DISTRICT COURT OF QUEENSLAND

CITATION:	*Queensland Building Services Authority v Samimi & another* [2021] QDC 112
PARTIES:	**QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (plaintiff) **v** **KAMRAN SAMIMI** (first defendant) and **MOJGAN SAMIMI** (second defendant)
FILE NO:	1264 of 2012
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	9 July 2021
DELIVERED AT:	Brisbane
HEARING DATE:	31 August and 2 September 2020 and 25 March 2021 – 1 April 2021 and 17 May 2021 (close of submissions)
JUDGE:	RS Jones DCJ
ORDER:	1. **The claim against the first defendant is dismissed.** 2. **The claim against the second defendant is dismissed.** 3. **I will hear further from the parties as to any consequential orders.**
CATCHWORDS:	GENERAL CONTRACTUAL PRINCIPLES – BREACH OF CONTRACT – where defendant engaged in domestic building contract for residential construction – whether defendant failed to carry out domestic building works in accordance with contract – where contract terminated by owner – where plaintiff issued payout to owner under Queensland Home Warranty Scheme – where purported defective and incomplete works capable of rectification CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGED, BREACH AND DEFENCES TO ACTION FOR BREACH – TERMINATION – where works under domestic building contract suspended by defendant – where defendant sought further instructions from

	owner to continue works – whether owner failed to comply with implied obligation to cooperate – where continuation of works by defendant would lead to inefficient and out of sequence approach to construction absent further instructions from owner – where suspension of works lawful and warranted CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGED, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – where works under domestic building contract lawfully suspended by defendant – whether suspension of works enlivened default termination provisions of contract – where suspension did not constitute repudiation – where termination by plaintiff did constitute repudiation
LEGISLATION:	*Corporations Act 2001* (Cth) s 601AH *Queensland Building and Construction Act 1991* (Qld) ss 71, 111C
CASES:	*Guirguis Pty Ltd v Michel's Patisserie System Pty Ltd & Ors (No 2)* [2018] 1 Qd R 132; [2017] QCA 83 *Lourinda v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623, 634, 643, 658 *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444 *Shevill v Builders Licensing Board* (1982) 149 CLR 620 *Societe D'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co* (1924) 20 Ll.L.Rep. 140
COUNSEL:	Mr M Williams for the plaintiff Mr S Monks for the defendant
SOLICITORS:	Rostron Carlyle Rojas Lawyers for the plaintiff Peter Ryan Lawyers for the defendant

[1] This proceeding was concerned with an action commenced by the Queensland Building and Construction Commission (formerly the Queensland Building Services Authority) (the plaintiff) against Kamran Samimi (first defendant) and Mojgan Samimi (second defendant) to recover statutory insurance monies in the amount of $324,301.17 as a debt pursuant to ss 71(1), 111C(3) and (6) of the *Queensland Building and Construction Commission Act* (QBCC Act).

[2] The actions against both defendants are dependent upon the court being satisfied that they were at "*fault*" for the purposes of the QBCC Act.[1] It is alleged that the defendants were at fault, in the case of the second defendant, by virtue of the operation

[1] Section 71(1).

of s 111C of that Act and, in respect of both defendants, due to a number of alleged breaches of a building contract on the part of Spectrum Pty Ltd (Spectrum).

[3] At all material times the first defendant was a director of that company. The second defendant was also a director at certain times and that is a matter discussed further below.

[4] The alleged breaches of the contract are that Spectrum had failed to carry out works in accordance with its obligations under the contract,[2] had failed to rectify defects in the works carried out and had unlawfully suspended work under the contract.[3]

[5] For the reasons set out below the plaintiff has failed to establish the necessary fault on the part of the defendants and, accordingly, the orders of the court are:

1. The claim against the first defendant is dismissed;
2. The claim against the second defendant is dismissed;
3. I will hear further from the parties as to any consequential orders.

Background

[6] This proceeding has, at least as far as I understand it, been ongoing since 2012. Having regard to that historical background, it is perhaps unsurprising that by the time it came before me, the plaintiff was relying on its sixth further amended statement of claim and the defendant their sixth further amended defence. If things weren't bad enough, this proceeding initially commenced before Judge Porter QC. Unfortunately for reasons it is unnecessary to go into, it was agreed between his Honour and the parties that it would not be appropriate for him to continue to preside. That occurred on the second day of the trial, 1 September, 2020. The proceedings before me commenced on 25 March 2021 where Dr Djamshidi (the doctor) was re-sworn and cross-examination continued by Mr Monks, counsel for the defendants.

