

IN THE COUNTY COURT OF VICTORIA

Revis

AT MELBOURNE

Not Restrict

COMMERCIAL DIVISION

Suitable for Publicati

BUILDING CASES LIST

Case No. CI-23-04738

WALTER WANG

Plair

v

KIM MOUTIDIS

Defend

JUDGE: HER HONOUR JUDGE KIRTON

WHERE HELD: Melbourne

DATE OF HEARING: 14, 15, 19 May 2025 and 18 June 2025

DATE OF JUDGMENT: 18 August 2025

CASE MAY BE CITED AS: Wang v Moutidis

MEDIUM NEUTRAL CITATION: [2025] VCC 1156

REASONS FOR JUDGMENT

Subject: DOMESTIC BUILDING CONTRACT

Catchwords: Domestic Building Contract – warranties implied into contract by s 8 *Domestic Building Contracts Act 1995* – subsequent owner entitled to benefit of warranties by s 9 – defective building work – scope of builder's obligation under contract and Act

Legislation Cited: *Domestic Building Contracts Act 1995* (Vic); *Building Act 1993* (Vic); *Civil Procedure Act 2010* (Vic).

Cases Cited: *Fraser v Mason* [2019] VCAT 1009; *Bottrill v Graham (No 2)* [2025] NSWDC 221; *Luck v Secretary, Services Australia* [2025] FCAFC 26; *Mason v Fraser* [2021] VSC 461; *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286; *Owners Corporation PS623721 v Shangri-La Construction Pty Ltd (Building and Property)* [2022] VCAT 1499; *Kandelka Management Pty Ltd v Pisces Group Ltd (subject to deed of company arrangement)* [2009] FCA 1379; (2009) 76 ACSR 113; *RW Miller and Co Pty Ltd v Krupp (Australia) Pty Ltd* (1992) 11 BCL 74; *Theodor v Noonan (Building and Property)* [2015] VCAT 1390; *Waddell v JG King Project Management Pty Ltd* [2018] VCAT 1531; *Owners Corporation 1 PS523454S v L.U Simon Builders Pty Ltd* [2018] VCAT 987; *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613; *Mirvac Victoria Pty Ltd v Liszka & Anor*; *Mirvac Victoria Pty Ltd v Pahor* [2019] VSC 561; *Metricom Homes Pty Ltd v Hooper* [2015] VSC 110; *Yume Group Holdings Pty Ltd v Ashthorn CA Pty Ltd* [2024] VSCA 134; *Boncristiano v Lohmann* [1998] 4 VR 2; *Archibald v Powlett* [2017] VSCA 259; *Anderson & Anor v Wilkie (Domestic Building)* [2012] VCAT 432; *Alderson v Nelson (Building and Property)* [2024] VCAT 751.

APPEARANCES:

For the Plaintiff

Counsel

T Allen

Solicitors

Canaan Lawyers

For the Defendant

K Moutidis, in person

HER HONOUR:

1. The plaintiff **Mr Wang** is the owner of a home in Ringwood, having purchased it in 2019. The home was constructed by the defendant **Mr Moutidis**, between 2016 and 2018.
2. After moving into the home, Mr Wang began noticing issues he considered to be building defects. He obtained expert opinions from building and plumbing consultants Mr Jeff Beck and Mr Robert Quick. Mr Wang's claim in this proceeding is for defects identified by the experts. As a subsequent owner of the property he brings his claim pursuant to [sections 8 and 9 of the *Domestic Building Contracts Act 1995* \(Vic\)](#) (the *Act*).
3. There is no dispute about the existence of the defects and by the end of the trial, Mr Moutidis had accepted liability for the majority of them. However, he disputes liability for two of the major items. In respect of those items, his defence is that:

- (a) The defects are not his responsibility. The works which caused the defects were excluded from his building contract. They were carried out, or should have been carried out, by others engaged by the first owner.
- (b) Mr Wang had an obligation to pursue the builder's subcontractor plumbers for defects in the plumbing work, rather than bring claims against him.

4. For the reasons that follow I do not accept these defences. I am satisfied that there are defects in the home, and that Mr Moutidis is in breach of the warranties implied into the building contract by [s 8 of the *Act*](#).

BACKGROUND

5. There are two homes on one block of land, with a shared common property driveway. Mr Wang's home is at the rear. The home contains 4 bedrooms and 3 bathrooms, over two storeys. The lower storey is a basement below the outside ground level. It contains a bedroom with ensuite and walk-in-robe (together, the **Basement Bedroom Area**) as well as a **Garage**.

6. Both homes on the block of land were constructed by Mr Moutidis, for the original owner or developer, Ms Peifang **Sheng**. Mr Wang purchased the property from Ms Sheng in August 2019.

7. It is not in dispute that:

- (a) Mr Moutidis and Ms Sheng entered into a Master Builders New Homes **Contract** dated 18 May 2016 under which Mr Moutidis was to construct the home;
- (b) the Contract contained eight **Special Conditions** which excluded certain works from the Contract (although the extent of the works excluded is in dispute);
- (c) the home was built under Building Permit BS-U 39290/20160768/0 dated 22 June 2016 which was amended on 11 August 2016 with respect to the footing and wall design for the basement garage (**Amended Building Permit**) both of which name Mr Moutidis as the only builder;
- (d) the home is covered by Domestic Building Insurance complying with the Ministerial Order for Domestic Building Insurance issued under **s 135** of the **Building Act 1993** (Vic) (the **Building Act**) issued on 7 June 2016 which names Mr Moutidis as the builder; and
- (e) the home had an **Occupancy Permit** issued on 6 June 2018 which refers only to the Building Permit.

8. It is also not in dispute that the following warranties (**the Implied Warranties**) are implied into the Contract by **s 8** of the Act. Similarly, there is no dispute that Mr Wang is entitled to the benefit of the Implied Warranties, by reason of **s 9** of the Act.

THE ISSUES

9. What is in dispute is the nature of Mr Moutidis' obligations under the Contract. His defence to the claims concerning the Basement Bedroom Area and the subfloor under the kitchen (defects numbered 2 and 3 below) is that these alleged defects:

- (a) were caused by works not within the scope of the Contract, as they were excluded by Special Conditions in the Contract; and/or
- (b) were caused by works carried out by third parties and therefore are not his responsibility.

10. The Contract contained the following hand written Special Conditions:

- (a) SC1 – *All rock in ground found to be excavated will be an extra charge plus builder's margin as per contract*
- (b) SC2 – *Owner is to reinstate fence after construction.*
- (c) SC3 – *Owner is to contact council for final drainage inspection^[1]*
- (d) SC4 – *Landscaping is not included in this contract.*
- (e) SC5 – *Tree protection is not included in this contract Owner is to carry out tree protection as per council requirement prior to construction.*
- (f) SC6 – *All driveways is not included in this contract.*

(g) SC7 – No external works or decking is included in this contract.

(h) SC8 – No external concreting or cross over or driveways

11. In respect of the alleged defect at item 2 below (the Basement Bedroom Area), Mr Moutidis says that:

- (a) the waterproofing of the basement; and
- (b) the below ground sewerage and drainage;

are 'external works' for the purposes of SC7 and therefore not works he was required to, or did, carry out.

12. He also says that issues in the subfloor (item 3 below) and the blockage in the stormwater (item 2), were caused by the landscaping works which are excluded by SC4 and therefore are not issues he is responsible for.

13. In respect of all the plumbing defects, Mr Moutidis also submits that Mr Wang had an obligation to pursue the builder's subcontractor plumbers or their insurers, rather than bring claims against him.

Use of Artificial Intelligence

14. For the record, I note here that I have taken the issues in dispute and Mr Moutidis' contentions to be what he has said in his oral submissions during the trial, rather than on his written closing submissions. As he was self-represented at the trial, I allowed him to make submissions at the same time as he gave evidence, and during his cross examination of Mr Wang and the experts. He then made formal closing submissions orally at a hearing convened specifically for that purpose. I have determined the claims on the basis that his position is what he stated to me during the trial, not in his written submission.

15. This is because I have little confidence in the accuracy or reliability of his written submissions. Mr Moutidis conceded that he had prepared this document using Artificial Intelligence (**Gen AI**), and there are obvious errors or irrelevancies in the document. For example, the written submission:

- (a) purports to quote from parts of Mr Beck's and Mr Quick's written reports, apparently in Mr Moutidis' favour, however the quoted statements do not exist in either report. Instead, the experts' opinions are the opposite to what the Gen AI has alleged;
- (b) refers to a VCAT decision which I presume is a hallucination generated by Gen AI. It names the case of 'Mason v Fraser' (I will not provide the citation given in full, as there is a risk of it being picked up as genuine by other Gen AI^[2]) which apparently stands for the proposition that VCAT, 'affirmed that a builder is not liable under [section 8](#) for defects attributable to subsequent owner modifications or third-party works.'^[3] There is no VCAT decision with that name, in 2012 or at all. Of even greater concern is that the alleged proposition it puts is legally wrong. The correct law is set out in a 2019 VCAT decision in the case of *Fraser v Mason* [\[2019\] VCAT 1009](#). This is authority for the legal principle that if the building permit documents place legal requirements on a builder, then those works are warranted by the builder, regardless of whether the builder actually carried out the work.

That decision was upheld by the Supreme Court on appeal;^[4]

- (c) cites a decision of 'Justices Whelan, Niall and McLeish' of the Court of Appeal in 'Saini v Bupa Aged Care Australia Pty Ltd' (again, I will not provide the citation) which apparently 'affirmed that where the owner assumes control of the premises and engages in subsequent construction or modification works, any continuing duty of care on the part of the original builder is curtailed or extinguished.'^[5] Again, this purported decision appears to be a hallucination. The case with the given reference is a criminal law appeal against conviction. I have not been able to locate any case with that name; and

- (d) includes a section on duties of care with reference to High Court authorities on negligence. However, Mr Wang's claim is not based on a duty of care or negligence and so these submissions

are irrelevant.

The pleaded defence

16. I also note here, for the record, that I have proceeded on the basis of the filed pleadings. Mr Moutidis' defence dated 28 March 2022 was drafted by his previous solicitors, presumably on his instructions. It listed the eight Special Conditions set out above. Discovery took place and the trial started on 2 July 2024. Shortly before the trial commenced, Mr Moutidis changed solicitors and engaged Counsel for the trial. On the first morning of the trial before me, on 2 July 2024, presumably on Mr Moutidis' instructions, Counsel applied for leave to file an amended defence, to plead there were further special conditions in the contract contained in a previously undiscovered document. This caused the vacation of the trial, with Mr Moutidis having to pay Mr Wang's costs. However, after 2 July 2024 Mr Moutidis did not discover this document, nor did he proceed with his application for leave to amend his defence. The day before the trial was due to resume, on 13 May 2025, Mr Moutidis instructed his solicitors he would represent himself. The trial therefore proceeded on the basis of the original defence, with only the eight pleaded Special Conditions being relied on. I note with concern these tactics caused the trial to be adjourned for 10 months for no reason. This is a clear breach of the obligations in the *Civil Procedure Act 2010*, although I cannot say if the breach was caused by Mr Moutidis or his former legal representatives.

