

AUSTRALIA / JUDGMENT

Tan v Platinumhomeland Pty Ltd

[2026] NSWDC 343**COURT**

District Court

DECIDED

22 September 2026

BEFORE

Tsavdaridis ADCJ

CASE / FILE NUMBER

2025/00309952

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District Court**New South Wales****Medium Neutral Citation:** Tan v Platinumhomeland Pty Ltd [2026] NSWDC 343**Hearing dates:** 8 September 2026**Date of orders:** 22 September 2026**Decision date:** 22 September 2026**Jurisdiction:** Civil**Before:** Tsavdaridis ADCJ

Decision:

(1) Judgment for the first and second plaintiffs as against the first and second defendants, jointly and severally, in the amount of:

(a) \$706,431.00 for rectification; and

(b) \$20,790.00 for incidental expenses.

(2) Pursuant to s 100 of the Civil Procedure Act 2005 (NSW), pre-judgment interest against the first and second defendants, jointly and severally, in the sum of \$101,917.89.

(3) Judgment for the first and second plaintiffs as against the first defendant in the amount of \$41,567.85.

(4) Pursuant to s 100 of the Civil Procedure Act 2005 (NSW), pre-judgment interest against the first defendant in the sum of \$5,911.71.

(5) The first and second defendants shall pay the costs of the first and second plaintiffs on the ordinary basis up to and including 11 November 2025 and on an indemnity basis on and from 12 November 2025.

Catchwords:	BUILDING AND CONSTRUCTION – breach of contract – defective workmanship and materials – breach of statutory warranties under Home Building Act 1989 (NSW) – breach of statutory duties under Design and Building Practitioners Act 2020 (NSW) – misleading and deceptive conduct – contravention of Australian Consumer Law – unlicensed builder – rectification of defects – remedies – assessment of damages – measure of damages
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil Liability Act 2002 (NSW) s 5Q Civil Procedure Act 2005 (NSW) ss 98, 100 Competition and Consumer Act 2010 (Cth) Sch 2 ss 18, 237 Design and Building Practitioners Act 2020 (NSW) ss 36, 37, 39, 41 Home Building Act 1989 (NSW) ss 18B, 48A, 48M, 90, 92 Uniform Civil Procedure Rules 2005 (NSW) rr 6.12, 12.7
Cases Cited:	85 Princess Pty Ltd v Fleming [2025] NSWCA 261 Australian Orthopaedic Fixations Pty Ltd v Amplitude Australia Pty Ltd [2017] SASC 88 Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2) [2022] NSWSC 1368 Crump v Equine Nutrition Systems Pty Ltd trading as Horsepower (No 2) [2007] NSWSC 25 David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353; [1992] HCA 48 Daynes v I-MED Central Queensland Pty Ltd; I-MED Central Queensland Pty Ltd v Daynes [2025] NSWCA 150 Evans v Balog [1976] 1 NSWLR 36 Hunter v Roberts (No 2) [2019] NSWCA 235 Kalantzis v Brown [2026] NSWCA 17; (2026) 119 NSWLR 247 Larsen Superannuation Fund v Tastec Pty Ltd (formerly Wonders Building Company Pty Ltd) [2025] NSWCA 145 Livingstone v Rawyards Coal (1880) LR 5 App Cas 25 Owners SP 92450 v JKN Para 1 Pty Ltd [2023] NSWCA 114; (2023) 39 BCL 98 Pafburn Pty Limited v The Owners - Strata Plan No 84674 [2024] HCA 49; (2024) 421 ALR 133 Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353; (2004) 135 LGERA 98 Rosen v Louey [2026] NSWSC 1048 Stone v Chapel (2017) 128 SASR 165; [2017] SASCFC 72 Wabbits Pty Ltd v Godfrey [2009] NSWSC 1299
Texts Cited:	Hudson on Building Contracts (7th ed, 1946)
Category:	Principal judgment
Parties:	(Etanya) Tan Tan (First Plaintiff) (Michael) Jiang Yi (Second Plaintiff) Platinumhomeland Pty Ltd (First Defendant) Silong Wang (Second Defendant)

Representation:

Counsel:	Mr S Felthouse (Solicitor for the First and Second Plaintiffs) No appearance (First and Second Defendants)
Solicitors:	Artemide Law (First and Second Plaintiffs) No appearance (First and Second Defendants)
File Number(s):	2025/00309952
Publication restriction:	Nil

JUDGMENT

Overview The first and second plaintiffs are the registered proprietors, as tenants-in-common in equal shares, of a residential property situated at 37 Blake Street, Rose Bay NSW 2029, being the whole of the land comprised in Certificate of Title Folio Identifier B/311913 (premises). The first defendant is a company with which the plaintiffs contracted to perform building and renovation works (works) at the premises pursuant to two separate contracts, an internal works contract (internal works contract) and an external works contract for landscaping related works (external works contract) (together, the contracts). The second defendant was a director and shareholder of the first defendant who was involved in the day-to-day management of the first defendant at the premises and the provision of the works, and whose key responsibilities in respect of the provision of the works at the premises included facilitating and reviewing design specifications provided by an architectural firm; design and construction of the works; provision of advice; supplying materials for the purposes of undertaking the design and construction of the works; and overseeing and causing the design and construction of the works to be undertaken. Relevantly, neither the first nor the second defendant held a valid licence under the Home Building Act 1989 (NSW) (HBA) to perform “residential building work” within the meaning ascribed in the HBA. The plaintiffs and the first defendant entered into the internal works contract on or about 28 July 2024. The internal works contract provided for a fixed price of \$592,911.00 (inclusive of GST) and was subsequently varied on or about 12 August 2024 by the addition of \$49,995.00 to the price, totalling \$642,906.00 (inclusive of GST). The plaintiffs and the first defendant entered into the external works contract on or about 15 January 2025. The external works contract provided for a fixed price of \$259,077.50 (inclusive of GST). Following the provision by the first defendant of various works at the premises, on or about 26 February 2025, the second defendant terminated the External Works Contract. The plaintiffs originally commenced proceedings against the first and second defendants via Points of Claim filed in the NSW Civil and Administrative Tribunal (NCAT). However, after it emerged that the plaintiffs’ claim exceeded NCAT’s jurisdictional limit of \$500,000.00, the proceedings were transferred, pursuant to s 48M of the HBA, to the District Court of NSW, following which the plaintiffs filed a formally pleaded Statement of Claim on 13 November 2025. The plaintiffs’ claims against the first defendant were grounded in: Contractual breaches in respect of what was said to be the defective quality of building works undertaken at the premises; Breaches of statutory warranties within the HBA; Breaches of statutory duties within the Design and Building Practitioners Act 2020 (NSW)

(DBP Act); and Misleading and deceptive conduct within the Australian Consumer Law (ACL) set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth) (CC Act). The plaintiffs' claims against the second defendant were grounded in: Breaches of statutory warranties within the HBA; Breaches of statutory duties within the DBP Act; and Misleading and deceptive conduct within the ACL. The first and second defendants, through their former lawyers, filed a Defence on or about 19 February 2026, the same date on which their former lawyers also filed and served a Notice of Intention of Ceasing to Act. On 2 March 2026, the defendants' former lawyers filed and served a Notice of Ceasing to Act. Since then, the defendants have played no part in the proceedings, have not filed any affidavit evidence or submissions, and have failed to appear at mentions, directions hearings and on 7 September 2026, the date the matter was fixed for trial, despite having due notice of the dates on which the matter was listed and with all pleadings, correspondence and other documents continuing to be served on the first and second defendants at their last known address and email. As a result, and after affording the defendants an opportunity to show cause as to why their Defence ought not be struck out, on 6 May 2026, Judicial Registrar McDonald ordered that the Defence of the first and second defendants be struck out pursuant to r 12.7 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) and entered judgment for the first and second plaintiffs as against the first and second defendants, with damages to be assessed. Liability, therefore, has been established as against both the first and second defendants. The only remaining question is the assessment of quantum of the plaintiffs' loss and damage. As at the date of hearing, the plaintiffs sought judgment in the sum of \$768,788.85, which, excluding interest, was comprised as follows: Loss and damage Rectification and completion costs (inclusive of GST): \$706,431.00 Incidental expenses (expert) (inclusive of GST): \$ 20,790.00 Invalid invoices paid (or, alternatively, restitution): \$ 41,567.85 Total \$768,788.85 The plaintiffs also sought pre-judgment interest pursuant to s 100 of the Civil Procedure Act 2005 (NSW) (CPA) from 8 September 2026 to the date on which the judgment takes effect, together with costs on an indemnity basis or, in the alternative, on the ordinary basis up to and including 11 November 2025, the date on which the plaintiffs made an offer pursuant to the principles outlined in *Calderbank v Calderbank* [1975] 3 WLR 586 (*Calderbank*), to settle the whole of the proceedings for \$500,000.00, and on an indemnity basis thereafter. The basis of the plaintiffs' claims Given that liability has already been determined via the first and second defendants' Defence having been struck out and judgment having been entered against them in their absence, the Court proceeds on the basis that such judgment was entered regularly and, in the absence of any involvement by, or evidence from, the first and second defendants whatsoever since the entry of judgment, there is no utility in traversing, in any great detail, the specific pleadings and particulars within the Statement of Claim or the Defence. It is, however, beneficial to give some context to the plaintiffs' claims so as to better understand the structured approach through which the assessment of any damages is to be determined. Claim in contract It was asserted that, between 28 July 2024 and January 2025, the period during which the works were performed, the first defendant breached the terms (both express and implied) of the contracts by failing to: Complete the internal works (and do so) by November 2024 and the external works by March 2025; Undertake the works in a diligent and professional manner in accordance with the relevant standards for the provision of such services; Act in good faith in all its dealings with the