[7] It is uncontroversial that the first defendant and the doctor were previously known to each other and that the latter had engaged the first defendant to undertake renovation works on a residential property at 19 Drayton Terrace, Mermaid Waters (the Mermaid Waters property) in or around early 2006.

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2 Sixth Amended Statement of Claim at paras 5B, 5D and 5E.
3 Ibid at paras 9A, 9B and 9C.

[8] On or about 1 May 2006, Mehran Pty Ltd (Mehran) entered into a contract (the contract) engaging Spectrum to undertake domestic building works for the construction of two residential dwellings. These dwellings were situated at 29 and 31 Macquarie Street, St Lucia, better described as Lots 38 and 39 on RP23316. The agreed contract price for the construction works was in the amount $1,385,260.00, of which Spectrum purports to have received payment in the amount of $700,000 from Mehran to date.

[9] On or about 20 November 2006, Mehran and Spectrum signed the Master Builders Residential Building Contract which articulated the terms of the contract.[4]

[10] Between or about May 2006 and March 2007, Spectrum carried out building works in respect of the dwellings. It is uncontroversial that such works included the engagement of subcontractors to perform excavation, soil removal and footings.[5]

[11] In July 2007, the plaintiff asserted that building works undertaken by Spectrum in respect of the dwellings were defective and incomplete and had been suspended altogether. A notice of intention to terminate the contract was issued to Spectrum on or about 11 July 2007.[6]

[12] On or about 24 July 2007, Mehran lodged a claim with the plaintiff under the Queensland Home Warranty Scheme for defective and incomplete works carried out by Spectrum in respect of the dwellings. And, on or about 10 August 2007, Mehran provided Spectrum with a notice of termination of the contract for failure to remedy alleged breaches identified under the notice.[7] It is uncontroversial that, prior to the termination of the contract, building works were in fact suspended by Spectrum.

[13] The first defendant took the position the above termination by Mehran was invalid and amounted to a repudiation of the contract. Accordingly, the first defendant caused Spectrum to issue its own notice of termination pursuant to clause 22.2 of the contract on 30 August 2007.[8]

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4 See Exhibit 2.
5 See Exhibit 3.
6 Exhibit 111.
7 See Exhibit 112.
8 Exhibit 113.

[14] On or about 10 November 2011, the plaintiff paid to Mehran the sum of $400,000 under the Queensland Home Warranty Scheme, the sum of $200,000 being attributable to each of the dwellings. It is understood the above warranty was provided pursuant to insurances premiums paid in favour of the plaintiff by the first defendant between or about 13 June 2006 and October 2007, respectively.

[15] On or about 9 December 2011, it is agreed that the plaintiff issued a letter of demand to the first and second defendant in respect of the $400,000 payout made in favour of Mehran Pty Ltd.

Key issues for determination

[16] Central to the outcome of this proceeding are the answers to the following questions:

(i) Was the suspension of preliminary works by the first defendant in respect of Lots 38 and 39 on RP23316 unlawful?

(ii) Were the works in respect of Lots 38 and 39 on RP23316 defective and incomplete such that Mehran was entitled to terminate the contract?

(iii) In the event that Mehran was entitled to terminate the contract, what is the quantum of damages that should be awarded?

(iv) In the event that Mehran was not entitled to terminate the contract, what relief should be granted?

[17] Before going on to deal with those key issues, there are three matters that either should be, or are convenient to deal with at this stage. The first matter is concerned with the credit and reliability of the two key witnesses regarding liability, namely the doctor and the first defendant, Mr Samimi. Second, is the question of whether there were two separate building contracts or only one. The third matter is concerned with the liability of the second defendant, being the ex-wife of the first defendant.

Credit and reliability

[18] Neither the doctor nor the first defendant covered themselves in glory insofar as credit and reliability are concerned.

[19] Turning to the evidence of the doctor first, from his own lips it was evident that he was a party to a scheme which saw the first defendant paid in cash for building works

he carried out on the Mermaid Waters project on the Gold Coast. His evidence involved the following response during cross-examination:[9]

> "Because my brother carried the big lump of money to his house. He was very close friend at that time, and he put it on top of his fridge into a little opening and dropped the money bag in there. He's – didn't even count it."