THE WITNESSES

Mr Wang

17. Mr Wang gave evidence. His evidence was of what he observed in his home, the steps he took to identify who was the builder, the many opportunities he allowed them to rectify, and when that failed, that he engaged experts and brought this proceeding. He was challenged by Mr Moutidis on some matters, and I found his answers to be measured and thoughtful. He would have been justified in being frustrated with the near four year delay in getting to the trial (the proceeding had actually commenced in September 2021 in VCAT before being referred to this Court), but he remained calm and focused only on the issues to be determined. Mr Moutidis ultimately accepted Mr Wang's answers in relation to the damaged roof tiles, the satellite dish and his dealings with Leon Zheng, and accepted liability for those items.

Mr Moutidis

18. Mr Moutidis also gave evidence. He spoke about the Contract, the build, events following completion and then provided his own opinion on the alleged defects. He appeared sincere in his statement that he would accept liability for matters under the Contract, but he was adamant and did not move from his position that any "external works" were not part of the Contract and so he was not liable for those.

19. His evidence about the formation of the Contract with Ms Sheng was superficial. It was apparent Mr Moutidis was not directly involved in preparing the contract documents and that there were other people involved, including Ms Sheng's partner Leon Zheng. Mr Moutidis said he knew them only from sharing an office with them, yet he was content for Mr Zheng's name to be recorded on the contract as the email contact for the builder.

20. Mr Moutidis' evidence was that, "[w]e made an arrangement that I build the two units, and there's a lot of exclusions in the contract which were in the special conditions".^[6] However, Mr Moutidis did not explain why the Contract referred to a 15-page specification, apparently prepared by him, but which was not discovered or put in to evidence. Nor did he explain why the Contract was to build two units, not the partial construction of two units, with exclusions. Nor why the progress payment schedule in the Contract was premised on the completion of all stages for the two units, without exclusions. He also do not explain why item 19 of the Contract was left blank (work to be carried out by the owner), nor how the eight special conditions came to be inserted into the Contract and what was meant by them.

21. Mr Moutidis' evidence demonstrated he had some knowledge of what occurred on site during the build. He set out the various steps involved in the build, such as excavating the site, erecting retaining walls, footings,

framework and trusses, windows, plumbers and electricians, plastering, joinery, tiling, internal waterproofing and fixings.

22. However, his evidence demonstrated he had only a superficial knowledge of the critical matters in dispute; such as what waterproofing was carried out and by whom, and the overlap of works carried out by him and by, or on behalf of, Ms Sheng. He said he was supervising the works on site, but he had little knowledge or memory of what each subcontractor actually did on site. Much of his evidence was what he would have done, or what his usual practice was. When I questioned him about inspections with the building surveyor, Mr Moutidis stated: [7]

I'm going by memory, Your Honour, so please forgive me if I'm not correct or 100 per cent precise. I'm just going by experience as well.

23. Crucially, in relation to the waterproofing of the Basement Walls, Mr Moutidis said in his witness statement that he never had any dealings with a professional waterproofing company, Proform, that it was Ms Sheng who had engaged Proform to undertake the waterproofing works, and he did not engage them. [8] However, during his evidence in chief and cross examination, he agreed he had engaged Proform, to install an AG pipe at the base of the block wall and footings, to install geofabric drainage cell sheeting to the positive side of the wall, and to apply negative tanking to the inside of the Basement Walls. Proform did these works in February 2017, at which time Mr Moutidis said he was on site constructing the frame of the home. Proform also provided a compliance certificate, which Mr Moutidis provided to the building surveyor for the purposes of obtaining the occupancy permit in June 2018. [9] It is surprising that Mr Moutidis initially stated he had not engaged Proform, and had no dealings with them, when he later conceded the opposite. Based on his evidence, I conclude that Mr Moutidis was either uninformed as did not have a hands on role in the construction of the home and in the engagement, direction or supervision of some of the relevant subcontractors, or that his initial evidence was deliberately false.

24. I am satisfied that he and Ms Sheng and/or Mr Zheng were working together during the build. This is consistent with his evidence as follows: [10]

I then took access [of the site] a few weeks later, as the builder. Engaged in a land surveyor, which gave me the RL heights for the slabs, then performed the site cut, Your Honour, for the slabs. After that I engaged – I engaged my trades, which were also used by my client, 'cause it was more economically useful to use the same trade that's onsite if you need to go out and get someone else and pay travel time or find someone you don't know. So I had no problem with that, Your Honour. And no other trade would have a problem with that.

So my trades did when I instructed them to, as per my contract[ual] obligations. I then constructed two townhouses.

25. His evidence leads me to conclude that Mr Moutidis had agreed to provide some services as a builder for acquaintances, at a discounted price, on the understanding that he would not be directly involved in much of the build or liable for the works listed in the Special Conditions. He mentioned several times that he had agreed to build the unit for only \$400,000, which was a low price, but achievable because of the exclusions:

And in relation to the price of the building, Your Honour, which is \$440,000 including GST, so it was \$400,000. That's a significant low price to build a home with a basement in that price, without going into the exclusion process. [11]

... so therefore, we - the builder isn't liable for works he hasn't been paid for and he hasn't carried out. [12]

...

They – the insurer – the insurance broker asked me why the contract was such a low price. It was just around about \$400,000 ex-GST per townhouse. I said there's a lot of exclusions, which then were self-explanatory to the insurer. [13]

26. This relationship would explain why Mr Moutidis was so adamant that he was not liable for such integral parts of the building as waterproofing the Basement Walls. It would also explain why he was not familiar with documents which contradicted his evidence.

27. Very little (if any) of Mr Moutidis' evidence was supported by contemporaneous documents. When challenged by being shown documents contradictory to his evidence, he was sometimes unreasonably evasive and uncooperative, or demonstrated he was committed to his position, even when it was obviously incorrect.

Accordingly, where Mr Moutidis' answers or submissions are inconsistent with a contemporaneous document, I will prefer a document which speaks for itself. Examples where Mr Moutidis was unfamiliar with the documents, or refused to acknowledge their contents, included:

(a) He was adamant that Mr Wang denied him access to the property to carry out any testing^[14] yet this is clearly incorrect on the letters sent by Mr Wang's lawyers at the time.^[15] Mr Moutidis refused to answer any questions about this on cross examination on the basis that he was bound by an undisclosed "NDA" relating a company "Landmark Building Design" going into liquidation.^[16] When it was pointed out to him that this was not an adequate reason to refuse to answer questions about the document in question, he maintained his position.

(b) He refused to acknowledge the Plans as architectural plans and instead told the Court they were engineering computations, only to then acknowledge that he couldn't read the text and accepting he had made a mistake.^[17]

(c) He refused to accept that the Plans contained a water tanking detail despite being taken to such a detail.^[18] His answers to this line of questioning demonstrated he was committed to his defence that the Plans were insufficiently detailed, even when he was shown the detail. His answers on this issue were self-serving and not credible.

28. I will address Mr Moutidis' evidence further below, as it is relevant to each defect.

The expert evidence

29. Expert evidence was given for Mr Wang by the expert witnesses Mr Jeff Beck and Mr Robert Quick, as well as by Mr Andrew Cini who had provided a quotation for works to remediate mould. I am satisfied of their experience or expertise, and it was not challenged. Mr Cini's witness statement was also not challenged.

30. Mr Moutidis chose not to call his building expert Mr George Stefanidis. Although Mr Stefanidis was not called, he, Mr Beck and Mr Quick had met prior to the hearing in a facilitated expert conference. They prepared and signed a Joint Report dated 23 February 2024. I have had regard to Mr Stefanidis' opinion where it is set out in the Joint Report.

31. I will address the expert evidence further below, as it is relevant to each defect.

32. I also note that I had a view of the property and the home, with the parties, Counsel, Mr Beck and Mr Quick, during the trial.

THE LEGAL PRINCIPLES

33. As noted, Mr Moutidis agreed that the Implied Warranties are part of his Contract, and that Mr Wang is entitled to the benefit of the Implied Warranties, by reason of s 9 of the Act. Mr Moutidis' contention is that the Implied Warranties only apply to the work which was part of his contractual scope of work and/or was actually carried out by him.

34. Counsel for Mr Wang correctly summarised the application of s 8. Each of the warranties implied by sub-sections 8(c), (e) and (f) are absolute.^[19] As absolute obligations, a breach of the warranty occurs when the home fails to perform as required.^[20] They are not qualified by the exercise of reasonable care and skill and to the contrary, a builder could be in breach of the warranties despite having exercised the utmost care.^[21]

35. The wording of **s 8** of the Act states that the Implied Warranties are provided by a builder for work to be carried out under a domestic building contract (emphasis added). If the domestic building contract required work to be carried out, those works are warranted by the builder, regardless of whether they are carried out by the builder or a third party. As Member Edquist (as he then was) stated in *Theodor v Noonan*:^[22]

It does not matter, in my view, that [the named builder] did not personally perform or direct the works. If this was a defence, then the ability of a homeowner to enforce the statutory warranties implied into every domestic building contract by **s 8** of the [Act] might be severely impaired.

