the plaintiff is not established.

The third matter relied on by the plaintiff is the removal of scaffolding, security fencing and safety hand rails “without notice to or agreement from the plaintiff”. There was certainly no agreement by the plaintiff that the builder could remove these items, but the builder did give notice. The builder communicated with the plaintiff on this subject in October 2019, January 2020, April 2020 and August 2020. By the time the scaffolding was removed, a year had passed since the quote for windows and doors had first been circulated to the plaintiff. No instructions had been forthcoming. The builder had also offered, in April 2020, to bring the scaffolding back when the plaintiff was ready to proceed with the project.

The removal of the security fencing does indicate that the builder was not then planning to continue with the building works. Nor is it entirely clear how the builder could have proceeded in the absence of any instructions from the plaintiff. That the plaintiff told the builder at the time, “You are the builder – go ahead and build”, is somewhat hollow, where the builder had not been provided with – and was not about to be provided with – any instructions on key matters of interest to the plaintiff, including the type and location of windows and doors, the internal layout and fit-out.

As earlier canvassed, whether the builder repudiated the contract does not depend on the subjective state of mind of Mr Boujaoude. The question is whether the builder’s conduct conveyed to the plaintiff that the builder did not intend to perform the building contract or only intended to do so in a manner substantially inconsistent with its contractual obligations. Nor is the issue determined by what the plaintiff actually thought, but what a reasonable person in his position would infer in the circumstances.

I consider that a reasonable person in the plaintiff’s position would have viewed the builder’s actions as ‘accepting the inevitable’, where the plaintiff had declined to give the builder the instructions he needed to progress the building work and ignored the builder’s efforts to resume the build. A reasonable person in the plaintiff’s position would not have inferred an unwillingness on the part of the builder to perform the contract, but an acceptance that he was unable to do so given the plaintiff’s indecision followed by disengagement. I am not satisfied that the plaintiff has discharged the onus of proof on this issue.

On 28 August 2020, the plaintiff’s solicitors purported to terminate the contract. Further, the solicitor demanded that the builder cease and desist from entering the site and, if the couple did not receive the builder’s undertaking that it would not enter the site by noon on 31 August 2020, advised that the couple would take urgent injunctive proceedings to restrain the builder from doing so, then also seeking damages and costs. In these circumstances, I consider that the builder was entitled to terminate the contract, and did so, on 26 October 2020. In these circumstances, I am not satisfied that the plaintiff is entitled to the cost to complete the building works.

Turning to the plaintiff’s alternative claim to recover overpayments in respect of milestone payments and variations, I accept Mr Arden’s expert opinion that the second and third milestones were not completed and thus the builder ought not to have received those payments, being

\$214,769 and \$303,744 respectively (excluding GST). Of the contract sum, the value of the completed works was \$790,389 (excluding GST). The builder has already received more than this, by \$59,097. As to variations, the contractual provisions were not followed. The builder received \$274,371.30 for variations but, as assessed by Mr Arden, overcharged by \$109,532. These overpayments should be repaid.

Cross-claim

By cross-claim, the builder sought \$575,000 for unpaid variations said to arise as a result of the plaintiff's requests and the fact that the original building was structurally unsuitable to support the design of the renovation. The builder claimed an extension of time for the additional works comprised in the 18 variations or, alternatively, the fair and reasonable value for the additional works. The builder also sought liquidated damages of \$500 per week for delay costs over and above the adjusted date for practical completion under the building contract.

The builder submitted that the original contract scope was for a 'renovation and addition' to the property. But during the project the scope expanded significantly, effectively becoming a complete 'knockdown and rebuild'. The project design was changed after discovering the existing building was unsuitable to support the contracted building work. The structural engineers had relied on erroneous information about the building, for example, the slab was only 80 millimetres thick where the plaintiff had said it was 200 millimetres thick.

The builder submitted that further variations were made by the plaintiff's structural engineers, such as a revised design for the pool. Initially, the plans were for a pool at ground level. The plaintiff requested that the pool be suspended on piers. This was outside the original contract scope. The lack of contemporaneous records in respect of the variations was said to be due to the plaintiff verbally requesting and approving variations as they arose. The plaintiff was on site for much of the building works, allowing for real-time decision-making and approvals.

The plaintiff submitted that, on any view, the variations were not sought in accordance with the contractual regime. The builder could only rely on a quantum meruit claim. But in any event, Mr Arden had calculated the value of the variations which had, in fact, been performed and allowed for that figure in the damages sought by the plaintiff. As such, if damages were awarded then the cross-claim ought be dismissed.

Consideration

It follows from what I have earlier concluded in respect of the claim for overpayments of milestone payments and variations that the cross-claim cannot succeed. The builder has already received more from the plaintiff than the value of works performed on a quantum meruit basis.

Orders

For these reasons, I make the following orders:

Judgment for the plaintiff against the first defendant in the sum of \$1,133,332 (excluding GST) together with interest under s 100 of the Civil Procedure Act 2005 (NSW).

Proceedings otherwise dismissed.

Cross-claim dismissed.

Parties to notify any errors or omissions within 7 days.

Parties to confer in respect of costs and, in the event that no orders are agreed, direct to parties to file any affidavits and submissions (limited to 3 pages) in support of the costs orders sought within 7 days, such application to be determined on the papers.

Amendments

18 March 2025

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[2], [61], [76], [114] - typographical amendments.

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Decision last updated:

18 March 2025

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