plaintiffs, manage the costs and disbursements during the works, and not do anything harmful to the plaintiffs; Comply with all reasonable time limits imposed by the contracts for the performance of the internal and external works; Ensure that the works were carried out in a workmanlike manner in compliance with all relevant standards, including the Building Code of Australia and all relevant codes, standards and specifications required to be complied with under any law; Comply with all statutory obligations in respect of the works, including all relevant regulatory bodies, all relevant codes of practice, and any applicable legislation; Obtain and maintain during the period of the contracts current policies of insurance required to be effected by law in respect of the works and the contracts; Ensure that the works were completed by a licensed builder for the purposes of the HBA; Complete the works with due skill, care and diligence, using materials that were of acceptable quality and fit for their intended purpose and work and, indeed, fit for their purpose; and Indemnify the plaintiffs from and against all actions, costs, charges, claims and demands with respect to a breach of the contracts. While it was the first defendant which carried out the works, it was asserted that the second defendant supervised, coordinated and project managed the carrying out of the works by and on behalf of the first defendant; that the second defendant had substantive control over the carrying out of the works by the first defendant; and that the second defendant had the ability and the power to control how the works were carried out. Claim under the HBA By reason of this (and having regard to the fact that the premises were a “dwelling” (within the meaning ascribed in cl 3 of sch 1 of the HBA); that the works carried out by the defendants were “residential building work” (within the meaning ascribed in cl 2 of sch 1 of the HBA); and that the works carried out by the defendants were “building work” and, therefore, “construction work” (for the purposes of s 36(1) of the DBP Act)) and by virtue of s 18B(1) of the HBA, it was asserted that the defendants breached the following statutory warranties implied into the contract: The works would be carried out with due care and skill and in accordance with the plan and specifications set out in the contracts; The materials supplied by the first defendant would be good and suitable for the purpose for which they are to be used and that such materials would be new; The works would be carried out in accordance, and would comply, with the HBA or any other law; The works would be carried out with due diligence and within the time stipulated in the contracts, or a reasonable time; The works would result in a dwelling that was reasonably fit for occupation as a dwelling; and The works and any materials used in carrying out the works would be reasonably fit for the specified purpose or result. In the same vein, it was asserted that the defendants breached s 92 of the HBA by performing “residential building work” without having obtained and maintained a contract of insurance in respect of the works that complied with the HBA and without having provided to the plaintiffs a certificate of insurance evidencing the contract of insurance, in a form approved by the State Insurance Regulatory Authority. Claim under the DBP Act Further, by reason of the operation of ss 37(1) and (2) of the DBP Act, it was asserted that the first and second defendants breached their statutory duties to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done and arising from the construction work through the preparation of designs for the work; manufacture or supply of a building product used for the works; and supervising, coordinating, project managing or otherwise having substantive control over the carrying out of the works. The breach was said to

arise in the context of the works carried out by the first defendant containing defects (defects) which were, or ought to have been, apparent to the defendants; require the plaintiffs to undertake necessary and expensive replacement or remediation works and suffer harm in the form of economic loss; and were reasonably foreseeable to the defendants, such that a reasonably foreseeable person in the position of the defendants would have taken precautions against such risks. Misleading and deceptive conduct It was asserted that the defendants engaged in misleading or deceptive conduct by representing to the plaintiffs that either or both of them were a licensed contractor pursuant to the HBA; the second defendant was licensed to supervise, coordinate and project manage the performance of the works by the first defendant; the defendants had adequate insurance in respect of the works; the defendants had the requisite due skill, care and diligence to carry out the works and use materials that were fit for purpose to undertake the works; and the defendant would undertake the works in compliance with all relevant standards and laws (representations). The representations were said to have been made by the defendants to the plaintiffs by the defendants' acts or omissions conveyed via the second defendant's exhibition of building works to the first plaintiff which the second defendant indicated he or the first defendant had completed; the defendants' provision of the contracts which, amongst other things, implied that the defendants were capable of meeting the express and implied obligations contained within them, including the express and implied terms referred to above; the second defendant informing the first plaintiff in or about July 2024 that he had the necessary skills and expertise to conduct the works; and the second defendant omitting to disclose that neither he nor the first defendant was licensed for the purposes of the HBA. It was asserted that the representations were made in trade or commerce, within the meaning of s 18 of the ACL; were continuing representations, from the date on which the first plaintiff and the second defendant were introduced to each other on or about 16 July 2024, and lasting for the duration of the contract; and were representations that a reasonable person in the plaintiffs' position would have believed and relied upon. Finally, it was asserted that the representations were misleading in that neither the first nor the second defendant was a licensed contractor pursuant to the HBA; the second defendant was not licensed to supervise, coordinate and project manage the performance of the works by the first defendant; the defendants did not have adequate insurance in respect of the works; the defendants did not have the requisite due skill, care and diligence to carry out the works and did not use materials that were fit for purpose to undertake the works; and the defendant did not undertake the works in compliance with all relevant standards and laws. It was the combination of these factors which constituted the defendants engaging in conduct in trade or commerce that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL. Relief sought Reconciling the various causes of action referred to above, as pleaded in the plaintiffs' Statement of Claim and in respect of which the plaintiffs assert they suffered loss and damage, the relief sought by the plaintiffs was particularised as follows: Damages for breach of the contracts; Damages (or, more precisely, "compensation", with respect to a building claim, pursuant to s 48A(2)(b) of the HBA) for breaches of the statutory warranties within the HBA, including damages for breach of the insurance obligations under the HBA; Damages pursuant to s 37(3) of the DBP Act for the breaches of the statutory duties within the DBP Act; and Compensation, pursuant to s 237 of the

ACL for the misleading and deceptive conduct in which the defendants engaged, for the reasonable and necessary costs of building works incurred by the plaintiff to rectify the defects. Invoices and payments From July 2024 to December 2024, the first defendant issued the following invoices (all of which are headed “invoice”, rather than “Tax Invoice”, and none of which disclosed the first defendant’s ABN) to the plaintiffs with respect to the Internal Works Contract, calling for the payment of a total sum of \$702,267.99 (inclusive of GST): On 29 July 2024, an invoice for \$195,660.63 described as “First Deposit”; On 26 August 2024, an invoice for \$220,658.13, described as “Second Deposit” and “50% of Variation”; On 29 October 2024, an invoice for \$231,316.26, described as “Third Deposit”, “50% of Variation” and “Carrying balance” of the unpaid balance carried forward (thereby not an additional cost, but carried over from the previous invoice); and On 9 December 2024, an invoice for \$65,220.21, described as “Final Deposit”. From July 2024 to 13 December 2024, the plaintiffs paid to the first defendant the total sum of \$692,197.10 with respect to the Internal Works Contract, comprising the following amounts: On 2 August 2024, an electronic funds transfer (EFT) payment of \$195,660.63; On 4 September 2024, an EFT payment of \$100,000.00; On 14 September 2024, a cash payment of \$100,000.00 (the receipt of which was acknowledged by the second defendant); On 31 October 2024, an EFT payment of \$50,000.00; On 4 November 2024, an EFT payment of \$50,000.00; On 13 November 2024, an EFT payment of \$65,000.00; On 18 November 2024, an EFT payment of \$66,316.26; and On 13 December 2024, an EFT payment of \$65,220.21. On 15 January 2025, the first defendant issued an invoice (also headed “invoice”, rather than “Tax Invoice”, and which failed to disclose the first defendant’s ABN) to the plaintiffs with respect to the External Works Contract, calling for the payment of \$77,723.25 (inclusive of GST) described as “First landscaping deposit”. No further invoices were issued by the defendants in relation to the External Works Contract prior to the defendants’ termination of the contracts on 26 February 2025. On 22 January 2025, the plaintiffs paid to the first defendant, by way of EFT payment, the amount of \$70,000.00 with respect to the External Works Contract. Plaintiffs’ evidence The plaintiffs relied on the following statements and affidavits: Witness statement of Ms Etanya Tan (the first plaintiff), together with Exhibit ET-1, (Court Book, Tab 5, pp. 14 - 482) filed in the NCAT proceedings and incorporated into the present proceedings, dated 22 July 2025 and filed 21 August 2026 (tendered and admitted without objection, and marked “Exhibit 1”); Affidavit of Mr Sean Felthouse (solicitor for the first and second plaintiffs), together with Exhibit SF-1, (Court Book, Tab 4, pp. 1 - 5; and Court Book, Tab 5, pp. 1 - 489), sworn and filed 21 August 2026 (tendered and admitted without objection, and marked “Exhibit 2”); and Expert Report of Mr Gordon Xue (building inspector) (the expert) commissioned by the first and second plaintiffs) (Court Book, Tab 3, pp. 1 - 428), dated 28 July 2025 and filed 21 August 2026 (tendered and admitted without objection, and marked “Exhibit 3”) (Expert Report). The First Plaintiff’s evidence The salient features of the first plaintiff’s unchallenged evidence, primarily with respect to the question of defects and an assessment of damages, can be summarised as follows: After having decided in July 2024 to undertake building works and renovations to the premises, she made enquiries about possible builders who could undertake the works. She wanted the works to include not only cosmetic upgrades but changes to the floorplan of the premises so that it was more suitable for entertainment and for housing her and her husband’s teenage children. She also wanted the