36. This position has also been confirmed by the Supreme Court in an equivalent owner-builder context. *Mason v Fraser*^[23] involved an appeal from a decision in VCAT.^[24] The owner-builder's defence was that he 'had not touched the stormwater drainage system under the house. Accordingly, he contended, he can have no responsibility for it.'^[25] At first instance, Member Edquist held:

I regard this line of defence as misconceived. I say this because responsibilities regarding stormwater drainage were imposed on the Masons as owner builders by the building permit documents approved in connection with the building permit issued on 21 July 2010 for the upstairs extension.^[26]

37. This was upheld by Keogh J in the Supreme Court.^[27]

38. **Section 9** of the Act permits a subsequent owner to sue for a breach of the Implied Warranties as if they were a party to the contract. The section gives rise to a chose in action held by the owner of the property for the time being on which works under a domestic building contract have been carried out.^[28]

39. If a breach is proven, it is well established that the applicable measure of damages is the cost of rectifying the defective building work so as to give the owner the equivalent building which is substantially in accordance with the contract.^[29] The same measure of damages applies for a successor in title claiming breach of an implied warranty pursuant to **s 9** of the Act.^[30]

40. Domestic building contracts are to be construed in accordance with the usual principles applicable to commercial contracts.^[31] These principles include the following: when construing the terms of a commercial contract, the court asks what a reasonable business person would have understood those terms to mean. To answer that question, the reasonable business person is placed in the position of the parties. The terms are construed objectively and the subjective intentions of the parties are irrelevant. The objective approach requires reference to the text and its ordinary meaning, together with the context, being the entire text of the contract including matters referred to in the text, and the purpose. Unless a contrary intention appears in the contract, the court is entitled to approach the task of interpretation on the assumption that the parties intended to produce a commercial result, and should construe it so as to avoid a commercial nonsense.^[32]

THE BUILDING DEFECTS

2. Basement walls leaking

41. It is not in dispute that there is water leaking into the Basement Bedroom Area and the Garage through the basement walls. Mr Beck observed water ingress from 'multiple locations through external walls'. Mr Stefanidis agreed there 'are leaks and parts of the waterproofing appears to have failed.' Mr Moutidis has admitted that the home suffers from 'serious issues including mould and water ingress.'^[33]

42. Mr Wang observed that:^[34]

In the early morning of 15 February 2020, I went down to the basement level of the home and noticed that there was water all over the floors. The water appeared to be coming out of the bottom of the walls. I also noticed that there was dirt in the toilet bowl. It was like a bomb had gone off. I recall that it had been raining the night before... At this same time, I noticed that there was water pooling in three different areas against the walls in the garage.

43. He emailed Leon Zheng (who, as well as being named on the Contract as the contact for the builder, had described himself to Mr Wang as 'the project manager for building the house') on 17 February 2020, attaching photos and videos he had taken of the water in the basement, and stated: [35]

I want to discuss with you about a serious water leak with the unit. After the rain storm on Friday, I discovered the basement was soaked in water. Water was seeping through the floor tiles in the hallway, bathroom and bedroom. In addition, there are many dirty marks of silt on the toilet bowl and rim which may be a result of sewage reflux. The whole basement currently has a strong odour of mould' and 'I'm concerned that the water proofing under or around the basement was not done properly and the whole unit is saturated and soaked in water during heavy rainfalls. This is clearly a quality defect that needs to be addressed immediately.

44. Mr Beck and Mr Quick investigated the leaks and concluded there is water penetrating the basement walls which is a defect in itself, as it is a departure from the Performance Provisions of the Building Code of Australia (**BCA**), specifically clause P2.2.2 (Weatherproofing), which states that an external wall must prevent the penetration of water that could cause unhealthy or dangerous conditions, or loss of amenity for occupants and undue dampness or deterioration of building elements. Mr Stefanidis agreed that water penetrating into a habitable room is a defect.

45. Mr Beck's and Mr Quick's opinions of the cause of the leakage, in summary, is that:

- (a) The waterproofing required by the Plans and Engineering Drawings (being a positive tanking system) has not been installed, in breach of the permit documents. Instead, the builder has apparently applied a negative tanking membrane on the inside of (at least part of) the Basement Walls. This has failed.
- (b) The AG drain adjacent to the basement walls required by the Plans and Engineering Drawings has not been installed in accordance with the permit documents (in that it has not been installed in a mesh sleeve with crushed screenings surrounding it) and is clogged with clay.

46. Mr Stefanidis said he had not been provided with the permit drawings so did not comment on the plans and engineering drawings.

The Waterproofing – what was actually constructed?

47. The Basement Walls are core-filled blockwork walls. The permit documents, specifically details RW2 and RW3 in the Engineering Drawings and sheet A11 of the Architectural Plans revision C, prescribe the waterproofing system to be applied on the outside of the Basement Walls. This was to be 'selected brush-on bitumen based waterproof membrane' and 'selected polythene waterproof membrane over brush-on waterproofing continuous to under slab' (together, the **Required Membranes**) followed by 'FC sheet protective board over waterproof membrane'.

48. There is no dispute that Mr Moutidis did not follow this requirement. His evidence about what he did instead was unreliable. He put forward several inconsistent versions of what he said had happened on site, which leads me to conclude that he had little or no firsthand knowledge of what had actually happened during the build, as discussed above. Importantly, in relation to the waterproofing, Mr Moutidis conceded he was not present on site at the time. [36] Examples of his inconsistent evidence include the following.

49. In his witness statement he said he never had any dealings with the professional waterproofing company, Proform and that it was Ms Sheng who had engaged Proform to undertake the waterproofing works. However, during his evidence in chief and cross examination, he agreed he had engaged Proform to install an AG pipe at the base of the block wall and footings, to install geofabric drainage cell sheeting to the positive side of the wall, and to apply negative tanking to the inside of the Basement Walls.

50. I do not accept his explanation that his witness statement meant to say he had not engaged Proform to waterproof the planter boxes. That is inconsistent with the surrounding paragraphs of the witness statement. Further, it is incredible that Mr Moutidis would not recall Proform doing the basement tanking works in February

2017, while he was on site at the same time (so he says) supervising his subcontractors constructing the frame of the home. Further, a year later Mr Moutidis provided Proform's compliance certificate to the building surveyor in order to obtain the occupancy permit in June 2018.^[37] Again, it is incredible that he would not recall having engaged Proform.

51. In any event, whatever works had actually happened on site, the works performed by Proform (according to their compliance certificate) do not satisfy the scope of works specified in the Contract or the building permit. Proform provided a negative tanking while the Contract and building permit required positive tanking.

52. Mr Moutidis also changed his evidence in relation to his father's role. In his witness statement prepared in 2024 he said he did not take part in or undertake any waterproofing.^[38] His father also provided a witness statement in which he did not mention having carried out any waterproofing. Instead he said:^[39]

As site supervisor I was the Defendant's man on site at all times works were being undertaken by the Defendant and/or his subcontractors and managing the site on the Defendant's behalf.

...

I also know what works were actually performed by the Defendant at the site. The Defendant did not do any external works (including external plumbing, landscaping, driveways and the like) and no such works had been performed when the Defendant handed the site back over to the developer.

53. Contrary to this written evidence, during cross-examination, Mr Moutidis said that he had arranged for some waterproofing to be carried out by his father on the positive side of the base of the Basement Walls.^[40] He made this statement after being shown photos taken during the construction which showed a black substance on the outside of the basement walls.

54. Mr Moutidis then gave evidence that his father had applied a tanking to the outside of the wall but not all the way to the top. He stated, "we didn't go very high with the retaining wall [waterproofing] 'cause we didn't know how high these guys were going to finish the bed".^[41]

55. Mr Moutidis said his father's tanking was two coats of an Austral Flex bitumen product, applied only to the lower part of the walls, and he left the upper part of the walls to be tanked by others engaged by Ms Sheng as part of the landscaping works.

56. He estimated that his father painted the bitumen to about half a metre above the foundations, which was approximately 800 mm below the sill of the basement bedroom window. He conceded that the tanking and the waterproofing membrane should be finished at least 75 mm above the finish landscape level. When it was put to him that this meant his father's works assumed the finish landscaping would be at least 875 mm below the window, he repeatedly said he did not have a landscaping plan and did not know what the landscapers would do.

57. When asked why he had had his father paint on the first half metre of membrane, his answer was that he wanted to protect the home^[42] and this was something his father always did. That statement is inconsistent with both their witness statements and is implausible. If Mr Moutidis genuinely desired to protect the home, the membrane would have been painted to a higher level.

58. Mr Moutidis' reason for not having his father do any further works was that he was not sure how high the landscaping would take the finished ground level, and so it was the responsibility of whoever Ms Sheng engaged to complete the waterproofing before they completed the landscaping.

59. It was put to him that it was illogical for his father to have painted some membrane on the outside of the walls, and then to engage Proform to install the black geofabric drainage cell sheeting on the outside of the Basement Walls after his father had painted the bitumen to the lower parts of the walls. Mr Moutidis' answer that he left the sheeting in place to protect his walls from the landscapers and he presumed they would be able to move it sufficiently to be able to paint on the required waterproofing before filling the area, is a nonsense.

60. In any event, whatever they were, the works performed by Mr Moutidis' father also do not satisfy the scope of works specified in the Contract or the building permit.

The AG drain – was it incorrectly installed and/or clogged?

61. Sheet A11 of the Plans shows the AG drain required. This sheet refers to the Engineering Drawings. Sheet S5 of the Engineering Drawings shows the required construction of the AG drain around the retaining walls (which includes the Basement Walls). Specifically, a 90 diameter pipe 'in screeding surround' and within 'free draining granular compacted fill'. Mr Moutidis agreed that this was the required and appropriate method of installation.

62. Mr Quick inspected the AG drains using CCTV. The photographs provided show they are clogged with clay. His opinion is that this indicates the AG pipe adjacent to the basement walls has not been installed with a mesh sleeve with crushed screenings surrounding it, because if it had been, clay would not be able to enter the pipe.

63. Mr Moutidis agreed with Mr Quick's opinion and conclusion. In his closing submissions he said 'Mr Quick also refers in his report that the aggie pipes... that they have to have a mesh device around them to stop that [blockage] from happening. Clearly they haven't been installed which causes mud to seep through into the aggie pipes...' which also confirms that's not granular fill, Your Honour. That is mud.^[43]

64. Mr Moutidis' evidence as to who installed the AG pipe around the Basement Walls was unreliable. In his witness statement he said he 'did not install any agi pipes at the subject premises, nor were any such works part of my contract'.^[44] Later he was shown three photographs of the south-east corner of the home taken during construction of the retaining walls. They show the AG pipe in a sleeve placed next to the base of the Basement Walls at the time Mr Moutidis' father was allegedly painting the bitumen onto the walls. His response to the photographs was that his father would have moved the AG pipe then laid it back. Moreover, those two versions of events are inconsistent with the Proform invoice, which records that Proform installed Agi pipe to base of block wall and footings. As noted above, Mr Moutidis eventually conceded that he had engaged Proform.

65. At times he said it was the landscapers who were responsible for providing the granular fill, when they backfilled the site around the house. He did not explain how that was possible, when either Proform or his father had placed the pipe long before the landscapers were on site.