[20] The following exchange also took place between the doctor and Mr Monks:[10]

Q: So are you saying that there were multiple payments of cash for the Mermaid Waters or for work – or for some other work done by …. ?

A: No.

Q: Mr Samimi.

A: He did – at the beginning of the St Lucia – that's why I didn't separate – he request to pay in cash. And then when he requested that, I said, 'this is not personal. It's the company. I have to give all the documents provided to the accountant for this particular one.' Because it was a serious business, as my, you know, superannuation. I had to have actually (sic) document to do that. So from there onward, refused to pay him cash for any other job, and everything was paid to him by correct bank account.

Q: Okay. So the only cash, you say, is for Mermaid Waters?

A: I believe so, yes. Yes.

Q: Why would you pay on your Visa Card… part of it?

A: Because the – the last question asked me, and we were calculative (sic) already, and I didn't really want to pay cash to – from my things. I'm – it's my surgery. Taxation would go, so I – we pay in cash. I refuse to do cash for my own thing, because I didn't want to have anything that is done with, you know, hanky-panky and stop waiting to build there.

Q: So why is the hanky-panky ok for your wife and your mother?

A: Because that was what he requested and I was trying to be nice to him. We were – they were trying to be nice to him. My mother was talking to his mother in Sydney. We wanted to be nice to him.

Q: So where – the fridge with the opening in it?

A: Sorry?

Q: The fridge with the hole (sic) where the cash was put, where was the hole in the fridge?

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9 See T1-59 at 10 – 13 of Proceeding before Porter DCJ on 31 August 2020.

10 See T1-60 at lines 13 – 43 of Proceeding before Porter DCJ on 31 August 2020.

A: Not in the fridge. It was cabinets, sort of, of little doors on top, and the fridge was here. And I exactly remember this, because it was such a – it just dropped into the right hand side of the fridge, into some little cabinet.

[21] The first defendant denied being involved in any cash payments for work done on this project but for reasons that will become apparent, I have little if any confidence at all in respect of his credit and/or reliability.

[22] Insofar as the doctor's evidence relating to the subject dwellings were concerned, there were a number of troubling aspects. First, in cross-examination, he vehemently denied telling the first defendant that in or around February 2007, he was experiencing financial difficulties. On 21 February 2007, however, the doctor advised the first defendant by way of email correspondence that he was "*in extremely difficult financial circumstances*".[11] Some six weeks after that, a Mr Simeone, retained by the doctor in the capacity of a form of building inspector, on 16 March 2007 advised the doctor as follows:[12]

> "Kamran (the first defendant) will not commit to a timeframe for the completion of the work to the above work. [sic]. This makes it impossible for me to give you a fixed price. I noted that the completion date is 13th April 2008 to complete the entire work **however at this stage we are not sure at what stage you will stop the work due to your finances**.
>
> Under these circumstances I believe that the best option will be to give you a fixed price per week, this will allow you to terminate my services at the end of any week. …" (emphasis added)

[23] The doctor's attempts to reconcile his evidence and these documents was unconvincing. I also found implausible his evidence concerning the extended excavation works carried out on both sites. While this issue will be dealt with in more detail below, the excavated area of the garages for both dwellings was effectively doubled. According to the doctor, not only did he not approve those works, he was not even aware of those works having been carried out until sometime afterwards. That evidence cannot be accepted. I am satisfied that on 15 August 2006, Spectrum advised the doctor that, among other things, excavation to almost the boundary of the adjoining property had been completed to accommodate two interested purchasers of

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11 Exhibit 9.

12 Exhibit 10.

the two dwellings.[13] I am unaware of any evidence which suggested that that information had not been received by the doctor. Further, in any event, notwithstanding the doctor having visited the site on more than one occasion, I was taken to no document which recorded the doctor's concerns about those works being carried out without his permission. I should also observe in this regard that Mr Simeone must have been aware of those works having been carried out. Again, I was not taken to any evidence of Mr Simeone having raised the alleged unauthorised excavation works with either the doctor or the first defendant.

[24] I also found that the doctor's evidence about receiving only parts of correspondence sent to him by the first respondent in respect of the extended excavation works was also unconvincing. On 12 June 2006,[14] correspondence including plans showing the excavation works was sent by Spectrum House and Land to the Doctor.[15] While accepting that he did, or might have, received the front sheet of that document, the doctor denied receiving any of the attachments, including the plans. In all the circumstances of this case, I found this evidence to be unrealistic.