works to include new and extensive landscape designs. She tasked herself with handling the engagement of the builder whilst also still managing the household and looking after her children. In addition to this, she continued to work full time at a bank. She had been introduced to the second defendant by friends on or about 16 July 2024 and initially met with him, during which he informed the plaintiffs that he was the director of the first defendant; that they would be dealing with him personally; that the works would be completed by late November 2024; that the works were “very achievable” and that he would put together a quote and scope of works; that the quality of his work was “to the highest of standards”; and that he owned a joinery business so there would be a limited wait time on finishes once they had been measured up. The second defendant took her to visit and inspect other properties which he had renovated and completed (including one property in Strathfield and two properties in Concord) so that she could “see [his] work and the finishings”. The statements made by the second defendant and the visits to those properties left her impressed by the quality of work and created the understanding that the joinery was being made in Australia; that there would not be a significant wait time; that she would be moving into the premises before Christmas 2024 which would obviate the need to keep paying \$10,000.00 per month in rent; and that he would predominantly be undertaking the works himself through the first defendant. These matters, in combination, culminated in her decision to engage the first defendant. At no stage did the second defendant make the plaintiffs aware that either the first or second defendants were not licensed within the meaning of the HBA. After securing the services of the first and second defendants, the Internal Works Contract which was entered into, and which provided for a total sum of \$592,911.00 (inclusive of GST), contained a detailed scope of works including: Preliminaries: Rubbish removal (9 m3), Site protection, Final clean up, Overhead management (Sub-total: \$12,200.00) (excluding GST); Entry door replacement and repairs: Demolish existing entry door, Installation of new front door, New doors supply and delivery (Sub-total: \$20,500.00) (excluding GST); Timber floor: Demolish existing carpet and timber floor and skirting board, Timber supply (1900mm*190mm matt finished engineering timber, 3/4mm timber veneer), Self-Levelling, Waterproofing for ground level, Install timber floor, Supply & install new skirting (Sub-total: \$54,810.00) (excluding GST); Stairs and handrail rebuild: Demolish existing stairs, handrails and replace with new stairs and handrails, Rebuild the structure of stairs, Install timber stairs, Glass panel handrail supply and install (Sub-total: \$26,450.00) (excluding GST); Kitchen: Demolish existing kitchen cabinet, Demolish existing toilet and wall & ceiling, tiles and vanity, shower screen, Electrical rough in & connections (switches*1, downlights*, power points*3, exhaust fan*1 budget \$200), Supply & install 13 mm moisture resistant plasterboard for ceiling and painting, Supply & install waterproofing for wet area, Plumbing rough in & Connections, Supply & install tape, sink, Supply allowance \$1,500.00, Install kitchen appliances, Supply and install marble splashback/benchtop/island, supply allowance, Supply and install wall cladding for structure post, Supply and install kitchen cabinet and cooking island (Sub-total: \$73,350.00) (excluding GST); Ground bathroom: Demolish existing wall & ceiling, tiles and vanity, shower screen, Plumbing rough in & connections, Electrical rough in & connections (switches*1, downlights*1, power points*3, exhaust fan*1, budget \$200), Supply & install 13 mm moisture resistant plasterboard for ceiling and painting, Supply & install cement rendering for walls, Supply & install waterproofing for wet area, Install floor & wall tiles, Supply

& install vanity, shower screen, fixtures. Supply allowance \$4,000, Supply & install radder glass door, Supply & install bathtubs (basin, mixer, shower mixer, floor waste). Supply allowance \$3,000 (Sub-total: \$35,900.00) (excluding GST); Laundry: Hot water plumbing rough in & connections & relocation, Demolish existing wall & ceiling, tiles and vanity, cabinet, Electrical rough in & connections (switches*1, downlights*1, power points*3), Supply and install laundry cabinet, Supply & install tape, sink. Supply allowance \$1,500.00, Supply & install 13 mm moisture resistant plasterboard for ceiling and painting, Install floor & wall tiles, Remove the existing door and frame (Sub-total: \$16,600.00) (excluding GST); Windows and doors replace: Demolish existing windows and doors, Supply and install new windows and doors, Skirting and levelling (Sub-total: \$47,150.00) (excluding GST); Master bedroom: Bedside table remove and wall repair, Ensuite toilet seat installation (Sub-total: \$2,050.00) (excluding GST); Bedroom 3 and Bedroom 5 and ensuites: Demolish existing wall and ceiling and cabinet, Demolish existing wall & ceiling, tiles and vanity, shower screen, Plumbing rough in & connections, Electrical rough in & connections (switches*, downlights*1, power points*3, exhaust fan*1 budget \$200), Supply & install cement rendering for walls, Supply & install 13 mm moisture resistant plasterboard for ceiling and painting, Supply & install waterproofing for wet area, Supply & install floor & wall tiles, Supply & install vanity, Shower screen, fixtures. Supply allowance \$4,000, Supply & install bath wares (basin, mixer, shower mixer, floor waste). Supply allowance \$3,000, Supply and install bedroom wardrobe (Sub-total: \$80,400.00) (excluding GST); Bedrooms 2 and 4 and ensuites: Demolish existing wall and ceiling and cabinet, Plumbing rough in & connections, Electrical rough in & connections (switches*1, downlights*1, power points*3, exhaust fan*1 budget \$200), Supply & install cement rendering for walls, Supply & install 13 mm moisture resistant plasterboard for ceiling and painting, Supply & install waterproofing for wet area, Supply & install floor & wall tiles, Supply & install vanity, Shower screen, fixtures. Supply allowance \$4,000, Supply & install bath wares (basin, mixer, shower mixer, floor waste) supply allowance \$3,000, Supply and install bedroom wardrobe (Sub-total: \$59,000.00) (excluding GST); Electrical: Supply and install new lights, new switches and power points, internet ports (allowance for \$15 *75 downlights, \$35*30 switches, \$35*30 power points, \$120), Supply & install new kitchen light supply allowance \$1000, Optional Daikin Variable Refrigerant Volume (VRV) AC system (Sub-total: \$27,800.00) (excluding GST); Painting: Painting on plasterboard ceiling, wall, doors and skirtings (Internal) (Sub-total: \$32,300.00) (excluding GST); Internal doors and handles replacement: Internal doors and handles replace (Sub-total: \$11,000.00) (excluding GST); Ground level ceiling rebuild: Ceiling remove and rebuild, ceiling high raise up (Sub-total: \$11,500.00) (excluding GST); Basement: Basement storage repair and painting, Storage build under the stairs (Sub-total: \$9,500.00) (excluding GST); and Cabinet supply and install: Living cabinet supply and install, Tea room cabinet supply and install, Shoe storage supply and install (Sub-total: \$39,500.00) (excluding GST). The External Works Contract which was entered into, and which provided for a total sum of \$259,077.50 (inclusive of GST), contained a detailed scope of works including: Front Yard: Remove plants, Grade and level front yard, Install composite decking, Install in-ground lighting and wiring in front yard, Install marble floor (Sub-total: \$17,650.00) (excluding GST); Side Passage: Grade and level outdoor ground, Install marble floor, Replace exterior entry door and pave stairs with marble, Paint stair handrail, Paint brick wall on side passage (Sub-total: \$19,725.00) (excluding

GST); Backyard (in front of sliding door): Grade and level ground, Install marble floor, Fill and level stairs with sand, pave with marble, Paint brick wall (Sub-total: \$7,500.00) (excluding GST); Backyard First Level: Fill with sand and level ground, Demolish stairs (both sides), Repair right-side wall, Rebuild stairs, Install composite decking (including joists), Wrap stairs with composite decking, Paint walls (Sub-total: \$37,100.00) (excluding GST); Backyard Second Level water feature and flower bed: Demolish stairs, Rebuild stairs, Prune plants, Connect water feature (water feature provided by landlord), Build composite flower bed and fill with soil (Sub-total: \$14,500.00) (excluding GST); Backyard Third Level near garage: Fill soil (5 truckloads), Level cement ground, Install marble floor, Build flower bed and redwood cover, Build new retaining wall, Connect sauna and spa, Render retaining wall and paint brick wall (Sub-total: \$70,450.00) (excluding GST); Garage: Replace roller gate, Paint garage walls, Sand and level garage floor, Paint garage exterior wall (Sub-total: \$12,700.00) (excluding GST); Fence Painting: Paint natural timber fence in backyard (Sub-total: \$4,000.00) (excluding GST); Water & Electricity: Install water supply and drainage in backyard, Install electrical wiring in backyard, Install LED strips and in-ground lights (Sub-total: \$27,000.00) (excluding GST); Door & Window Replacement: Replace two backyard doors, Replace second floor metal shield (Sub-total: \$4,900.00) (excluding GST); and Master Bathroom: Renovate master bathroom (Sub-total: \$20,000.00) (excluding GST). By November 2024, she was becoming concerned that the works had not been completed as contracted and remained desirous of moving back into the premises prior to the holiday season. She had a conversation with the second defendant at about this time and he assured her that while the works had not quite finished, they could move in by 4 December 2024 and he would work around them if need be to finish any minor things. In light of her conversation with the second defendant, she took steps to move her family back into the premises on or about 4 December 2024. Upon arriving, she became distressed. Nothing had been completed in a manner that was to a reasonable standard and, in some cases, the premises were uninhabitable. She took various pictures (and videos) of the state of the premises on that day (copies of which are annexed to her evidence). She raised her concerns with the second defendant who assured her that he would attend the premises on the next day to run through a defects list together, that it would all be fixed and that he was happy to pay for a hotel for one night for her and her family to stay in for the evening. On 5 December 2024, one day after moving back into the premises with her family, the second defendant attended the premises and she walked him through and noted the defects that were apparent to her. During his visit, they discussed the progress of the exterior works, which involved significant landscaping. The second defendant told her to pay the final payment for the internal works so that he could complete all defects and then he would quote up and start the external works. At this stage, in early December 2024, whilst she was not happy with various aspects of the works, she nonetheless (although, erroneously) thought that they were largely fixable or related to the cleanliness of the house. She understood that some delays were often inevitable with construction works and renovations. She was not aware of any further major defects and, for that reason, felt reassured that the first and second defendants would fix any problems with the works and, thereafter, be able to competently complete the landscaping works that were due to commence following the completion of the internal works. For these reasons, on 13 December 2024, she made payment of the first defendant's invoice for \$65,220.21, described as