Mr Moutidis' defences

66. As noted above, Mr Beck and Mr Quick were certain in their opinions of the causes of the leakage to the Basement Bedroom Area and Mr Stefanidis did not dispute them. On the other hand, Mr Moutidis proposed a number of other possible causes of the leakage, and/or reason why he was not liable. These were:

- (a) The waterproofing and drainage works are 'external works' within the meaning of SC7, and so not his responsibility.
- (b) The leakage was caused by the planter boxes.
- (c) The leakage was caused by the landscaping, carried out by Ms Sheng after he ceased his works.
- (d) As both units were constructed in an identical manner, with the same waterproofing treatment, and it was only Mr Wang's home which developed issues, this is evidence that the issues must have been caused by others engaged by Ms Sheng after he ceased his works.
- (e) There was a lack of detailed waterproofing plans in the Contract and this necessitated an acceptance of 'negative waterproofing' methods.
- (f) The waterproofing works complied fully with the requirements of Australian Standard AS 3740-2010.
- (g) Mr Beck and Mr Quick failed to carry out sufficient testing to rule out other causes.
- (h) The water leaking into the basement is coming up from below the slab, rather than through the Basement Walls.

I will address each of these defences in turn.

Are waterproofing and drainage works ‘external works’ within the meaning of SC7?

67. I do not agree with Mr Moutidis’ interpretation that waterproofing the basement walls and drainage around the home is ‘external works’ covered by SC7. In my view, ‘external works’ means works associated with the construction of the home which lie beyond the external face of the home (including but not limited to landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways and fencing)).

68. ‘External works’ do not include works forming part of the home itself, even if those works form part of the home’s external face or lie outside its external face. Works providing essential services to the home such as sewerage and drainage form part of the home (for the purposes of SC7) regardless of whether those works lie within or outside of the external face of the home. This meaning of ‘external works’ when used in SC7 is arrived at when the Contract is construed in accordance with the Act, and the principles set out in paragraph 40 above.

69. The most appropriate ordinary meaning of ‘external works’ in the context of the Contract is: ‘situated outside, not included within the limits of, the object under consideration’.^[45] Mr Wang submits that the ‘object under consideration’ in SC7 is the new home being constructed. He contends that this is plain from the fact that the Contract is to build a new home, under a standard form New Homes Contract. Clearly, the new home is the central object of the Contract, and it is also the central object of SC7 when it uses the words ‘external works’.

70. I agree with Mr Wang’s submissions that the context in which SC7 is found supports this construction. The entire text of the Contract and documents referred to therein, starting with the text of the special conditions (which take precedence over the rest of the Contract to the extent of any inconsistency), support this construction. For example:

- (a) The other Special Conditions 4, 5, 6 and 8, and SC7 itself, all expressly particularise items of work which are to be excluded from the Contract, being ‘landscaping’ (SC4), ‘tree protection’ (SC5), ‘driveways’ (SC6), ‘decking’ (SC7) and ‘external concreting or cross over or driveways’ (SC8). Clearly, the parties had turned their mind to what items of work were to be excluded and expressly listed these. Had the parties intended to exclude items of work which could themselves be easily described, and which are obvious items of work in the construction of a home, such as sewerage and drainage or waterproofing, they would have expressly listed these items, as they did with the others items specifically excluded.
- (b) Further, and importantly, the parties clearly turned their minds to drainage works because these works are expressly referred to in SC3 which states, ‘[o]wner is to contact council for final drainage inspection.’ Again, having turned their mind to drainage, had the parties intended for these works to be excluded from the Contract, they would have expressly stated this.
- (c) The text of s 5(1)(a) of the Act describes the ‘construction of a home’ as including ‘the provision of ... sewerage or drainage to the home or the property on which the home is, or is to be’ and therefore, the words ‘construction of two units’ should be understood as including the provision of sewerage or drainage to the units.
- (d) The works expressly excluded by the special conditions use the same language as s 5(1)(a)(i) of the Act (noting that the Act is a document expressly defined and referred to throughout in the Contract) which describes works associated with the construction of a home as ‘including, but not limited to, **landscaping, paving** and the erection or construction of any building or **fixture associated with the home** (such as retaining structures, **driveways**, fencing, garages, carports, workshops, swimming pools or spas).^[46] It is common sense that the above works fall outside the external face of the home, albeit, they may be fixed to it.

71. This interpretation is also consistent with the text of the Contract:

(a) 'Works' is defined in the Contract to mean 'the work described in item 5 and item 9.3 (if applicable) of the Appendix and described in more detail in the Plans and Specifications which is to be carried out under this Contract on the Land by the builder.' Item 5 of the Appendix describes the Works as 'construction of two units' and not 'partial construction of two units', 'construction of two units to frame stage,' or 'construction of two units excluding the provision of services', as would be expected if Mr Moutidis was not required to construct the external face of the homes or provide services to the home such as sewerage and drainage.

(b) Item 19 of the Appendix is headed 'MATERIALS TO BE SUPPLIED BY, OR ITEMS OF WORK TO BE CARRIED OUT BY THE OWNER' and states '[m]aterials to be supplied by or work to be carried out by the Owner are to be stated in this Table. No warranties are given by the builder, either express or implied, as to the suitability or otherwise of those Materials or items of work stated in this table (Clause 11.11)'. The table is left blank. This is inconsistent with a construction that sees Ms Sheng carrying out substantial and important parts of the construction of the home.

(c) The progress payments schedule in the Contract includes all stages for the construction of a home, that is, 'Deposit, Base Stage, Frame Stage, Lockup Stage, Fixing Stage, Final Payment upon Completion.' If Mr Moutidis was not constructing the whole home, this would be expected to be reflected in the progress payment schedule.

(d) The wording of the Contract specifically contemplates that parties might give the various stages of the build different meanings to those provided for in the Contract and/or s 40(1) of the Act. That is, the progress payments schedule states, '[i]f Stage is NOT the same as a Stage defined in this Contract or [Section 40\(1\) of The Domestic Building Contracts Act 1995](#), what does this Stage mean?' If the Contract did not include external components of the home or the provision of services to the home, then one would expect to see the relevant stages specifically defined as such.

(e) Clause 10.1 of the Contract, which mirrors the Implied Warranties, requires the builder to warrant that the homes will be suitable for occupation at the time the Works reach completion. This is not possible if Mr Moutidis is not constructing the external face of the home or the sewerage and drainage required to service the home.

72. I then consider the purpose of the Contract. There is no evidence that the Contract had any other purpose than to have a new home constructed by Mr Moutidis for Ms Sheng and to have this done in a way that is compliant with the legislative framework regulating domestic building contracts, most importantly, the Act. I can surmise that Ms Sheng's purpose may have included having the home built at a cheap price, but that does not lead to a conclusion that critical components of the home were to be omitted such as subsurface waterproofing and sewerage and drainage. Such a compromise is also inconsistent with the builder's obligation to obtain an occupancy permit for the home on the conclusion of his works.

73. Considering the terms of the Contract objectively, I agree with Mr Wang's submission that an ordinary business person would not read SC7 as excluding critical components of the home such as waterproofing and drainage. There is no evidence of any objective matters known to both parties that would provide a commercially sensible reason for the parties to exclude works such as subsurface waterproofing and the installation of sewerage and drainage.

74. I also accept the submission that Mr Moutidis' position leads to absurdities. For example, why does Mr Moutidis say waterproofing is covered by SC7, but not roof tiles? Why is below ground sewerage excluded but the bored piers not?

75. Based on the well-established principles I am required to apply in constructing terms of a contract, I do not accept Mr Moutidis' construction of SC7. I do not accept that the waterproofing of the external walls of the home and the drainage associated with the home were excluded from Mr Moutidis' obligations under the Contract.

Could the leakage be caused by the planter boxes?

76. Mr Moutidis agreed with Mr Beck and Mr Quick that the AG pipe installed around the perimeter of the basement is 'not working' because it is 'full of mud'. He suggested that the AG pipes in the planter boxes are also 'full of mud' and as they may have been the last connection of the AG pipes between the perimeter of the home and the stormwater pit, they are 'causing a blood clot in the system'.^[47] However, he was not aware of whether the pipes were actually connected in that manner.

77. There is no dispute that Mr Moutidis did not install the AG pipes in the planter boxes, nor that he was not required to under the Contract. Mr Wang conceded that the planter boxes were landscaping or external works, and thus excluded from the Contract by SC4 and SC7.

78. However the opinion of Mr Beck was that the AG pipes in the planter boxes may have contributed to the water entry, but were not the main cause, which instead was the lack of waterproof membrane.

79. Mr Beck's evidence in response to Mr Moutidis' question was as follows:^[48]

Moutidis: ...is there a possibility that water can enter the property through the retaining walls where the planter boxes are? Through the mud through there where the agi pipes were installed, ... that were not covered properly with mesh and / or full of mud, is there a possibility that water can get in – water ingress can get into the property?

Beck: Your Honour, it is possible that water from the planter boxes is entering the building through the brick walls because the waterproof membrane's not there.

80. Mr Quick was not asked to give evidence about the cause of the water entry to the Basement Bedroom Area. His report on the water entry was confined to carrying out camera testing of the drains and reporting his observations. He identified the blockages in the AG drains and also stated that "[t]he wall cladding behind the downpipe on the righthand side of the garage door is allowing rainwater to enter the residence. This is in Private Lot Property. The installation of this work is the responsibility of the builder."

81. Mr Moutidis made much of this comment, and contended that if there was water entering the property through the wall, it was because the AG pipes were blocked, the planter boxes were therefore not draining and water was accumulating in them, which allowed water to enter the home through the gap and/or the walls.

82. During the evidence there was some confusion between the downpipes and walls to the left and the right of the garage door. However the there is no claim for the water entering to the lefthand side walls, and so I have disregarded the evidence given in relation to that area. The only relevant evidence is that given in relation to the wall to the righthand side of the garage door.

83. Mr Quick's evidence was that he did not know what was the cause of water entering that area, as follows:

Moutidis: But you've said, Mr Quick, in p184, that the water is going into the property?---Where is it?

Quick: ...No, I'm saying is – I said there's water to enter the (indistinct). That's that gap. That's got nothing to do with the Ag.^[49]

...

Moutidis: So I'll ask the question again. The Ag inside [the planter box], is it a contribution for the water ingress into the property?---Is it a contribution?

Quick: For the water ingress into the property?---No, 'cause I don't know.^[50]

...

Moutidis: Are you saying you're wrong, you're incorrect?