[25] I also find it improbable that, in circumstances where the doctor's evidence was that he had his staff press the first defendant for a written contract over a period of "*a few months,*"[16] yet when that contract did finally arrive, he did not know what the document contained and "*just signed it because I wanted the contract to be given me – that's as simple as that.*" According to the doctor, that was done because at that stage he considered the first defendant to be an honest person and a person whom he trusted.[17]

[26] Turning then to the evidence of the first defendant, he fares even worse. As already noted, it is highly likely that he was involved in carrying out the building work at Mermaid Waters on a cash basis. He, as I have said, denied these transactions, but I am simply unable to accept his evidence on this matter, or indeed any other matter unless it is supported by other independent objective evidence.

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13 Exhibit 17.

14 Exhibit 94.

15 Spectrum House and Land was a separate name used by the First Defendant.

16 See T1-28 at lines 37 – 47 of Proceeding before Porter DCJ on 31 August 2020.

17 Ibid at T1-29 at lines 35 – 40.

[27] The first defendant on a previous occasion had given evidence that he had never been paid for the Mermaid Waters contract. However, in proceedings before the Supreme Court of New South Wales, he swore an affidavit where, among other things, he deposed to the fact that in respect of the Mermaid Waters contract, he was paid $125,000.[18] Unsurprisingly, that affidavit concludes with the first defendant stating that the matters set out therein were to the best of his knowledge true and correct. Not only was the affidavit signed by the first defendant, but he also initialled every page. When this anomaly was pointed out, the first defendant gave what could only be described as an extraordinary and bizarre account. According to him, he would "*swear*" that he did not read this affidavit. And, not only that, according to the first defendant, this was the first time he had seen this document and he repeated that he had not read it.[19] Obviously he must have seen this document before because he signed and initialled it. That he did not read it before swearing it to be true and correct simply cannot be accepted.

[28] This however was not the only document of significance that the first defendant had not read. According to him, the various defences pleaded must have been but a construct on the part of his lawyers. His evidence was that he did not read his defences and did not understand them. The first defendant put to the court that, his lawyers would simply say words to the effect "*can we put this in?*" and he would simply agree. I have no doubt that the pleadings were prepared upon proper instructions and that this is but another example of the first defendant being prepared to say anything that he thought might advance his case.

[29] Yet another example of this is that, notwithstanding it was he who had the building contract prepared, [20] he said he only had a vague, if any, understanding of what was contained in that contract. This is in circumstances where he was a very experienced builder. On my account, there were in the order of 10 occasions when the first defendant, when taken to a document, said words to the effect that he had not read it.[21]

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18 Exhibit 118, p 3 at para 9.
19 T5-93 at lines 17 – 25.
20 Exhibit 2.
21 T5-48 at line 34, T5-54 at line 5, T5-55 at line 8, T5-75 at line 17, T5-79 at line 21, T5-80 at line 26, T5-90 at line 5, T5-93 at line 14 and T5-95 at line 32.

[30] During the course of the proceedings, reference was also made to adverse findings concerning the credit of the first defendant in other proceedings in New South Wales. However, my assessment of the first defendant's credit, or more accurately lack thereof, was formed by my own observations and impressions.

[31] Having regard to the above, the observations of the Court of Appeal in *Guirguis Pty Ltd & Anor v Michel's Patisserie System Pty Ltd & Ors* seems apt: [22]

> "Most experienced judges subscribe to the view expressed by Goff LJ in *Armagas Ltd v Mundogas SA* (The 'Ocean Frost') that it is essential 'when considering the credibility of witnesses, always to test their veracity by referenced to the objective facts proved independently of their testimony, in particular by reference to the document sin the case, and also to pay particular regard to their motives and to the overall probabilities.' Goff LJ was referring to cases of fraud, but the statement is of general application. As Goff LJ observed in the same passage:
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>> '**It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth**.'" (emphasis added)

[32] As was observed by Atkin LJ in *Societe D'Avances Commerciales (Societe Anonyme Egyptienne) V. Merchants' Marine Insurance Co*: [23]

> "*An ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.*"

[33] The end result is that, insofar as the evidence of the doctor and the first defendant is concerned, I will only accept their evidence when it is supported by documentary evidence or other evidence which I am able to accept.