“Final Deposit”. In early January 2025, she had various conversations with the second defendant about defects relating to the internal works and also the proposed scope of the landscaping and exterior works. On or about 14 January 2025, the second defendant conceded that the following various defects still needed to be addressed: Reorder stove knobs. Polish marble gaps. Add shelves inside cabinets. Add clothes rail in wardrobe. Paint touch-up. Add power outlets to desks in both rooms. No water supply to toilet in daughter’s room. Add door stop in laundry. Adjust desk height in son’s room. Steam oven still has no water (exact cause unknown). Replace kitchen tap. Front yard light trips. The second defendant also provided various options for external surfaces in relation to the external works. After entering into the External Works agreement, on or about 22 January 2025, at the second defendant’s request, she caused an initial payment of \$70,000.00 to be made to him in consideration of the performance of the external works. On or about 25 February 2025, the second defendant telephoned her and requested a second deposit of 30% for the external works. At this time, she spoke with her husband and told him about the second defendant’s request. She and her husband were concerned about further payments in circumstances where payment in full had been made regarding the internal works and there had not been any significant progress with respect to the external works that would warrant a further significant payment. She telephoned the second defendant and conveyed to him their concern about further payments, given the circumstances with incomplete and unadvanced works. On or about 26 February 2025, the second defendant sent her a final message on WeChat to the effect of, “I’ve agreed with Michael [the second plaintiff] that I didn’t need to do this job anymore. This is the end of our cooperation.” The second defendant then left the group chat which each of them had regularly used throughout their dealings. Between 5 March 2025 and 14 March 2025, she sent pictures to the second defendant regarding the defects and tried to call him on several occasions, including 6 March 2025, 7 March 2025, 10 March 2025, 11 March 2025 and 14 March 2025. She received no response whatsoever. Since moving back into the premises on 4 December 2024, she has identified various defects and problems with the works. Further, the external works and landscaping remain incomplete. Some examples of defects, aside from the extreme lack of cleanliness throughout the premises at the time they moved in, included: Kitchen and cabinetry: Doors were misaligned, soft-closing features did not work, hinges were improperly installed, and multiple panels were scratched or warped. The joinery quality was poor overall; Floorboards: Laid with gaps exceeding 2mm, causing visible separation and an unlevel surface; Painting: Patchy and inconsistent, with brush strokes visible and some areas left unpainted; Bathroom: Waterproofing was either inadequate or missing in areas; grout was inconsistent, and tiles were unevenly laid causing, from time to time, pooling of water; Lighting and electrical: Fixtures were misaligned and multiple switches did not function properly; Glass balustrades: Not installed despite being included in the contract; Garage: Incomplete cabinetry and shelving, no epoxy flooring, and the roller door was poorly installed; Doors: Substandard and poor quality which, despite promises that they would be solid wood (at a cost of \$1,000.00 per door), were hollow and light (retailing for about \$50.00 each); and External decking and landscaping: Either not commenced or left incomplete, debris was scattered across the backyard, damaging the soil and plants. In light of this, she and the second plaintiff commenced these proceedings. On or about 2 April 2025, she and the second plaintiff also obtained an independent building inspection

together with a third party quotation to fix the various defects and to complete the works. She and the second plaintiff also engaged an independent building expert who provided the Expert Report. She found the experience incredibly distressing. She and the second plaintiff spent a significant amount of money trying to renovate the premises and thought that they had engaged a professional who was competent in completing the works. Instead, she and her family are now living in unfinished premises, having spent \$782,855.00 of their hard-earned savings. The Plaintiffs' solicitor's evidence The salient features of the unchallenged evidence of Mr Sean Felthouse (solicitor for the first and second plaintiffs), primarily with respect to the question of defects and an assessment of damages, can be summarised as follows: Exhibits 1 and 2, comprising the first plaintiff's evidence and the Expert Report of Mr Gordon Xue (building inspector), were served on the former solicitors for the first and second defendants on 28 July 2025 (and, in the case of Exhibit 1, served again on the first and second defendants themselves on 21 August 2026). Exhibit 3, comprising his own affidavit, was served on the first and second defendants on 21 August 2026. The plaintiffs seek that their damages be assessed in the sum of \$844,664.85 as at the date of hearing on 8 September 2026. The rectification costs, completion costs and GST sought, in the sum of \$706,431.00, are based on the itemisation outlined in the Scott Schedule on pp. 234 - 238 of the Expert Report. The incidental expenses sought, in the sum of \$20,790.00, being the costs of the expert's time and the preparation of the Expert Report, are based on the itemisation outlined in the expert's invoice (Exhibit 2, pp. 483 - 484). The pre-judgment interest sought, in the sum of \$117,443.85, from 28 July 2024 (being the date on which the cause of action is said to have accrued by the parties executing the Internal Works Contract, despite neither of the defendants being licensed to undertake the contracted works), up to and including the date of swearing his affidavit on 21 August 2026, is based on the following statutory rates: 28.7.2024 to 31.12.2024 - 8.35% 1.1.2025 to 30.6.2025 - 8.35% 1.7.2025 to 31.12.2025 - 7.85% 1.1.2026 to 30.6.2026 - 7.60% 1.7.2026 to 21.8.2026 - 8.35% The further amount sought is pre-judgment interest up to and including the date on which damages are assessed and the Court's judgment takes effect. The plaintiffs' claim for costs is on an indemnity basis for the entirety of the professional fees incurred. In the alternative, the plaintiffs seek their costs on a party / party basis up to 12 November 2025, being the date on which the plaintiffs made a Calderbank offer (which was not accepted by the first and second defendants) and on an indemnity basis on and from thereafter. The plaintiffs' claim for indemnity costs is based on a letter from the plaintiffs' solicitors to the former solicitors for the first and second defendants, annexed to the affidavit (Exhibit 2, pp. 485 - 489). The Expert's evidence The salient features of the unchallenged evidence of the expert, primarily with respect to the question of defects and an assessment of damages, can be summarised as follows: He confirms his instructions to provide an expert report on the status of the works as at the date of his inspection on or about 9 July 2025; details of any incomplete work; details of any defective works; the scope of works necessary to rectify any alleged item of defective work; and the preparation of a Scott Schedule detailing the scope of works, the cost to rectify the defective works and the incomplete works. He acknowledges reading and agreeing to be bound by the Expert Witness Code of Conduct in Schedule 7 of the UCPR. He confirms that the opinions and reasoning expressed within the Expert Report are wholly based on his expert knowledge and his training, qualifications and experience. He holds a

number of qualifications and professional associations, including a Bachelor of Construction Management (UNSW); a Master of Project Management (USyd); registration as a Quantity Surveyor with the Australian Institute of Quantity Surveyors (No.9497); NSW Builder's Licence (No.250296C); and a Certificate IV in Timber Joinery Machining (TAFE NSW). No Construction Certificate was obtained by the defendants prior to the commencement of the works. Neither the first defendant nor the second defendant held a building contractor licence. No home warranty insurance was obtained by the defendants. He inspected the premises on 9 July 2025. The work at the premises remained partially incomplete at the time of his inspection. During his inspection, there was no inclement weather which could have had an impact on the result of the inspection. He calculated the total sum of the defective works, preliminaries, cost escalations, builder's margin and home warranty insurance to be \$706,431.00 (inclusive of GST). He applied the standard construction code guide rates of Rawlinsons Cost Guide 2025 (Ed 33) (RCG) for the purpose of rates reference in his report. He made no further adjustment for inflation or cost increases for the rates, as the RCG was a recent publication. He allowed for preliminaries as a percentage of net cost which, according to the Australian Institute of Quantity Surveyors - Building Cost Index (September 2024), makes an allowance of 13% for building works at Sydney suburban sites. He allowed for a builder's margin as a percentage of the net cost and, in this case and based on his experience, he formed the opinion that 20% for defect rectification works was reasonable and was reflective of what he observed the industry charging for builder's margin for like projects. He added an itemised amount for insurance under the Home Building Compensation Fund (HBCF) (formerly, Home Warranty Insurance) based on a percentage rate of total cost of 1.111% for category H04, plus an additional 1% for insurance brokerage premium, totalling a 2% premium for HBCF insurance, effective as at 1 March 2024. Where he calculated hours and materials based on "experience", he did so applying his own experience in managing and coordinating work of a similar nature. He was of the opinion that a reasonable contingency rate of 10% should be applied to the total rectification costs which, based on his experience in managing defect rectification works, is a rate added by remedial builders to the total cost of rectification works due to the increased risk associated with those works. He considered a number of risk factors to determine the contingency rate, including lack of documentation for the building; unlicensed and uninsured building work; poor workmanship at the premises; and the failure to comply with the National Construction Code (NCC) and Australian Standards requirements. As there were multiple defects present, there was a greater risk of there being unforeseen items or areas not able to be assessed while undertaking an inspection, including testing and invasive investigations. He was of the opinion that the RCG, which made a contingency allowance of 2.5% for new residential buildings, was inadequate for this project, having regard to the extent (and value) of the defect rectification works and, having regard to the risk factors identified earlier, a 10% contingency rate should be applied to the total rectification cost. He made a number of assumptions including that the background information and documents provided to him accurately recorded the history of the matter; that the Building Code of Australia (BCA) amendments relevant to the works were those as at 2023, and which had been adopted in NSW on 1 June 2022; that, apart from compliance with relevant codes and standards, the works were to be of reasonable trade quality; that he conducted a visual inspection of the