Quick: I'm saying – is I have no evidence. I didn't say that I'm incorrect. I'm saying it's quite a possibility. But at this point in time, you're asking me to produce evidence, I don't have evidence.^[51]

84. I will take Mr Moutidis' contention at its highest, that:

It's just like someone attaching something to a house and filling it with mud. And water going inside there. So yes, we agree, water is going in there, but no one is saying hey, it's because the person that made the planter box, attached it to the house, put an Agi pipe – whichever way they want to put it in there – we don't have - to waterproofed it, and water is going somewhere. So that's what I'm just trying to demonstrate to the court, that these planter boxes are contributing to the water ingress into the property.^[52]

85. Even so, it is no answer to Mr Beck's opinion that the lack of membrane is the main failure in the home allowing the water to enter. The blocked AG pipes mean that water is not draining from around the basement. These blockages are in both the pipes installed by Mr Moutidis (via his father or his subcontractor Proform) around the home, and the pipes installed by the landscapers in the garden bed to the left of the front staircase (assuming the pipes are connected). As a result, water is pooling in the garden bed. It is then penetrating the wall of the home because that wall has not been adequately waterproofed.

86. This cause is not the fault of the landscapers. It is defective building work by Mr Moutidis.

Could the leakage be caused by the finished height of the landscaping?

87. There is no dispute that the landscaping around the north and north west side of the home has been built up to a level higher than the home. Evidence of this is that the vents at that corner are at or below the finished ground level. There is also no dispute that the landscaping was carried out by or for Ms Sheng and is not part of the Contract.

88. Mr Beck was asked his opinion of whether this incorrect level is causing the water ingress into the home. His evidence was: ^[53]

Q: ...what do you say to [Mr Moutidis'] statement at paragraphs 34(a) and (b) [of his witness statement], that the backfilling of the landscaping was undertaken to a much higher than correct level by the landscapers?

A: Your Honour, I would agree, particularly at the north elevation of the building and the west elevation of the garage that the landscaping is higher than what it should be.

Q: What do you then say to his suggestion that it is this incorrect level of the landscaping that is causing the water ingress into this building?

A: I don't agree with that statement, Your Honour, because if the compliant membrane was applied to the external walls of the building, then we wouldn't have the ingress into the building.

89. I accept the expert opinion of Mr Beck that although the landscaping is incorrect in places, it is not the cause of the leakage through the Basement Walls. It is self-evident that if Mr Moutidis had correctly applied the waterproofing as he was required to do by the building permit documents, subsurface water would not be penetrating the Basement Walls.

90. I also note that Mr Moutidis' generalisation that the water problems are all caused by the landscaping being too high, is not supported by a detailed examination of what was actually built. The main location of water entering the Basement Bedroom Area is the south wall and south-west corner of the home. The landscaping around this area has not been built up by the landscapers to an incorrect level.

91. The Contract Drawing A08 shows the finished Natural Ground Level (NGL) at the south west corner of the home is approximately two brick courses below the basement windows. That is, the Basement Walls below the NGL are and always were intended to be underground.

92. From our site visit and from the photographs in the expert reports, I observed that the current ground level, as finished by the landscapers, is the equivalent of at least three brick courses below the window. Whatever works were carried out by landscapers engaged by Ms Sheng, they did not raise the finished level of the ground outside the Basement Walls above that shown on the Plans.

93. Accordingly, there is no basis for Mr Moutidis' contention that the landscaping around the south wall and south-west corner of the home has built up the surrounding soils to a level significantly higher than Mr Moutidis senior had allowed for when painting on the membrane.

Does the other unit provide evidence for the landscaping being at fault?

94. Mr Moutidis submitted that he constructed both Mr Wang's home and the front unit in the identical manner and they both received the same waterproofing treatment. He said that it was only Mr Wang's home which developed issues, and this is evidence that the issues must have been caused by others engaged by Ms Sheng after he ceased his works.

95. I do not accept that submission. First, there is no evidence that the front unit has not suffered any water issues. Just because Mr Moutidis has not been notified of any problems, it does not mean they do not exist. There are many reasons why a complaint may not have been made, such as the unit may be vacant, the current owners may live overseas, it may be tenanted, or a previous owner may have sold it 'as is' at a discounted price. No evidence was given about any of these matters.

96. Second, the design of the front unit is not identical to the Mr Wang's home. Mr Moutidis conceded this in his closing submissions.

97. Third, the location of the units on the block are not identical. The front unit sits high up on the block, with the driveway running along all of its southern face. Mr Wang's home is at the rear of the block, and the area of the Basement Walls where the water is entering is the lowest point of the site, and abuts a gravel path, not the driveway.

98. Fourth, there is no evidence that the landscaping was identical. Given the different layouts, levels and finishes of the driveway, garden beds, lawn and decking areas, it is obvious the landscaping was not identical.

99. Fifth, there is no evidence that the method of construction, particularly the method of water proofing, was identical in both units. Mr Moutidis led no evidence about what work Proform or his father did on the front unit. Given his original denial that he engaged Proform at all, and the failure to lead any evidence from his father (not even in his witness statement written in 2024), I consider that Mr Moutidis' statement that the methods were identical has no basis. I am not satisfied that Mr Moutidis has any direct knowledge about the method of the water proofing used in the front unit.

100. Therefore I do not accept that the front unit provides any evidence to support Mr Moutidis' contention that all problems are caused by the works carried out (or which should have been carried out) by others engaged by Ms Sheng.

Was there a lack of detail for the required waterproofing?

101. Mr Moutidis submitted that there was a lack of detailed waterproofing plans in the Contract and this necessitated an acceptance of 'negative waterproofing methods' consistent with the approved construction. He referred to Mr Stefanidis' report where he said, '[w]ith a lack of waterproofing detail on the plans, negative waterproofing was acceptable.'^[54]

102. I do not accept that there was a lack of detail as contended by Mr Moutidis. As noted above, sheet A11 of the Plans and retaining wall details RW2 and RW3 of the Engineering Drawings clearly contain a waterproofing detail. They specified 'selected brush-on bitumen based waterproof membrane' and 'selected polythene waterproof membrane over brush-on waterproofing continuous to under slab' followed by 'FC sheet protective board over waterproof membrane'.

103. Mr Beck confirmed in his oral evidence that this is the relevant detail. He said 'the waterproofing detail clearly shows the membrane and a protection over it on the outside of the wall.'^[55]

104. I accept that no particular brand of membrane was selected, but there is sufficient detail in the requirement for 'brush-on bitumen based waterproof membrane' and 'polythene waterproof membrane' for Mr Moutidis to have complied with this specification.

105. Mr Stefanidis comments must be read in the context that he did not have the most recent permit drawings (as he stated in the joint report). His opinion is therefore unfounded and it was not tested. I do not accept it.

Did the waterproofing works comply with the requirements of Australian Standard AS 3740-2010?

106. Mr Moutidis submitted that the waterproofing works complied fully with the requirements of Australian Standard AS 3740-2010. As I understand it, the basis for this submission is that the work carried out by Protech was sufficient to satisfy the specification.

107. Neither of Mr Beck or Mr Quick agreed with this submission, and nor did Mr Stefanidis in his written report. I accept the opinion of Mr Beck that: [56]

[T]he building permit required the membrane to be on the outside of the wall. So it needed to have the bituminous paint and this particular detail has a cement sheet covering that to protect the membrane. So the acceptance of the building surveyor of the certificate for the negative tank is not in accordance with the permit.

108. In accordance with the Implied Warranty 8(c), if the works do not comply with the building permit, then they are a breach of the warranty.

109. Having regard to the inconsistent and unpersuasive evidence about what works were actually carried out, and my comments about the reliability of Mr Moutidis' evidence, I do not accept this submission from Mr Moutidis. I prefer the evidence of the experts. Whatever waterproofing works were actually carried out by him or on his behalf, they do not comply with the building permit documents or AS 3740-2010.

Should the experts have carried out further tests?

110. Mr Moutidis submitted that Mr Beck and Mr Quick failed to carry out any performance testing, dye testing, flood testing, or invasive investigation, in order to properly identify the source of alleged water ingress. He suggested that they should have conducted 'performance tests ... to actually ascertain how much water is actually coming into the property and if it's coming from the basement walls or if it's coming from poor drainage from the agricultural pipes and improper fill around the site, and the height of the landscaping, which was quite significant and inconsistent with the good design of the landscaping plan.' [57]

111. I do not accept that submission. Both Mr Beck and Mr Quick said they were satisfied they had sufficient information to form their opinions. They each carried out testing before forming their opinions. It was open to Mr Moutidis to instruct Mr Stefanidis to carry out those tests if he thought they were necessary.

Could the leakage be caused by water coming through the slab rather than the walls?

112. Mr Moutidis contended that it is possible that the water leaking into the basement is coming up from below the slab, rather than through the Basement Walls. The evidence he relied on in support of this proposition was an email sent by Mr Wang on 17 February 2020 in which Mr Wang stated:

I want to discuss with you about a serious water leak issue with the unit

After the rain storm on Friday, I discovered the basement was soaked in water. Water was seeping through the floor tiles in the hallway, bathroom and bedroom. In addition, there are many dirty marks of silt on the toilet bowl and rim which may be a result of sewage reflux. The whole basement currently has a strong odour of mould.

113. Mr Moutidis said this indicates water was coming through the slab and grout between the floor tiles. He said that if that is happening, then Mr Beck's opinion that it is the Basement Walls which are leaking, should be discounted.

114. I do not accept there is any basis for this submission. First, Mr Wang in his email does not state that the water was coming through the slab. He is merely reporting what he saw in a general manner. He does not purport to have any knowledge of the source of the water, as can be seen from the next sentence in his email which states:

I'm concerned that the water proofing under or around the basement was not done properly and the whole unit is saturated and soaked in water during heavy rainfalls.

115. Next, in his oral evidence Mr Wang denied that he saw water 'coming out of' or 'spurting out' of the tiles. In response to the following question he said: [58]

Q: When it's heavily rained there was seeping through the floor tiles?

A: It was - because at the start, it was all the plasterboards were fully sort of intact and the first spot I saw was there was water on the floor and, um, that was just very concerning to me and not in one but in many spots. So being a layperson, I can only assume the floor was saturated, was somehow there's water coming from the floor.

116. Further, Mr Moutidis did not put this proposition to the experts. He did not instruct his own expert Mr Stefanidis to investigate this possibility and he did not ask Mr Beck or Mr Quick any questions on this point during the trial.

117. Having said that, I note for the record that during the site view Mr Moutidis pointed to the floor tiles in the basement and mentioned this was where Mr Wang said water had leaked through. Mr Beck said if that were the case, the tiles would be drummy, and they are not. He disagreed that water was seeping through the slab. That conversation was not in evidence and as Mr Moutidis did not put the proposition to Mr Beck in cross examination, Counsel for Mr Wang correctly objected when Mr Moutidis tried to rely on the hypothesis in his closing submissions.

118. Noting that Mr Moutidis was self-represented, I nevertheless explored the hypothesis with him during his opening and closing submissions. In opening, in response to my question, he said: [59]

Q: How is the water getting underneath the slab?