Were there two separate contracts

[34] According to the first defendant, there were two separate contracts which are relevant to this matter – one being for the excavation and associated works primarily concerned with the two garages under the two dwellings, and the second contract being the written contract entered into by the parties and signed on 20 November

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22 [2018] 1 Qd R 132 at [50]-[51].

23 [1924] 20 LI.L.Rep 140 at [152].

2006.[24] According to the first defendant, he invoiced the doctor $125,000 for the excavation and associated works which were described on various occasions as "*preliminary works*". The first defendant's evidence about this was that, having regard to his experiences as a builder, he was well aware that that contract should have been reduced to writing but it was not because of the close relationship that he and the doctor had then shared. I am unable to accept the evidence of the first defendant about this. That is so for not only the reason that there is no independent, objective evidence supporting the existence of such an oral contract and, in this context, the two invoices referred to by the first defendant are of no assistance. The second matter is that, the building contract expressly includes within its scope of works both excavation and the construction of retaining walls, the value of which was said to be $50,000 and $100,000 respectively.[25]

[35] In light of those provisions of the contract and there being no independent objective evidence supporting the existence of an oral contract, I am satisfied that no such contract existed.

[36] It can be accepted that from 10 July 2006 to 29 September 2006, invoices were sent under the name of Spectrum House and Land, another business name the first defended traded under from time to time. The total amount liable under those invoices was $220,000.[26]

[37] At face value, that might suggest that there were two separate contractual arrangements, one under the business name, and the other with the company. However, I do not consider that to be the situation. It appeared to me to be tolerably clear that the first defendant used the two business entities interchangeably from time to time. Further, it is clear that the sum of $220,000 was $100,000 in excess of the so-called preliminary works. That is, other works in the furtherance of completing the two dwellings was also carried out and invoiced under the business name and not that of Spectrum.[27]

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24 Exhibit 2 at p 13.
25 Exhibit 2 at p 10.
26 Exhibits 4 and 5
27 T5-100 at lines 24 – 47 to T5-101 at lines 1 – 11. See also T5-104 at lines 14 – 36.

Liability of the second defendant

[38] It was alleged on behalf of the plaintiff that the second defendant was and remained a director of Spectrum from 17 August 2007. The evidence is that the second defendant was, from 17 August 2007 to 13 August 2011, a director of that company. It is also uncontroversial that the second defendant has been a director of Spectrum since 11 May 2017. However, on 13 August 2011, Spectrum was deregistered. Subsequently, by order of the Supreme Court of Queensland dated 11 May 2017, the Australian Securities and Investments Commission was ordered to reinstate the registration of that company and, pursuant to s 601AH(3)(b) of the *Corporations Act* (2001) (Cth) (Corporations Act), a Mr Stimpson and a Ms Meheher were appointed as joint and several liquidators of Spectrum.

[39] Pursuant to s 601AH(5) of the *Corporations Act* if a company is reinstated, that company is taken to have continued in existence as if it had not been deregistered. Further, a person who was a director of the company immediately before de-registration, becomes a director again as and from the time when either the Australian Securities and Investments Commission or the Court reinstates that company.

[40] In the fifth further amended reply of the plaintiff, it is asserted:[28]

> "… the second defendant was a director of Spectrum when the contract pleaded at paragraph 5 of the Statement of Claim was terminated, as pleaded at paragraph 9G(a), or the (sic) alternative at paragraph 9I of the Statement of Claim and so was a director of Spectrum when Spectrum's work under the said contract, the subject of these proceedings was, or was to have been, carried out, within the meaning of s 111C(6)(a) of the *Queensland Building and Construction Commission Act* 1991."

[41] In the plaintiff's closing written submissions, after referring to that legislation it was then asserted:

> "(the second defendant) by being a director from 17 August 2007 she, had it not been for the actions of her husband, a director of Spectrum, when the balance of the building work left my Samimi, which **could have been completed** – and this is the subject of the claim". (emphasis added)

[42] Section 111C(6)(a) relevantly provides:

[28] At para 3(b).

"**111C Liability Of Directors For Amounts**

(1)

….

(2)

…

(3) This section also applies if a company owes a commission an amount because of a payment made by the commission on a claim under the insurance scheme.

(4)

….

(6) If this section applies because of subsection (3), the liability to pay the amount attaches to –

(a) each individual who was a director of the company when building work the subject of the claim was, or was to have been carried out; and

(b) each individual who was a director of the company when the payment was made by the commission."