areas of the premises so as to form a view about the matters alleged; he had previously sourced and reviewed relevant codes, standards and building industry data; the weather was fine during his inspection and although it had been raining leading up to the day of his inspection, the weather before and during his inspection had no substantive effect on his opinions; where he took photographic records at the premises, he did so using an iPhone 12 digital camera, the photos of which had not been enhanced in any way; where he undertook moisture readings, he did so using a Flir MR775 moisture meter, using the pin-type electrical resistance moisture testing whereby a moisture reading above 20% was indicative of excess moisture within the test material; and where he had taken levels, he used an Empire digital spirit level of 600mm and 1200mm lengths. He referred to extensive defects and breaches of specific clauses of the NCC, the Australian Standards and the NSW Guide to Standards and Tolerances 2017, including: - NCC (2023, Vol. 2, Housing Provision Clause 10.2.10 - Materials - Construction of wet area floors - Water resistant surface materials); NCC (2023, Vol. 2, Housing Provision Clause 10.2.12 - Construction of wet area floors - Minimum and maximum continuous falls of a floor plane to the floor waste); NCC (2022, Vol. 2 Objective H401 - Construction of wet areas to safeguard occupants from illness or injury and protect the building from damage caused by the accumulation of internal moisture arising from the use of wet areas in a building); NCC (2022, Vol. 2, Housing Provision Clause 10.4.2 - Construction of sanitary compartments); NCC (2022, Vol. 2, Housing Provision Clause 5.7.4(3) - Damp-proof courses and flashings installation); NCC (2022, Vol. 2, Housing Provision Clause 11.3.4(2)(a) - Construction of barriers to prevent falls); NCC (2022, Vol. 2, Housing Provision Clause 11.2.2 - Stairway construction); Australian Standards (AS3958:2023 Clause 5.4.5 - Installation of Ceramic and Stone Tiles - tiles that become pitted, chipped, cracked or scratched during installation to be replaced or remediated); Australian Standards (AS3958:2023 Clause 5.4.8 - Installation of Ceramic and Stone Tiles - lippage tolerances); Australian Standards (AS2047:2014 Clause 7.2.2 - Windows and External Glazed Doors in Buildings - Requirements for flashing during the installation of windows and external glazed doors); Australian Standards (AS1288:2021 Clause 3.3.3 - Glass in buildings - Procedures for the selection and installation of glass in buildings, subject to wind loading, human impact, and special applications, such as overhead glazing, barriers and glass assemblies and the maximum deflection for all glass under the serviceability limit); Australian Standards (AS4386:2018 Clause 8 - Cabinetry in the built-in environment - Commercial and domestic - Benchmark requirements for the design, manufacture and installation of built-in joinery); Australian Standards (AS1859.3:2017 Clause 2.2.1 - Reconstituted wood-based panels - Specifications, Part 3: Decorative overlaid wood panels - Compliance criteria for surface defects on visual appearance - Fibre and hair of decorative veneers overlaid to entire board - veneers not varnished); Australian Standards (AS1859.3:2017 Clause 6.1.3 - Reconstituted wood-based panels - Specifications, Part 3: Decorative overlaid wood panels - Compliance criteria for surface defects on visual appearance - Face grade veneers must exclude open joints, splits and any other faults detrimental to the finish and appearance of the surface); Australian Standards (AS1859.3:2017 Clause 6.1.7 - Reconstituted wood-based panels - Specifications, Part 3: Decorative overlaid wood panels - Compliance criteria for surface defects on visual appearance - Edges must be clean cut and square to the surface, and sanded finish to be equivalent to 150 grit or higher); Australian Standards (AS4386:2018 Clause 12 - Cabinetry in the

built-in environment - Commercial and domestic - Fitting doors and drawers); Australian Standards (AS4386:2018 Clause 13 - Cabinetry in the built-in environment - Commercial and domestic - On completion of installation); Australian Standards (AS4386:2018 Clause 11.1 - Cabinetry in the built-in environment - Commercial and domestic - General installation of cabinets and worktops - Cabinet panels and worktops with cut edges in high moisture areas to be sealed to prevent the ingress of moisture); Australian Standards (AS3740:2021 Clause 4.8.2 - Waterproofing for domestic wet areas - Minimum step down requirements); NSW Standards and Tolerances (2017 Clause 11.4 - Bench tops, cabinet doors and drawer fronts); and NSW Standards and Tolerances (2017 Clause 15.8 - Levelness of timber flooring). He outlined the most cost-effective method of rectification (which in some cases required replacement of the item in question), including in cases where, for example, the joinery was imported from overseas and it would not be possible to provide a matching veneer within Australia. He exposed clearly the methodology of rectification with respect to each defect. He engaged in a structured, evidence-based process to calculate the cost of rectification works, culminating in a comprehensive Scott Schedule, costing calculation and quantification schedule (Exhibit 3, pp. 234 - 270), which he summarised as follows:

Item #	cl.	Description	Amount
1	8.1	Tea / sun room - defective display shelf joinery	\$ 25,508.00
2	8.2	Entry - defective shoe storage joinery	\$ 10,530.00
3	8.3	Living - defective display shelf	\$ 45,253.00
4	8.4	Kitchen - defective kitchen cabinets	\$ 88,085.00
5	8.5	Family room - defective joinery	\$ 23,103.00
6	8.6	Ground floor bathroom - defective tiling	\$ 13,579.00
7	8.7	Lift off hinge missing	\$ 411.00
8	8.8	Poor tiling installation	\$ 3,014.00
9	8.9	Window flashing missing	\$ 30,433.00
10	8.10	Non-compliant balustrade	\$ 8,105.00
11	8.11	Bedroom 2 - defective wardrobe joinery	\$ 9,302.00
12	8.12	Ensuite 1 - damaged joinery	\$ 8,363.00
13	8.13	Shower screen not functional	\$ 807.00
14	8.14	Ensuite 2 - poor tile installation	\$ 2,179.00
15	8.15	Bedroom 3 - wardrobe joinery defective	\$ 9,302.00
16	8.16	Hallway - cupboard joinery defective	\$ 6,323.00
17	8.17	Ensuite 3 - basin cabinet water damaged	\$ 7,623.00
18	8.18	Ensuite 3 - damaged light fitting	\$ 612.00
19	8.19	Ensuite 3 - inadequate step down to shower	\$ 10,686.00
20	8.20	Bedroom 5 - wardrobe joinery defective	\$ 16,502.00
21	8.21	Master bedroom - bedhead joinery defective	\$ 6,761.00
22	8.22	Ensuite 1 - defective tiling	\$ 10,383.00
23	8.23	Bedroom 4 - wardrobe joinery defective	\$ 9,302.00
24	8.24	Ensuite 4 - basin cabinet defective	\$ 7,623.00
25	8.25	Ensuite 3 - defective tiling	\$ 10,345.00
26	8.26	First floor - floor out of level	\$ 6,212.00
27	8.27	Defective stair riser height	\$ 10,628.00
28	8.28	Wine joinery not fit for purpose	\$ 12,887.00
29	8.29	Defective plasterboard installation	\$ 7,280.00
30	8.30	Missing downlights	\$ 2,790.00
Sub-total (Items 1 to 30)			\$403,932.00
Preliminaries - 13%			\$ 52,511.00
Sub-total			\$456,443.00
Cost escalation - 4.5%			\$ 20,540.00
Sub-total			\$476,983.00
Contingency - 10%			\$ 47,698.00
Sub-total			\$524,682.00
Builder's margin - 20%			\$104,936.00
Sub-total			\$629,618.00
GST			\$ 62,962.00
Total			\$692,580.00
HBCF insurance - 2%			\$ 13,852.00
Grand Total			\$706,431.00

Damages Relevant provisions and principles for contract Section 18B of the HBA provides, relevantly: 18B Warranties as to residential building work