A: Because water, Your Honour, is filling up. It's becoming a swimming pool. It's filling up and it has to come from somewhere. It can't come through the walls 'cause, obviously, the walls are pretty much watertight. But it's coming through the bottom. 'Cause, the place is becoming like a - like - like - like a swimming pool. So it's gonna come through the bottom first.

119. In other words, Mr Moutidis' contention assumes that the basement walls are watertight. As discussed above, the walls are not watertight. Accordingly, the assumption on which the hypothesis is based is not supported by the evidence.

120. Later, during his closing submissions, Mr Moutidis and I had the following exchange: [60]

MR MOUTIDIS: ...if water's coming through the tiles, it's coming from the slab, Your Honour. It's not coming from the site.

HER HONOUR: ...The experts disagreed with you when you suggested that so how should I accept your version that there is water coming through the floor?

MR MOUTIDIS: Your Honour, the experts were aware of the photos. They didn't mention it in the report anywhere.

HER HONOUR: Because they didn't think it was an issue. They know where they think the water's coming from and they are not saying it's coming up through the slab.

...

MR MOUTIDIS: ...What I was getting at, Your Honour, is that's another possibility. What I was trying to put in my submission, that there's water coming through the tiles on the bottom floor.

HER HONOUR: Yes, I understand.

MR MOUTIDIS: What I was getting at, Your Honour, if an expert wants to cancel that out, Your Honour, they will do a dye test. That's what they normally do. When I used to work for CGU, Your Honour, as an expert plumber, we used to do a dye test to find where water's coming through, if it's a slab or it's coming from the wall, to determine where that water's coming from, Your Honour.

HER HONOUR: Yes, and did you ask Mr Stefanidis to do that?

MR MOUTIDIS: A dye test?

HER HONOUR: Yes.

MR MOUTIDIS: No, Your Honour, I didn't...

121. In other words, Mr Moutidis admitted that his hypothesis is no more than a possibility. For the reasons discussed above, I do not agree that Mr Beck or Mr Quick should have carried out further testing to rule out the possibility. Both Mr Beck and Mr Quick said they were satisfied they had sufficient information to form their opinions. They each carried out testing before forming their opinions. It was open to Mr Moutidis to instruct Mr Stefanidis to carry out those tests if he thought they were necessary.

Conclusion on the basement walls defect

122. For the reasons set out above, I am satisfied of the following matters:

- (a) there is water leaking into the Basement Bedroom Area and the Garage through the basement walls;
- (b) the cause of the leak is inadequate waterproofing and incorrectly installed AG drain;
- (c) the Contract required Mr Moutidis to carry out waterproofing to the external walls of the home and to install drainage around the perimeter of the home in accordance with the building permit approved documents, being the Engineering Drawings and the Architectural Plans;
- (d) these works were not excluded by the Special Conditions in the Contract;
- (e) Mr Moutidis failed to adequately carry out these works; and
- (f) this amounts to a breach of the Implied Warranties in sections 8(a) and 8(c), that the work will be carried out in accordance with the plans and specifications set out in the contract and in accordance and compliance with all laws and legal requirements.

Amount to rectify item 2

123. Mr Beck gave evidence of the necessary scope of works and reasonable cost to rectify this item. The works required are to remove adjoining soil, install new compliant membrane to walls, install new AG drain, clean out current AG drain and construct it at a compliant grade or fall, to enable the water to drain.

124. Mr Moutidis did not provide any alternate methods of rectification or costings. He did not dispute Mr Beck's evidence on this issue. I accept Mr Beck's evidence. I will set out details of all the amounts to be ordered later in this decision, after I have addressed each defect.

3. Subfloor

125. Mr Beck identified extensive mould in the subfloor. He said this is due to several causes:

- (a) significant building rubble is present in the subfloor, against the basement wall, preventing moisture draining via the AG drains and evaporation from cross flow ventilation;
- (b) the masonry vents being finished below the finished ground height allowing stormwater to enter the subfloor unimpeded;
- (c) the ground in the subfloor is lower than the external ground around the building's perimeter;
- (d) the wet soil has caused mould to form which is a health hazard to the occupants.

126. Mr Stefanidis did not inspect the subfloor. He agreed that water flowing under a building that has no way of discharging is a defect. He said his instructions were that in accordance with page 32 of the Contract, landscaping is not part of the builder's works.

Builder's rubbish:

127. Mr Moutidis' defence is that the rubbish must have been put in the subfloor after he had built the floor, as it included insulation and electrical cable off cuts which could only have been installed after the floor and walls were completed. His evidence was that he had no knowledge of builder's rubble being put under the floor. He also said variously that the rubbish was pushed from the 'external area of the premises' to 'under the building' by the landscapers (who he did not engage), and that it must have been put through the trap door in the pantry floor by others after he had finished his works.

128. His evidence was supposition and not based on any first hand knowledge. In his original witness statement he suggested that the landscapers had pushed rubble under the house. During cross-examination he said that was a mistake and instead someone must have put rubbish through the trap door after he had installed the floor. His evidence ultimately was: [61]

I made a mistake [in my witness statement] with the pushing of the stuff under the floor... I'm not trying to change my witness statement. It was just an honest mistake. Okay. In relation to this, it's impossible for to put - in here - to put insulation when there's floor already installed in a property. And plaster - impossible. The plaster, you can't put the horse before the cart, sir. So what I'm saying is that I don't know who put that in there. Okay. I do not know who put that in there. And if Her Honour thinks it's my fault, I'll pay for it. But I don't know who put it in there. I honestly don't.

129. Mr Moutidis did not give any indication that he had direct knowledge of what had happened on site. He was vague in his evidence about how often he was present and how much supervision he actually gave. I note his father Ilias stated in his witness statement that Ilias was the 'site supervisor [and] was the man on site at all times.'

Accordingly Mr Moutidis' evidence as to how the material got in to the subfloor can be nothing more than a guess.

130. It is not in dispute that the construction of the subfloor was within the scope of the Contract. Mr Moutidis admits that he built the subfloor. During the view and in the photographs in the expert reports, I saw pieces of concrete, timber, plasterboard, insulation and electrical cable amongst the rubbish in the subfloor. There is no dispute that Mr Moutidis engaged the subcontractors who carried out the concreting, framing, plastering, insulation and electrical works.

131. In my view, it is implausible that landscapers, or Ms Sheng, found rubbish left by a variety of trades and dumped it through the trap door. Mr Moutidis agreed that the landscaping was being carried out prior to him applying for the occupancy permit. In other words, he was on site (or Ilias as site supervisor was on site) at the time the rubble was allegedly being put through the trap door in the pantry floor.

132. I am satisfied that it is more likely than not that the rubble was in place at the time Mr Moutidis completed the Contractual works. This is poor workmanship. In any event, the leaving of rubble is a departure from cl 3.4.1.2 of the Building Code of Australia ('BCA'), which states that the sub-floor space must be cleared of all building debris.

133. I am satisfied that these are breaches of the Implied Warranty in s 8(a) of the Act, to carry out the works in a proper and workmanlike manner. It is also a breach of the Implied Warranty in s 8(c), namely to comply with all laws and legal requirements, which includes the BCA. Further, as s 8(c) is a strict liability warranty, Mr Moutidis is liable for this breach even if the rubble was left by others prior to him completing his Contractual scope.

Subfloor lower than external ground height:

134. Mr Beck identified that the external ground height is higher than the subfloor and Mr Moutidis agreed. This is a defect because it is a breach of clause 3.1.2.3(c) of the BCA which requires the ground in subfloors to be above the adjacent external finished ground level.

135. Mr Moutidis contended that the level of the external ground height is a defect caused by the landscaping, which he was not responsible for under the Contract, by SC4. He could not recall the exact details, but thought he must have left the site graded away from the home at the time the landscapers engaged by Ms Sheng took over. His recollection was not based on actual memory but on what he would usually do.

136. I do not accept Mr Moutidis' evidence that he had necessarily left the site graded away from the home. The distance between the north wall and the back fence is at most 1200mm. He gave no evidence that about how he had managed to achieve the requisite fall in that space. Nor did he give any evidence that he then saw the landscapers bring in large amounts of fill to build up the site to the current levels. If that had occurred, Mr Moutidis would presumably have seen it as he was working on site at the same time as the landscapers.

137. Having said that, I accept that Ms Sheng engaged landscapers who provided the finished ground levels. I also accept that landscaping was excluded from Mr Moutidis' Contract. However, Mr Moutidis is liable for this defect because the landscaping work was carried out while he was still completing his Contract works. Mr Moutidis admitted that the landscaping had been completed by the time he advised the building surveyor that the home was ready for the occupancy permit to be issued. This was confirmed by Nearmaps photographs taken during the build which showed the landscaping was completed between February and April 2018. A final inspection was carried out by the building surveyor on 15 May 2018 and the occupancy permit was issued on 6 June 2018.

138. The Implied Warranty in s 8(c) that the building works would comply with the BCA is an absolute warranty. It does not matter that Mr Moutidis was relying on the landscapers engaged by Ms Sheng to carry out their works in a compliant manner. If the landscapers' work meant the home did not comply with the BCA, then Mr Moutidis is in breach of the Implied Warranty.

139. Further, he is also in breach of the Implied Warranties to carry out his work in a proper and workmanlike manner and with reasonable care and skill (s 8(a) and (d) of the Act). He advised the relevant building surveyor that the Works were complete and the home was suitable for occupation, when he applied for an occupancy permit in May 2018. The landscaping was complete at that time. There is no evidence that Mr Moutidis took any steps to advise the building surveyor or Ms Sheng that the landscaping works did not comply with the BCA. In my view, in those circumstances, his application to the building surveyor falls short of the standard required by the Implied Warranties.

Vents below finished ground level:

140. I inspected the vents and observed that several vents on the north wall of the home outside the kitchen are below the finished ground level. The ground around them has been boxed out to prevent the ground surface from entering the subfloor. All experts agree that water being able to enter the subfloor via the vents is a defect.

141. Mr Moutidis constructed the subfloor and vents. He says that when he finished that work, the vents were approximately 0.5 metres above the existing ground level. Ms Sheng's landscapers must have then come and filled the area to a height that covered the vents, and boxed them out.

142. Even if this is the case, Mr Moutidis is liable for this defect, because the landscaping was in situ at the time he completed his Contractual scope of works and obtained the occupancy permit. Mr Moutidis admitted that the path along the north wall of the house and the water tank (which sits on that path) had been installed prior to the occupancy permit being issued. Even if that path was constructed by landscapers engaged by Ms Sheng, Mr Moutidis is liable for ensuring that the works covered by the occupancy permit are compliant. The warranty to ensure compliance with all legal requirements is absolute. As with the site levels, it does not matter that Mr Moutidis was relying on others to carry out their works in a compliant manner. It is a breach of the Implied Warranties in sections 8(a), (c) and (d).