[43] In paragraph 9G of the sixth further amended statement of claim, it is alleged that the owner was entitled to terminate the building contract and did so on or about 10 August 2007. In the alternative, it is pleaded in paragraph 9I that the owner became entitled to accept Spectrum House and Land's repudiation and terminate the contract on or about 10 August 2007. In paragraph 9C it is alleged that Spectrum House and Land unlawfully suspended work under the contract.

[44] For the purposes of s 111C(3), the claims in respect of the two dwellings were paid on or about 5 September 2011, in the amounts of $200,000 for each dwelling.

[45] The difficulty for the plaintiff in respect of the second defendant is that it is not, as the plaintiff seems to contend, to the point that during the relevant period, the building works could have been carried out.

[46] It is uncontroversial that the second defendant was a director at the time the payments were made. However, as pleaded on behalf of the plaintiff, the builder had suspended works on or about March 2007 and,[29] as a consequence of that, the owner terminated

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[29] Exhibit 111.

the building contract on 10 August 2007.[30] The second defendant did not become a director until one week after the contract had been terminated. That is, if the termination of the contract by Mehran was lawful, the contract was at an end. In such circumstances, the second defendant was not a director at a time when the work "*was, or was to have been carried out*" for the purposes of s 111C(6)(a).

[47] For the reasons given below, I have concluded that the building contract had not been lawfully terminated by Mehran. The irony in that is that the second defendant would have been a director at the relevant times. However, for the reasons that follow, no liability flows from this.

Was the suspension of works by the first defendant unlawful?

[48] It was submitted on behalf of the defendants that Mehran was subject to an implied term which required it to cooperate with Spectrum by providing instructions which would permit the building works to proceed. It was said that the duty owed by Mehran "*could be characterised as a duty of good faith and fair* dealing".[31] It is then asserted that Mehran, in breach of that implied term, failed to provide those instructions, which in turn prevented the building works from being completed. According to the defendants, this was not a case where they unlawfully suspended the works. Rather, it was because of the conduct of Mehran that the works ceased.[32]

[49] The failure to provide instructions was concerned with:[33]

1. The design and precise location of two sets of stairs;
2. Cladding details for the front elevations of the two houses;
3. An instruction to vary the approved architectural plans to facilitate the removal of water from the basement;
4. The failure to provide electrical plans; and
5. The failure to provide hydraulic plans.

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30 Exhibit 112.
31 Closing Submissions of Defendant at [94].
32 Sixth Amended Defence at paras 9C and 9D.
33 See exhibits 15, 22, 24, 27, 31.

[50] Before proceeding, two of those matters can be readily disposed of. First, the evidence is that Spectrum had in fact been pumping water from the basements. In any event, in respect of this matter, I agree with the submission made on behalf of the plaintiff that, insofar as this was but a temporary problem during the construction phase, it was properly a matter that Spectrum had to deal with as and when the problem arose. However, insofar as the balance of the hydraulics for the two dwellings was concerned, including the installation of water tanks and pumps in the two garages, they were matters requiring plans and specifications. Second, Spectrum had, of its own initiative reached a solution regarding the stairs.

[51] The evidence surrounding the issue of instructions is somewhat confusing. On 4 March 2007, Spectrum advised Mr Simeone that it needed instructions regarding stairs, front cladding material and hydraulic and electrical details.[34] On 23 March 2007,[35] and 26 March 2007,[36] there are follow ups regarding the above by Spectrum. On 4 April 2007, Mr Simeone advised that Spectrum is no longer to contact the doctor and that all correspondence must be directed to him.[37] As I have said, Mr Simeone was retained by Mehran as some form of a project manager, although the extent of his authority was very vague. According to Mr Simeone, he had very little, if any, authority over the work site.[38] On the other hand, according to the doctor, he told Mr Simeone to do whatever he needed to do to finish the two dwellings.[39] At the very least, Mr Simeone was playing the role of a form of trouble-shooter for Mehran. That is, he would relay problems onsite to the doctor, suggest solutions and relay the doctor's instructions back to the first defendant.

[52] On 30 April 2007, Mr Simeone suggests that he and the first defendant get together "*to work out a solution*".[40] It would appear that the meeting was not entirely successful. Later the same day, the first defendant advised Mr Simeone that during discussions with the doctor, he was advised, among other things, to the effect that

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34 Exhibit 22.
35 Exhibit 23.
36 Exhibit 24.
37 Exhibit 25.
38 T1-72 at lines 16 – 18, see also T1-86 at lines 40 – 46.
39 T1-38 at lines 27 – 32.
40 Exhibit 28.