- (1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work—

- (a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,
- (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
- (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
- (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
- (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
- (f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment. ... Liability having been established, it is trite to observe that any losses arising from a breach of contract sound in damages for breach of contract. Similarly, any losses arising from a breach of the HBA sound in damages for breach of contract. At its foundational level, the common law prescribes that where a party sustains a loss by reason of a breach of contract, such party is to be placed, so far as monetary damages can, in the same situation as if the contract had been performed: *Robinson v Harman* (1848) 1 Exch 850 at 855. In *Bellgrove v Eldridge* (1954) 90 CLR 613; [1954] HCA 36 (*Bellgrove*), the High Court held that an owner is entitled to the "reasonable cost of rectifying the departure or defect so far as that is possible" and "[t]his loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract" (at 617). The Court noted, however, an important "qualification" to this rule, that is, "not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt" (at 618). The Court continued in its holding that "[a]s to what remedial work is both "necessary" and "reasonable" in any particular case is a question of fact" (at 619). The application of these principles is evident in the decision of *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272; [2009] HCA 8 (*Tabcorp*) in which the High Court affirmed the

approach in Bellgrove and noted that “the test of “unreasonableness” is only to be satisfied by fairly exceptional circumstances” such as “where the innocent party is “merely using a technical breach to secure an uncovenanted profit”” (at [17]). Ultimately, as Ball JA (with whom Payne and Stern JJA agreed) stated in 85 Princess Pty Ltd v Fleming [2025] NSWCA 261 (85 Princess), “what is reasonable is very much a question of fact that depends on the particular circumstances of the case” and “relevant to the question of reasonableness is the subjective intention of those in whose favour the relevant contractual requirement is included” (at [65]). In Kalantzis v Brown [2026] NSWCA 17; (2026) 119 NSWLR 247 (Kalantzis), Adamson JA (with whom Ward P and Mitchelmore JA agreed) said that where “the property in question is a residential home in which the plaintiffs live, concepts of reasonableness take on a different complexion” and that such an analysis “harks back to the general principle that a party ought not be permitted to profit from its own breach” (at [148]). In 85 Princess, Ball JA referred to the “useful checklist” of relevant considerations set out by Kourakis CJ in Stone v Chapel (2017) 128 SASR 165; [2017] SASCFC 72 at [55], which is as follows:

- (1) the degree of departure from the contractual stipulation;
- (2) the adverse effect of the departure on the functional utility, amenity and aesthetic appearance of the building;
- (3) the reasons, objectively ascertained and commonly known, for which the innocent party made the stipulation which was breached;
- (4) the practical feasibility of rectifying the work, including the effects on third parties of attempting to do so;
- (5) whether or not the innocent party intends to carry out the rectification work;
- (6) the absolute cost of the rectification work and the disproportion between that cost and
 - the value of the building and contract price;
 - the diminution in commercial value of the building;
 - the effect of the departure on the functional utility, amenity and aesthetic appearance of the building;
- (7) the nature of the wrongdoer’s fault for the defect; and
- (8) the public interest in reducing economic waste. However, Ball JA stated that the checklist “should not be applied mechanistically and the ultimate question remains whether in all the circumstances of the case it would be reasonable to undertake the work necessary to achieve compliance with the contractual specification” (at [65]). Furthermore, Ball JA warned against treating the diminution of value and cost of reinstatement or rectification as the only two methods of assessing damages and adopted, with approval, the broad statement of Santow JA in Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353; (2004) 135 LGERA 98 (Tellamist) at [187] that “rules and principles as the common law has

developed to assess the damages of an injured party are not inflexible, and must always be applied with the overriding goal of compensation”. In *Owners SP 92450 v JKN Para 1 Pty Ltd* [2023] NSWCA 114; (2023) 39 BCL 98 (JKN), Gleeson JA (with whom White and Brereton JJA agreed) stated that “[t]he burden of proof for establishing loss lies on the claimant ... By contrast, the party in breach of contract has the onus of displacing the prima facie rule for assessing damages as the cost of reinstatement” (at [71]). After the Court has determined the amount of damages for the breach of the contract by the builder, there is to be a reduction for any amount of the contract price that remains unpaid. This is a reflection of the principle cited by the High Court in *Bellgrove* at 617 - 618, reliant on the following passage from *Hudson on Building Contracts* (7th ed, 1946) at 343: The measure of the damages recoverable by the building owner for the breach of a building contract is, it is submitted, the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract, with the addition, in most cases, of the amount of profits or earnings lost by the breach. Relevant provisions and principles for the extended duty in the DBP Act Section 37 of the DBP Act provides: 37 Extension of duty of care

- (1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects—
 - (a) in or related to a building for which the work is done, and
 - (b) arising from the construction work.
- (2) The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.
- (3) A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.
- (4) The duty of care is owed to an owner whether or not the construction work was carried out—
 - (a) under a contract or other arrangement entered into with the owner or another person, or
 - (b) otherwise than under a contract or arrangement. Any losses arising from a breach of the extended duty of care under s 37 of the DBP Act sound in damages of a tortious nature, the compensatory principle of which is to put the plaintiffs in the position they would otherwise have been had the tort not occurred: *Livingstone v Rawyards Coal* (1880) LR 5 App Cas 25. Relevantly, the counterfactual is that the defendants exercised reasonable care to avoid defects which cause economic loss in respect of premises in which work is performed and arising from the relevant construction work. The measure of damages in tort for defective building work is not dissimilar to the measure of damages in contract. In *Evans v Balog* [1976] 1 NSWLR 36, Samuels JA (with whom Moffitt P and Hutley JA agreed) held that the “normal measure of damages” is not “the amount of diminution in the value of the land and improvements” and that “an equally admissible measure is the cost of reinstatement and restoration” of “tortious damage to a building” (at 38) and reasonableness is the touchstone

between the different measures of damages. Although the relevant wrong under tort is the breach of a duty of care and the relevant wrong under contract is a breach of the contract, the calculation of damages in this case falls under the same principles. Both are seeking to put the plaintiffs in the position they would otherwise have been had the relevant wrong (that is, the relevant breaches) not occurred. Consideration In the present case, the defendants did not participate in the hearing nor the directions hearings leading up to it. Although the guidance given by Griffiths AJ in *Rosen v Louey* [2026] NSWSC 1048 at [28] - [31] concerned the weight to be attributed to evidence and submissions filed earlier by a party that later played no part in the hearing proper in the context of the relevant duties on NCAT in the Civil and Administrative Tribunal Act 2013 (NSW), I am cognisant of the importance of affording natural justice to the parties whose proceedings commenced at NCAT and from which these proceedings were transferred. Here, the defendants have not filed any evidence, submissions or other material, save for a Defence (which has been struck out after the defendants failed to show cause why it should not). Nonetheless, I have gleaned from the Defence that the defendants, in the main, do not admit, deny or, in some cases, do not respond at all to, almost every paragraph pleaded in the Statement of Claim without more. Relevantly, in relation to the relief sought by the plaintiff (Statement of Claim at [52] - [55]), the defendants deny each of those paragraphs without any further expansion or explanation either to these paragraphs or more broadly to the Claim, save for asserting that the first defendant was not the builder and neither the first nor the second defendant were required to hold a licence under the HBA. Whilst I am respectfully bound by the principle in *JKN* stated above, I am not persuaded to the view that the defendants' clinical traversals pleaded in its now struck out Defence alone adequately surmount the threshold of displacing the *prima facie* rule for assessing damages as the cost of rectification. That said, I am not persuaded to simply acquiesce to making orders that the cost of rectification be awarded merely because the defendants have not participated in this hearing nor produced any evidence. It is incumbent on the Court, nonetheless, to engage in the assessment process on the "ultimate question", as described by Ball JA in *85 Princess*, as to whether in all the circumstances of the case (to the extent that it is before me) it would be reasonable to undertake the necessary work to achieve what the parties had objectively intended in the contract. I am satisfied that the plaintiffs have established that the defects referred to above were significant and a material departure from that which they contracted with the first defendant. The combination of the Expert Report, which I accept, and the first plaintiff's evidence establish that the plaintiffs were left with a dwelling in a state of disrepair with numerous defects extending beyond matters of minor or cosmetic imperfections. In some cases, the defects were pervasive and affected important aspects of the quality, durability and proper functioning of the works undertaken by the first defendant. What the plaintiffs received was not a home renovation completed to the standard reasonably expected of a competent building contractor but, rather, one requiring extensive investigation, rectification and, in the main, replacement of defective work and materials. The workmanship was, in significant respects, carried out without the necessary due care and skill in accordance with the plans and specifications incorporated in the contracts; involved

materials supplied by the first defendant which were not good and suitable for their intended purpose; and was not performed in accordance with a multitude of building codes and associated laws, nor carried out with due diligence, resulting in an outcome manifestly below an acceptance standard for premises that were intended to be reasonably fit for occupation as a dwelling. This was not merely a case of the first defendant paying little attention to detail. Defective installation of cabinetry and tiling, inadequate finishing and departures from proper construction practice resulted in defects which compromised the quality and longevity of the home. They represented a consistent pattern of deficient workmanship across multiple rooms and areas within the home, leaving the plaintiffs to incur substantial expenditure to put right work which ought to have been properly completed to an acceptable standard in the first place. The deficiencies were compounded by the use of materials which were either substandard, unsuitable or inadequately installed. There were non-compliant balustrades, non-functional shower screens, defective tiling, missing flashing, defective stair riser heights and inadequate step down to shower areas, which represented structural irregularities leaving the plaintiffs with a home requiring rectification works of appreciable proportions, the cost of which is significant not merely because of its quantum, but because it represents the practical consequence of the first defendant's failure to deliver the quality of works for which the plaintiffs had contracted. The photos attached to the Expert Report illustrate the magnitude of defective workmanship and materials. In assessing the evidence as a whole, I am satisfied that the condition in which first defendant left the premises was a substantial departure from the standard of work and materials which the plaintiffs were entitled to expect. The first defendant's breach of the HBA extends not only to the statutory warranties implied into the contract by virtue of s 18B. The breach also encompasses the first defendant's failure, as contractor by virtue of ss 90(1) and 92 of the HBA, to obtain a contract of insurance (and an accompanying certificate evidencing same) in respect of the residential building work it had contracted to perform for the plaintiffs. The result in the present circumstances is that the plaintiffs have lost the benefit of being interested parties under a contract of insurance for effective residential building work which would otherwise have enured in their favour. It is a significant factor, as Adamson JA recognised in *Kalantzis*, that the premises were and remain the family home of the plaintiffs. They moved into the premises on 4 December 2024 with their children and have resided there since. There is no suggestion that they wished to, or might, sell it. I am satisfied that the expense of the remedial work to be undertaken as set out in the Expert Report would not be out of all proportion to the benefit to be obtained and that the rectification works are necessary to produce conformity and a reasonable course to adopt. The amounts quoted for the steps to be taken to remedy the defects are modest in the circumstances. This includes the allowances made by the expert for preliminaries, cost escalation, contingency, builder's margin and HBCF insurance. It cannot be said that the proposed steps to address the breaches would be disproportionate in this case. I am satisfied that it is reasonable and necessary in all the circumstances of this case to award damages for work to be undertaken to achieve compliance with the contractual requirements, including the statutory warranties in the HBA that are implied into the contract. Indeed, I consider