Mould

143. Mr Moutidis agreed with Mr Beck's opinion that mould is present in the subfloor. This is a defect because it is a departure from the deemed-to-satisfy provisions of the BCA. It is a breach of the s 8(c) warranty which is absolute, and it matters not whether it was contributed to by the landscapers' works.

Amount to rectify item 3

144. Mr Beck provided his opinion that to rectify these defects, the external ground levels need to be reinstated at least 150mm lower than the ventilation, all builder's rubble needs to be cleared and the AG drain needs to be made serviceable.

145. The scope of work and estimated cost was not challenged by Mr Moutidis. I accept Mr Beck's cost estimates.

5. Masonry

146. The items claimed are that the articulation joints do not extend through openings. This relates to eight windows and the front door. Further, there are areas of brickwork not fully cleaned.

147. Mr Moutidis accepted liability for these items. I accept Mr Beck's opinion and agree with Mr Wang's submission that these are defects because they are a failure to comply with parts 3.3.1 and 3.3.2 of the BCA. I find that they are a breach of the Implied Warranty in s 8(a) of the DBCA, that the works will be carried out in a proper and workmanlike manner, and also the Implied Warranty in s 8(c), that the work will be carried out in accordance with, and will comply with, all laws and legal requirements.

148. Mr Beck provided a method and cost of rectifying the deficient articulation joints. Mr Moutidis proposed an alternate method to Mr Beck, involving specialist saws and then, the installation of new windows. Mr Beck did not accept this method. Mr Moutidis did not provide any independent or credible evidence of his proposed scope of works nor how much they would cost. I accept Mr Beck's considered scope of works and costings.

149. Further, Mr Moutidis and Mr Beck agreed \$1,000.00 should be allowed to clean the bricks. I will allow the amount set out in the table below.

6. Shower leak

150. There is a leak in the shower. Mr Beck's opinion of the cause of the leak is that the shower screen junctions have not been properly sealed. Mr Stefanidis agreed with Mr Beck.

151. Mr Moutidis accepted liability for this defect. I accept the opinion of Mr Beck and agree with Mr Wang's submission that this is a breach of the ss 8(a), (b), (c), (d) and (f) Implied Warranties.

152. Both Mr Beck and Mr Stefanidis agreed the cost to rectify the shower is \$2,353.07. Mr Moutidis did not dispute this amount. I will allow the amount set out in the table below.

9. Laundry Door

153. There is no draft seal and this is a requirement of the BCA.

154. Mr Moutidis accepted liability for this defect. I accept the opinion of Mr Beck and I am satisfied that this is a breach of the ss 8(a), (b), (c) and (d) Implied Warranties.

155. Mr Beck provided his opinion of the reasonable cost to rectify this defect. Mr Stefanidis agreed with Mr Beck's estimate. Mr Moutidis did not dispute this amount. I will allow the amount set out in the table below.

11. Laundry ceiling

156. There was mould staining evident on the laundry ceiling from a roof leak. While Mr Quick addressed the cause of the leak below, this item is to rectify the ceiling.

157. Mr Moutidis accepted liability for this defect. I accept the opinion of Mr Beck and am satisfied that this is a breach of the ss 8(a), (c) and (d) Implied Warranties.

158. Mr Beck provided his opinion of the reasonable cost to rectify this defect. Mr Moutidis did not dispute this amount. I will allow the amount set out in the table below.

12. Wet area doors unsealed

159. Three doors are unsealed on all six sides. Mr Stefanidis agreed with Mr Beck that this is a defect and with his proposed scope of work to rectify.

160. Mr Moutidis accepted liability for this defect. I accept the opinions of Mr Beck and Mr Stefanidis and I am satisfied that this is a breach of the ss 8(a) and 8(c) Implied Warranties.

161. Mr Beck provided his opinion of the reasonable cost to rectify this defect. Mr Stefanidis agreed with Mr Beck's estimate. Mr Moutidis did not dispute this amount. I will allow the amount set out in the table below.

13. Straightness of study walls

162. The alleged defect is that the corner junctions are significantly out of plumb.

163. Mr Moutidis accepted liability for this defect. I accept the opinion of Mr Beck and agree with Mr Wang's submission that this is a breach of the s 8(a), (c) and (d) Implied Warranties.

164. Mr Beck provided his opinion of the reasonable cost to rectify this defect. Mr Moutidis did not dispute this amount. I will allow the amount set out in the table below.

14. Roof void

165. Mr Beck identified that some electrical cabling visible in the roof void has not been clipped.

166. Mr Moutidis accepted liability for this defect. I accept the opinion of Mr Beck and agree with Mr Wang's submission that this is a breach of the s 8(a) and 8(c) Implied Warranties.

167. Mr Beck provided his opinion of the reasonable cost to rectify this defect. Mr Moutidis did not dispute this amount. I will allow the amount set out in the table below.

Plumbing defects

Q10.1 – 10.9 Roof plumbing defects

168. Mr Quick identified the following defects in the roof plumbing:

10.1 Roof tiles have not been fixed in accordance with AS2050: 2002;

10.2 Roof tiles not sitting down correctly at the ends of gutters;

10.3 The cut valley tiles are cracked and need to be replaced;

10.5 Soaker flashing and cement sheet overflashing not installed in workmanlike manner;

10.6 Sarking beneath tiles is damaged;

10.7 Fascia gutters lack overflows and have non- conforming slots;

10.8 Fascia gutters lack correct grade and are ponding;

10.9 Parts of ceiling that lack insulation.

169. Mr Moutidis stated that he accepted Mr Quick's opinion and accepted that each of these items are defects. He also conceded that the roof plumber was his subcontractor, Christos Peters, who he had worked with for many years before he passed away.

170. I accept the opinion of Mr Quick as to the existence of the defective roof plumbing items 10.1 – 10.9 and am satisfied that these are breaches of the s 8(a) and 8(c) Implied Warranties.

171. Mr Quick provided his opinion of the reasonable cost to rectify this defect. Mr Moutidis did not dispute this amount. I will allow the amount set out in the table below.

Does Mr Wang have any obligation to pursue the plumber's insurance?

172. In his defence Mr Moutidis disputed the claims for the plumbing defects on the basis that Mr Wang should have made a claim to the plumbers' insurers, rather than bringing the claim against him as the builder. In his closing submissions, Mr Moutidis said: [62]

The Plaintiff made insurance claims for plumbing issues with two contractors:

- (a) A claim against the late Christos Peters was settled and accepted, but the Plaintiff made no rectifications with the payout.
- (b) A second claim against Alex Vinci was withdrawn because the Plaintiff found the insurer's legal team "too difficult" to deal with.

This justification is insufficient, particularly where the Plaintiff has shown no hesitation in pursuing legal action in this proceeding.

The Plaintiff failed to disclose the settlement of the first insurance claim to the Defendant or the Court. This raises concerns of double recovery, especially where compensation has already been accepted for the same or similar defects.

The Plaintiff's failure to use the insurance payout to mitigate loss, coupled with the non-disclosure of the settlement, supports a finding that the Plaintiff has not acted reasonably or in accordance with their duty to mitigate.

173. These submissions are factually incorrect, and contrary to the evidence presented at trial. As an example, Mr Wang's uncontested evidence was that he made a claim to the insurer of Christos Peters in relation to the drainpipe of the water tank only, and he received a settlement of \$6,000.00 for that claim. There is no claim for the drainpipe of the water tank in this proceeding and so there can be no concern of double recovery, as suggested by Mr Moutidis. Further, the documents relevant to that claim and payment were discovered and so Mr Moutidis' submission that Mr Wang failed to disclose the settlement cannot be accepted.

174. Further, Mr Wang gave oral evidence about a complaint he made to the Victorian Building Authority (VBA) about Mr Vinci, the plumber who laid the stormwater and sewer drains. He confirmed that he complained to the VBA about Mr Vinci's work after he received Mr Quick's report. He said that the VBA asked Mr Vinci to attend the site and fix certain issues but all he fixed was the 'inspection shaft'. Mr Wang confirmed that this item was subsequently removed from Mr Quick's report and his claim in this proceeding. Mr Wang confirmed he has never received any money from Mr Vinci or his insurer.

175. Mr Moutidis cross examined Mr Wang at length about why he had not made an insurance claim regarding Mr Vinci's plumbing works. His answer was that he had 'tried to reach out to the insurance company but they said you need to contact our legal department and I thought that was very difficult so I didn't proceed any further.'^[63] He did not say he had made and withdrawn an insurance claim, as Mr Moutidis submitted.

176. Even if Mr Moutidis' analysis of the evidence was to be accepted, it is not relevant to the claims made against him. A home owner has no obligation to pursue a subcontractor to a builder, or the insurer of a subcontractor, instead of enforcing the Implied Warranties given by a builder under sections 8 and 9 of the Act. On the contrary, the purpose of the Act is to provide home owners with the protection that a builder has a strict liability to them. It is a matter for a builder to seek contribution or indemnity from its subcontractors. Accordingly I do not accept Mr Moutidis' submission that because Mr Wang failed to pursue the plumbers, Mr Moutidis is not liable to Mr Wang for the plumbing defects.

Amount of loss and damage allowed

177. As discussed above, I have accepted the cost estimates for each of the items provided by Mr Beck and Mr Quick in their reports. Mr Beck gave evidence at the trial that construction costs have increased 6.4% since his costings prepared in 2023.^[64] This was agreed by Mr Moutidis. The figures in the table below are Mr Beck's estimate for each item as at 2023 (called '2023 base'), then his estimate as at today (which includes the 6.4% increase in construction costs) which are called 'current base'. The third line for each item, the 'current total', is the current base, plus a 30% margin and GST.