Spectrum should do whatever that was necessary to get the projects to enclosed (lock up) stage at its costs and to then cease work.[41]

[53] Quite properly, it was accepted on behalf of the plaintiff that as a matter of law, there is a general principle that a party to an agreement must not hinder or make it impossible for other parties to perform their contractual obligations. It is also accepted that, subject to the usual criteria being met, it may be appropriate to imply into a contract certain terms and conditions to that effect.[42] However, for the reasons set out in the plaintiff's written submissions, it is argued that an implied term of the kind advocated for on the part of the defendants was not warranted in the circumstances of this case.[43]

[54] Numerous provisions of the contract are pointed to on behalf of the plaintiff to rebuff the implication of a term or terms that required the doctor and/or his agents to provide the instructions referred to above.[44] In particular, reference was made to clauses 11.11 and 11.12 of the contract which provide:

> "**11.11 Documents supplied by owner**
>
> If the Owner supplies any documents or Foundations Data to the Builder, the Owner:
>
> (a) warrants that the documents or data are accurate and suitable for the purpose for which they are to be used;
>
> (b) acknowledge that it is reasonable for the Builder to rely on the documents or data; and
>
> (c) must supply sufficient number of copies to enable the Builder to undertake the Works and obtain the necessary approvals, if the Builder is required to do so under this contract.
>
> **11.12** The Owner must not obstruct, interfere with, or hinder the carrying out of the Works. The Owner must take all reasonable steps to prevent all others from obstructing, interfering with or hindering the carrying out of the Works.
>
> If the Owner or any person authorised by the Owner obstructs, interferes with, or hinders the performance of the Works, the Owner is liable to the Builder for any delay, and any additional costs incurred by the Builder, if the Builder gives the Owner a written notice advising of the delay and its additional cost within (5) days of the Builder becoming aware of the obstruction, interference or hindrance."

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41 Exhibit 29.

42 Closing Submissions of Plaintiff at paras [18]-[20].

43 Ibid at paras [21]-[35].

44 Ibid, for example see para [32].

[55] Neither clauses 11.11 nor 11.12, nor any of the other clauses referred to on behalf of the plaintiff, prevent the implication of a term of the type raised by the defendants. This is not a case where the parties have entered into a design and construct contract. And, while Spectrum was provided with architectural drawings and, under the contract was responsible for contract plans, it is uncontroversial that no plans or specifications existed in respect of the electrics and hydraulics.

[56] It might have been prudent, as Mr Simeone suggested,[45] for Spectrum to have had those specifications in place before construction began but, because that did not occur does not mean that Mehran could sit back and let the projects grind to a halt and then blame Spectrum. It was contractually bound to provide those instructions, be it by the operation of an implied term or as was required pursuant to clause 11.12 of the contract.

[57] Condition 3.1 of the contract also provides that, where there is a discrepancy or ambiguity in the contracts, one or the other of the parties is to notify the other of such discrepancy or ambiguity. Once notice has been given, then there is a duty to consult. Consult in this context must mean more than merely talking about a problem. It must mean that the parties are required to generally attempt to resolve the discrepancy or ambiguity. I was not taken to any evidence which showed any meaningful attempt on the part of Mehran to resolve the lack of plans on specifications.

[58] Not surprisingly, the defendants contend that a discrepancy and/or ambiguity did exist. Further, that notice was given and Mehran failed, contrary to the terms of condition 3.1, to consult or otherwise address the matters raised by Spectrum.

[59] On behalf of the plaintiff, it was submitted that clause 3.1 was not enlivened for a number of reasons. Having disposed of the pumping and the issues concerning the stairs, it is necessary to focus only on the three remaining issues. First, the front elevation cladding. Second, the hydraulic specifications and, finally, the electrics specifications.

[60] As to the first of these matters, I am also satisfied that no real ambiguity existed in respect of the cladding. As best as I can tell on the state of the evidence, Spectrum

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[45] T2-23 at lines 3 – 24.

was only concerned with how to achieve the "*groove*" effect in the finished product.[46] In circumstances where the architectural plans specified that "*light weight cladding*" was to be used, I agree that this was simply a construction issue which was a matter for Spectrum to resolve. More will be said about the cladding below.