that it would not be reasonable in the circumstances of this case to only award damages for the diminution of value. To do so would have insufficient regard to the importance of the family home to the plaintiffs and would radically undercut the bargain for which the plaintiffs, as the innocent parties, had contracted. If the benefit of the contracts and statutory warranties are to be secured to the plaintiffs, it is reasonable and necessary that rectification damages be paid in the sum of \$706,431.00 (inclusive of GST). Liability of the defendants to pay damages Under s 37(1) of the DBP Act, the duty is owed by a “person” who carries out construction work. In *Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2)* [2022] NSWSC 1368 (Boulus), Stevenson J considered an application to amend a Cross-Claim Cross-Summons and Cross-Claim List Statement that would identify a Mr Boulus and a Mr McCarthy as “persons” for an alleged breach of the extended duty in s 37(1) of the DBP Act. It was alleged that Mr Boulus was “the managing director of [the Builder]” and “had the power and ability to and did substantively control all of the building works comprising the entire project, such control including the appointment and control of the project delivery staff working for [the Builder] ..., the supervision of the adequacy of the works performed by such project delivery staff, the selection and appointment of subcontractors to perform elements of the Works for which [the Builder] was ultimately responsible, and the overall supervision and acceptance of the works performed by [the Builder’s] employees and subcontractors, for the ultimate benefit of [the Council]” (at [27]). It was alleged that Mr McCarthy was the “site supervisor for the Project, ... [who] actively supervised, coordinated and project managed all of the primary elements of the building works comprising the project, and coordinated and directed how the Works performed by [the Builder] were carried out, including by directing and engaging with [the Builder’s] subcontractors in the performance of their works” (at [28]). At [61], his Honour rejected a submission that, as a matter of statutory construction, the reference to a “person” in s 37(1) was limited to a person acting “in their own capacity”. Justice Stevenson held that such a construction, which was urged by the party resisting the amendment, “would, in effect, involve reading “person” in s 37(1) as meaning “practitioner”” and such a reading was not consistent with Parliament’s careful use of the defined term “practitioner” and the separate term “person” (at [61]). A broader construction of the term “person” would be consistent with the wide potential ambit of the definition of “construction work” (at [61]). His Honour therefore held that the proposed identification of Mr Boulus and Mr McCarthy as “persons” under s 37(1) of the DBP Act was not a reason to refuse leave to make the amendments. The plaintiffs pleaded in their Statement of Claim that both the first and second defendants were in breach of the statutory duties under the DBP Act. As explained above at [3], the second defendant was involved in the day-to-day management of the first defendant at the premises and the provision of the works. I am satisfied that the second defendant was involved in supervising and coordinating the works and exercised substantive control over the carrying out of the works. I am satisfied that he is a “person” within the meaning of that term in s 37(1) of the DBP Act, in the broader sense encapsulated by Stevenson J, respectfully, in *Boulus*. The fact that the second defendant is not a party to the contract is inconsequential for the purposes of s 37(1) of the DBP Act. Unlike s 18B of the HBA, s 37(1) of the DBP Act

does not operate as implying a term into the contracts. This conclusion is fortified by the wide terms of s 37(4) of the DBP Act, which provides that the s 37(1) duty is owed to an owner whether or not the construction work was carried out under a contract or arrangement. Section 39 of the DBP Act provides that a person who is subject to the extended duty in s 37(1) is not entitled to delegate that duty. But s 41(3) of the DBP Act makes Pt 4 (of which ss 37 and 39 form part) subject to the Civil Liability Act 2002 (NSW) (CLA). Section 5Q of the CLA provides that the extent of liability in tort for breach of a non-delegable duty “is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.” The operation of and interaction between these provisions was considered in *Pafburn Pty Limited v The Owners - Strata Plan No 84674* [2024] HCA 49; (2024) 421 ALR 133 (Pafburn). The plurality (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) held that ss 37 and 39 of the DBP Act, read in conjunction with s 5Q of the CLA, do not permit apportionment of a person’s liability as between them and any other person subject to a duty under s 37(1) of the DBP Act. The result is that, by application of the legislative provisions referred to above and the common law, the first and second defendants are jointly and severally liable to the plaintiffs for the damages for the breach of the duty to exercise reasonable care to avoid economic loss caused by the defects. Compensation under the ACL The plaintiffs pleaded their claim for a compensation order under the ACL in the alternative. Section 18 of the ACL provides: 18 Misleading or deceptive conduct

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).
Note: For rules relating to representations as to the country of origin of goods, see Part 5-3.
Any losses arising from a contravention of the ACL in the nature of misleading and deceptive conduct, sound in an order for compensation pursuant to s 237 of the ACL, which provides: 237 Compensation orders etc. on application by an injured person or the regulator
 - (1) A court may:
 - (a) on application of a person (the injured person) who has suffered, or is likely to suffer, loss or damage because another person has engaged in conduct in contravention of a provision of Chapter 2, 3 or 4; or
 - (b) on the application of the regulator made on behalf of, and with the consent in writing of, one or more such injured persons; make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct. Note: The orders that the court may make include all or any of the orders set out in section 243.
 - (2) The order must be an order that the court considers will:

- (a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or
- (b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.
- (3) An application under subsection (1) may be made at any time before the end of 6 years from the day on which the cause of action accrued that relates to the conduct referred to in that subsection. In *Larsen as trustee for the Larsen Superannuation Fund v Tastec Pty Ltd* (formerly *Wonders Building Company Pty Ltd*) [2025] NSWCA 145 (*Larsen*), Adamson JA (with whom Stern JA and Price AJA agreed) held that the measure of compensation payable for a breach of the ACL usually equates to damages in tort and that “broadly speaking, it is said that the victim of misleading or deceptive conduct is entitled to an award of damages sufficient to put that person in the position they would have been in had the misleading or deceptive conduct not occurred” (at [50]). Her Honour further stated, in relation to expectation losses, “[t]his process is akin to the process of assessing damages in tort because of the relevant comparison, but it involves an assessment of loss on an expectation basis, which is generally apposite for damages for breach of contract” (at [51]). The Internal Works Contract (and indeed the External Works Contract) made representations that the first defendant would perform the services in a “diligent and professional manner in accordance with all relevant standards”; would “act in good faith”; would “not intentionally do anything which is harmful to the [plaintiffs]” (which is to be read as a reference to economic harm rather than physical harm); would “comply with all reasonable time limits”; would carry out the works “in a workmanlike manner to all relevant standards”; would “comply, at their own cost, with all of their statutory obligations” (including relevant regulatory codes of practice) with respect to the works (which I understand to include holding the relevant licences under the HBA); would obtain and maintain current policies of insurance required to be effected in law (including negligence by the first defendant or an employee of the first defendant); would provide the plaintiffs with a certificate of currency of that insurance if requested; and would indemnify the plaintiffs in respect of any breach of the obligations relating to compliance with its statutory obligations, relevant regulatory codes of practice and insurances. Considered together with the oral representations and, via the inspections of other properties renovated by the defendants, the visual representations, I am satisfied that the defendants engaged in misleading and deceptive conduct by representing to the plaintiffs that they had the requisite due skill, care and diligence to carry out the works; that they had the requisite skills and expertise to conduct the works; would use materials that were fit for purpose to undertake the works; would undertake the works in compliance with all standards and laws; that the defendants had adequate insurances; that the defendants had all relevant licences and registrations required by statute; and that they were capable of meeting the express and implied obligations under the Internal Works Contract. These representations were believed and relied upon by the plaintiffs. I am satisfied that, had the misleading and deceptive conduct not occurred, the position in which the plaintiffs would have been is such that they would not have engaged the first defendant to carry out the

works. The evidence shows that the representations made by the second defendant for himself and on behalf of the first defendant were instrumental to the decision of the plaintiffs to engage the first defendant to conduct the works. The actions of the second defendant in taking the plaintiffs and their friend on inspections of other properties over which he had purportedly conducted renovation works through the first defendant, coupled with the oral representation “this is what I do. My quality of work is good. Everything will be done properly and to the highest standards ... It will look as good as this and I will personally make sure of it”, together with the representations referred to above, served to induce the plaintiffs to engage the first defendant to carry out the works and to engender confidence in the defendants’ ability to do so with due care, skill and diligence. Before engaging the first defendant, the evidence shows that plaintiffs had a strong desire to renovate their property and were in search of a suitable contractor to plan and carry out those works. The counterfactual is that the plaintiffs would have engaged a different contractor to carry out these works, rather than not carrying out a renovation at all. I consider, for the reasons set out above in the discussion about damages under contract and tort, that the appropriate compensation order is that the first and second defendants should pay for the cost of rectification, which I find is reasonable and necessary. I consider that this is preferred method over the difference in value method of assessment to properly compensate the plaintiffs for their loss and damage. Therefore, if I had not found that the first and second defendants were liable jointly and severally for damages for a breach of the extended duty under s 37(1) of the DBP Act, I would have made a compensation order for the cost of rectification against the first and second defendants for a contravention of s 18 of the ACL. Overpayment As Ward J (as the President then was) stated in *Wabbits Pty Ltd v Godfrey* [2009] NSWSC 1299, “[i]n determining damages as required under *Bellgrove v Eldridge*, account must be made for any amount of the contract price which remains unpaid to the builder, irrespective of whether the builder would be able to recover that amount” (at [109]). In *Australian Orthopaedic Fixations Pty Ltd v Amplitude Australia Pty Ltd* [2017] SASC 88, Doyle J stated at [423]-[425]:

423. Restitutionary relief will not be available where the payment is one to which the recipient is contractually entitled, or in circumstances where a grant of restitutionary relief would contradict the contractual obligation to pay. However, restitutionary relief may be available in respect of payments made as a result of a mistaken understanding or construction by the payer of their contractual obligation to pay. Certainly this has been so since the High Court's confirmation in *David Securities Pty Ltd v Commonwealth Bank of Australia* that there is no rule that precludes recovery of payments made under a mistake of law.
424. The payer's right to recover overcharged amounts requires that it establish a mistake that was causative of the payment, and is subject to the usual range of defences to restitutionary claims (such as change of position). As no defence has been invoked by Fixations, the only issue on Amplitude's set off and counterclaim in this case is whether it has established a causative mistake. [My emphasis added] In *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; [1992] HCA 48, it was held that a “payer will be entitled

prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment.” In the present case, the contractually fixed price for the Internal Works Contract was \$592,911.00 (inclusive of GST) with a variation of an additional \$49,995.00 (inclusive of GST), totalling \$642,906.00 (inclusive of GST). The first defendant issued invoices to the plaintiffs for a combined amount of \$702,267.99, representing an overcharged amount of \$59,291.10 by, it seems, mistakenly adding GST over and above the original contractually fixed price (before the variation). The first defendant was not contractually entitled to the \$59,291.10 invoiced to the plaintiffs. The plaintiffs have paid \$692,197.10 to the first defendant. Therefore, the plaintiffs have overpaid the first defendant by \$49,291.10 for the completed (albeit, defectively) internal works under the Internal Works Contract. In relation to the External Works Contract, the contractually fixed price was \$259,077.50 (inclusive of GST) and the first defendant issued an invoice on 15 January 2025 for \$77,723.25. The plaintiffs paid \$70,000 to the first defendant on 22 January 2025. The termination of the External Works Contract immediately thereafter released the first defendant of any entitlement to the balance, being \$181,354.25 (inclusive of GST), but created a liability of the plaintiffs for the shortfall in its payment of the said invoice in the sum of \$7,723.25 (inclusive of GST). Accordingly, an allowance should be made such that the first defendant ought repay the plaintiffs the sum of \$41,567.85 (inclusive of GST), this being the difference between the overpayment under the Internal Works Contract in the sum of \$49,291.10 and the underpayment under the External Works Contract invoice in the sum of \$7,723.25. Interest Section 100 of the CPA provides: 100 Interest up to judgment

- (1) In proceedings for the recovery of money (including any debt or damages or the value of any goods), the court may include interest in the amount for which judgment is given, the interest to be calculated at such rate as the court thinks fit—
 - (a) on the whole or any part of the money, and
 - (b) for the whole or any part of the period from the time the cause of action arose until the time the judgment takes effect. It was submitted for the plaintiffs that interest should date from 28 July 2024, the date on which the parties entered into the Internal Works Contract. In my view, an assessment of interest dating back to such date is erroneous. The “time the cause of action arose” is the date of practical completion (even if it be affected by the defective works), namely, 4 December 2024, which, incidentally, serves to also be the date on which the plaintiffs returned to occupy the premises. As the plaintiffs did not specify the rate of interest in the Statement of Claim, the rates are to be calculated in accordance with r 6.12(8) of the UCPR. Accordingly, interest on the amount of damages against the first and second defendants, in the sum of \$706,431.00, should be calculated as follows:

Start Date	End Date	Days	Rate	Amount Per Day	Total
4.12.2024	31.12.2024	28	8.35%	\$161.1666	\$ 4,512.67
1.1.2025	30.6.2025	181	8.35%	\$161.6082	\$ 29,251.08
1.7.2025	31.12.2025	184	7.85%	\$151.9311	\$ 27,955.31
1.1.2026	30.6.2026	181	7.6%	\$147.0925	\$ 26,623.74
1.7.2026	22.9.2026	84	8.35%		

\$161,608.2 \$ 13,575.09 Total 658 \$101,917.89 Interest on the overpayment, in the sum of \$41,567.85, against the first defendant begins to run from 13 December 2024 when the plaintiffs made their final EFT payment in respect of the Internal Works Contract with due allowance made for the plaintiffs' shortfall in the payment of the invoice regarding the External Works Contract, and should be calculated as follows:

Start Date	End Date	Days	Rate	Amount Per Day	Total
13.12.2024	31.12.2024	19	8.35%	\$9.4834	\$ 180.18
1.1.2025	30.6.2025	181	8.35%	\$9.5094	\$1,721.19
1.7.2025	31.12.2025	184	7.85%	\$8.9399	\$1,644.95
1.1.2026	30.6.2026	181	7.6%	\$8.6552	\$1,566.60
1.7.2026	22.9.2026	84	8.35%	\$9.5094	\$ 798.79
Total 649					\$5,911.71

Costs Under s 98(1)(a) of the CPA, costs are in the discretion of the Court. In *Hunter v Roberts (No 2)* [2019] NSWCA 235 at [6], it was observed that: The making of an offer of compromise in the form of a Calderbank letter may justify a departure from the ordinary basis on which costs are awarded and assessed and, as Giles JA observed in *SMEC Testing Services Pty Ltd v Campbelltown City Council* [2000] NSWCA 323 at [37], the ultimate 'question is whether the offeree's failure to accept the offer, in all the circumstances, warrants departure from the ordinary rule'. In *Crump v Equine Nutrition Systems Pty Ltd trading as Horsepower (No 2)* [2007] NSWSC 25, which was cited with approval by Bell CJ (Leeming and Free JJA agreeing) in *Daynes v I-MED Central Queensland Pty Ltd; I-MED Central Queensland Pty Ltd v Daynes* [2025] NSWCA 150 at [191], it was observed that the reasonableness of any rejection of a Calderbank offer is to be determined having regard to "the situation at the time when the offer was made and not solely by reference to the ultimate outcome of the proceedings" and the inquiry should not be undertaken with the benefit of hindsight (at [41]). The defendants' lack of engagement with these proceedings is relevant but not determinative. At the time that the offer was made on 12 November 2025, the defendants were legally represented and had access to the plaintiffs' evidence, including the Expert Report, and were fully apprised of the case they would be required to meet. I consider that the Calderbank offer, which proposed that the defendants, either jointly or severally, pay to the plaintiffs the sum of \$500,000.00 to resolve the claim in full and final settlement of the proceedings was entirely reasonable, in circumstances where there were obvious statutory and contractual breaches. It would have been clear that the plaintiffs' variable claims as pleaded each had significant merit. In my view, the defendants ought to have accepted the offer. The defendants, in failing to accept the Calderbank offer, persisted in their efforts to resist the plaintiffs' claims in circumstances where the Defence in its present form, and absent any evidence, was entirely deficient. The total sum in this judgment will exceed the amount stipulated in the Calderbank offer by more than \$200,000.00. That the amount is greater would not have been surprising to the defendants at the time the offer was made given that the Expert Report had already been served. Accordingly, the appropriate order is that the plaintiffs should have their costs on the ordinary basis up to and including 11 November 2025 and on an indemnity basis on and from 12 November 2025. Incidental expenses The plaintiffs commissioned the expert early in the proceedings to produce the Expert Report. This served to apprise the defendants of the significant defects detailed therein. The cost in doing so, \$20,790.00 (inclusive of GST), was a necessary expenditure in proceedings of this kind and arose from the breaches. I am

satisfied that it was appropriate, proportionate and reasonably incurred to buttress the claims the subject of these proceedings. The award of damages against the first and second defendants should include the costs associated with the expert's inspections and preparation of the Expert Report which, according to the invoice, involved over 50 hours of professional work at a rate of \$385.00 per hour (inclusive of GST). I am satisfied that the rate is similarly appropriate and reasonable for a consultant with the expert's education, training and experience.

Orders

For these reasons, the Court makes the following orders: Judgment for the first and second plaintiffs as against the first and second defendants, jointly and severally, in the amount of: \$706,431.00 for rectification; and \$20,790.00 for incidental expenses. Pursuant to s 100 of the Civil Procedure Act 2005 (NSW), pre-judgment interest against the first and second defendants, jointly and severally, in the sum of \$101,917.89. Judgment for the first and second plaintiffs as against the first defendant in the amount of \$41,567.85. Pursuant to s 100 of the Civil Procedure Act 2005 (NSW), pre-judgment interest against the first defendant in the sum of \$5,911.71. The first and second defendants shall pay the costs of the first and second plaintiffs on the ordinary basis up to and including 11 November 2025 and on an indemnity basis on and from 12 November 2025. Annexure - Schedule of Rectification Works [See attached] Tan v Platinumhomeland Pty Ltd - Schedule of Rectification Works (819 KB, pdf)

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Prepared on 27 October 2026 · Esheria