178. Accordingly the amounts I will allow are as follows:

Jeff Beck Costings

Item	Description	Amor
2	Basement walls	2023 base: \$71,662.38 Current base: \$76,248. Current total: \$109,035.
3	Subfloor	2023 base: \$6,360. Current base: \$6,767. Current total: \$9,676.
5	Masonry	2023 base: \$6,928. Current base: \$7,372. Current total: \$10,542.4
6	Shower Leak	2023 base: \$1,645. Current base: \$1,750. Current total: \$2,503.6
9	Laundry Door	2023 base: \$195. Current base: \$208. Current total: \$297.
11	Laundry Ceiling	2023 base: \$583. Current base: \$620. Current total: \$887.5
12	Wet area doors unsealed	2023 base: \$340. Current base: \$361. Current total: \$517.3
13	Straightness of study walls	2023 base: \$2,453. Current base: \$2,610. Current total: \$3,733.
14	Roof void	2023 base: \$690. Current base: \$734. Current total: \$1,049.8

	Preliminaries ^[66]	2023 total: \$9,691. Current total: ^[67] \$10,817.
Total (Jeff Beck)		\$149,061.
Robert Quick Costings^[68]		
Q6.2	Sewer drainage	Base: \$6,790.00 ^[69] Total: \$10,680.
Q6.3	Sewer drain to basement	Base: \$27,095. Total: \$42,620.4
Q7.1	Stormwater clogged with rubble	Base: \$1,100. Total: \$1,730.3
Q7.2	Agi pip installed without mesh sleeve	Base: \$6,965. Total: \$10,955.
Q10.1	Rooftiles have not been fixed properly	Base: \$5,420. Total: \$8,525.
Q10.2	Rooftiles not sitting down correctly at the ends of gutters	Base: \$460. Total: \$723.
Q10.5	Soaker flashing and cement sheet overflashing not installed in workmanlike manner	Base: \$460. Total: \$723.
Q10.6	Sarking beneath tiles is damaged	Base: \$460. Total: \$723.
Q10.7	Fascia gutters lack overflows and have non-conforming slots Fascia gutters lack correct grade and are ponding	Base: \$1,835. Total: \$2,886.
Q10.8		
Q10.9	Parts of ceiling lack insulation	Base: \$440. Total: \$692.
Total (Robert Quick)		\$80,262.

Damages for Loss of amenity

179. Mr Wang also claims \$15,000.00 for loss of use and amenity damages by reason of the physical inconvenience placed on him by the defects, in particular the water ingress into the basement.

180. An owner who has suffered actual disruption or physical inconvenience, anxiety and distress as a result of a builder's breach of contract is entitled to an award of general damages but only for the physical inconveniences and mental distress directly related to those inconveniences caused by the breach of the contract.^[70]

181. I am satisfied that Mr Wang has suffered such loss and damage. His evidence is that the Basement Bedroom Area has been sealed off and inaccessible for five years, due to the constant water ingress, the state that the builder has left it in trying to repair things, and the health risks of mould. He had purchased the home in 2019 with the intention of using the Basement Bedroom Area for his parents to stay with him, to set up a home gym, and to host his church group. However he has been unable to use the Basement Bedroom Area since 2020.

182. The question to be decided is the appropriate amount of damages to be awarded. This is to be more than a nominal sum. Over twelve years ago, in 2012, owners who had to 'live in a wet house for two and a half years' were awarded \$5,000.00 by way of general damages for loss of amenity.^[71] More recently, in 2024, owners who 'spent 6 years, rather than 2 ½ years, in their "hellish" house' were awarded \$15,000.00 for loss of amenity. This amount was calculated as being consistent with the reasoning in the earlier case, and an appropriate sum in today's money.^[72]

183. I am satisfied that an award of \$15,000.00 for loss of amenity is appropriate in this case.

Conclusion

184. For the reasons set out above, I will make the following orders:

(1) The defendant must pay the plaintiff \$244,323.58.

185. As Mr Wang has been completely successful in his claim, the usual order for costs is that the defendant should pay the plaintiff's costs of the proceeding on the standard basis. I will make that order unless any other application is made within 14 days.

Certificate

I certify that these 51 pages are a true copy of the judgment of Her Honour Judge Kirton delivered on 18 August 2025.

Dated: 18 August 2025

Jessica Meaney

Associate to Her Honour Judge Kirton

[1] At one point the defendant contended that SC3 should be read as 'Owner is to contact council for final damage inspection'. However during the trial he did not press that interpretation, sensibly in my view, as the handwriting clearly states 'drainage'.

[2] This has been the approach taken in other courts and I adopt it. See for example, *Bottrill v Graham* (No 2) [2025] NSWDC 221 [72]; *Luck v Secretary, Services Australia* [2025] FCAFC 26, 4 [14].

[3] Defendant, 'Closing Submissions', Submission in Wang v Moutidis, CI-2304738, 9 June 2025, 3 [2.5] ('Defendant's Closing Submissions').

[4] *Mason v Fraser* [2021] VSC 461.

[5] Defendant's Closing Submissions (n 3) 10 [9.5]; and 13, fn 13.

[6] Transcript of Proceedings, *Wang v Moutidis* [2025], Day 3, 7(8-10) ('TS').

[7] TS, Day 3, 10(10-12).

[8] Kim Moutidis, 'Witness Statement', June 2024, 3 & 9 [20] & [34(e)] ('Moutidis Witness Statement').

[9] TS, Day 3, 103(30) – 105(4); Day 3, 109(28) – 110(29).

[10] TS, Day 3, 9(14-30).

[11] TS, Day 1, 55(3-7).

[12] TS, Day 1, 55(23-24).

[13] TS, Day 3, 8(25-29).

[14] TS, Day 3, 17(28- onwards).

[15] Court Book, *Wang v Moutidis*, CI-23-04738, 662, [17] – [19] ('CB').

[16] TS, Day 3, 153(17) - 154(27).

[17] TS, Day 3, 53 - 58.

[18] TS, Day 3, 63 - 67.

[19] As to the warranties in ss 8(c) and (f), see *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286, 105 - 106 [282]-[284] (per Judge Woodward as his Honour then was); as to the warranty in s 8(e), see *Owners Corporation PS623721 v Shangri-La Construction Pty Ltd (Building and Property)* [2022] VCAT 1499, 49 [145].

[20] As to the operation of absolute obligations, see *Kandelka Management Pty Ltd v Pisces Group Ltd (subject to deed of company arrangement)* (2009) 76 ACSR 113; [2009] FCA 1379 [70].

[21] See *RW Miller and Co Pty Ltd v Krupp (Australia) Pty Ltd* (1992) 11 BCL 74 [141].

[22] *Theodor v Noonan (Building and Property)* [2015] VCAT 1390, 13 [63].

[23] *Mason v Fraser* [2021] VSC 461 (per Keogh J).

[24] *Fraser v Mason (Building and Property)* [2019] VCAT 1009 (per Member Edquist).

[25] Ibid, 16 [72].

[26] Ibid, 17 [74].

[27] *Mason v Fraser* [2021] VSC 461, 29 - 30 [88] - [90].

[28] *Waddell v JG King Project Management Pty Ltd* [2018] VCAT 1531, 8 [25] (per Kirton SM as I then was) citing *Owners Corporation 1 PS523454S v L.U Simon Builders Pty Ltd* [2018] VCAT 987 (per Aird DP).

[29] *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613, 617-618.

[30] *Mirvac Victoria Pty Ltd v Liszka & Anor; Mirvac Victoria Pty Ltd v Pahor* [2019] VSC 561, 22 [69].

[31] *Meticon Homes Pty Ltd v Hooper* [2015] VSC 110, [307] (per Digby J).

[32] *Yume Group Holdings Pty Ltd v Ashthorn CA Pty Ltd* [2024] VSCA 134 [92] and cases cited therein.

[33] Moutidis Witness Statement (n 8), 10 [35(c)].

[34] Walter Gang Wang, 'Witness Statement', 14 June 2024, 7 [19] – [20].

[35] *Ibid*, 7 [21].

[36] TS, Day 3, 96(26).

[37] TS, Day 3, 103(30) – 105(4); 109(28) – 110(29).

[38] Moutidis Witness Statement (n 8), 4 [21].

[39] Ilias Moutidis, 'Witness Statement', 17 June 2024, 1 & 2 [2] & [4].

[40] TS, Day 3, 93(29) – 94(1); 94(22) – 95(9).

[41] TS, Day 2, 223(11-14).

[42] TS, Day 3, 84(28).

[43] TS, Day 4, 203(11).

[44] Moutidis Witness Statement (n 8), 5 [27(d)].

[45] *Oxford English Dictionary* (online at 12 August 2025) 'external' (def 3a).

[46] *Domestic Building Contracts Act 1995* (Vic) s 5(1)(a)(i) (emphasis added).

[47] TS, Day 3 69(27) – 70(8).

[48] TS, Day 2, 208(19 – 26).

[49] TS, Day 2, 286(11 – 15).

[50] TS, Day 2, 286(20 – 24).

[51] TS, Day 2, 288(5 – 10).

[52] TS, Day 2, 288(30) – 289(8).

[53] TS, Day 2, 194(14).

[54] CB (n 15) 149.

[55] TS, Day 2, 185(24-26).

[56] TS, Day 2, 186(3-9).

[57] TS, Day 4, 177(30); see also 182(3) – 183(3).

[58] TS, Day 2, 176(24) – 177(15).

[59] TS, Day 1, 68(16 -23).

[60] TS, Day 4, 214(24) – 216(8).

[61] TS, Day 3, 114(3).

[62] Defendant's Closing Submissions (n 3), 8 [7.1] – [7.3] & [7.5].

[63] TS, Day 1, 82(9).

[64] TS, Day 2, T189(1 – 5).

[65] Base costing of \$72,002.38 less a costing error of \$340.00: 'Scott Schedule agreed as Joint Report following conference of experts,' 24 February 2024, CB (n 15), 202.

[66] Includes costs of the Building Permit, Liability and Contractors Insurance, Domestic Building Warranty Insurance, Protection of items (garage floor slab, paths and internal surfaces) and CCTV of drains post completion of works: Further Building Report of Jeff Beck, 22 September 2023, CB (n 15), 162 & 163.

[67] No margin has been applied to the preliminaries. The increase in the total of the preliminaries is the cost of the warranty insurance: Plaintiff, 'Closing Submissions,' Submissions in Wang v Moutidis, CI-23-04738, 30 May 2025, 4.

[68] Total Amounts for each item include 10% for contingencies, 30% margin and 10% GST: Quick report CB (n 15) 200.

[69] Robert Quick, 'Updated Costing,' CB (n 15) 833.

[70] *Boncristiano v Lohmann* [1998] 4 VR 2 [94] (per Winneke P, Charles and Batt JA agreeing); cited in *Archibald v Powlett* [2017] VSCA 259, 19-20 [65] (per McLeish JA, Redlich and Osborn JJA agreeing).

[71] *Anderson & Anor v Wilkie (Domestic Building)* [2012] VCAT 432, 7 - 8 [27] - [31] (per SM Walker).

[72] *Alderson v Nelson* (Building and Property) [2024] VCAT 751, 10 - 12 [21]-[23] (per DP Lulham).