[61] The lack of any details or specifications about the electrics and hydraulics is a different matter. In the absence of appropriate plans and specifications, the contract could not be completed. As Mr Simeone said, without details about the electrics a builder would not know where to locate lights, switches etc.[47] I can see no reason why that would not be the same situation in respect of the hydraulics.

[62] The lack of detail about those matters does not create a discrepancy but, in the absence of the necessary detail, there is an ambiguity about how those works are to be carried out. In this regard, I am unable to accept the submission made on behalf of the plaintiff which was that there was no discrepancy or ambiguity about those matters. Instead that information was "*simply not there*" and that was a risk the first defendant "*accepted under the contract*."[48]

[63] Accordingly, I am of the view that condition 3.1 of the contract was engaged. Mehran had a number of options open to it on receipt of those requests for instructions. It could have provided the necessary instructions. It could have told Spectrum that it should take measures to have the necessary specifications prepared as a variation of the contract. In this regard, as early as January 2007, Spectrum offered to work without hydraulic plans,[49] presumably by preparing its own. That offer was not only not accepted by Mehran, it was not even acknowledged. Third, if as the plaintiff contends, it was a risk that Spectrum accepted under the contract, Mehran could have said so.

[64] Instead Mehran did nothing. Whether that was because of the doctor's personal financial affairs or for other reasons is not clear. What is clear however, is that, as Mr Simeone described it, the controlling minds of the parties to the contract were at "loggerheads" and were not talking to each other.[50] While it might be right to say the

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46 Described "grooves" in correspondence at Exhibit 22.
47 T2-17 at lines 7 – 17.
48 Closing Submissions of Plaintiff at [48].
49 Exhibit 99.
50 T2-5 at lines 7 – 23.

parties were at loggerheads, as the correspondence suggests, Spectrum was communicating, or at least trying to communicate with Mehran to get instructions, but without success.

[65] It was submitted on behalf of the plaintiff that the information or instructions sought were not critical to the project continuing and that there were numerous other works Spectrum could have carried on with, rather than suspending works in March 2007. Reliance is placed on the evidence of Mr Simeone and Mr Axman-Friend in support of that submission.[51]

[66] I am unable to accept that the instructions sought concerning the electrics and hydraulics were not critical to the continuation of the projects. Further, while it might well be the case that Spectrum might have been able to carry out some works without those instructions, in reality the evidence makes it sufficiently clear that such works would merely be an exercise of marking time and that Mehran had no intention of providing those instructions.

[67] In his report Mr Axman-Friend, a project director and manager relied on by the plaintiff, identified various works that Spectrum could have continued on with, absent instructions regarding the electrics and the hydraulics. Insofar as the electrics is concerned, Mr Axman-Friend said by way of conclusion:[52]

> "**4.8 Electrical Works**
>
> 73. Paragraph 9C of the Fifth Amended Defence states "…*could not proceed with electrical plans showing location and details of lights, power points and other electrical items*".
>
> 74. Services rough-in would have been able to commence prior to receiving the final location of lights, general power outlets (GPOs) and other electrical items. **However, the completion of electrical rough-in, particularly the fixing of support brackets for GPOs, could not have occurred without a direction on the location of these GPOs**.
>
> 75. The Remaining Works Program shows that the critical path initially passed through the completion of electrical, mechanical and hydraulic services rough-in. This schedule shows a duration of 4 weeks to complete the rough-in to both the Ground Level and the First Level. Typically, hydraulic and mechanical rough-in works are carried out first to minimise the risk of

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51 Closing Submission of Plaintiff at [50].

52 Exhibit 72 at pp 12-13.

damage to electrical cable. **This means that if not received within 2 to 3 weeks of rough-in works commencing, the builder would have begun to experience delays to the critical path of the works, therefore impacting the completion date**.

76. The builder could have mitigated this delay by bringing forward some of the sheeting works, however, they would have only been able to sheet one side of the wall, to allow access to finalise the rough-in works.

77. The Remaining Works Program shows the Late Start for the first level rough-in works (Activity 12) commencing 5 March 2007, allowing 3 weeks for hydraulic and mechanical rough-in and the commencement of electrical rough-in, and allowing a further 1 week by bringing forward the plasterboard, the latest the builder would need to the GPO information would be 2 April 2007.

78. With respect to the electrical works, I am of the opinion:

    a. The builder could have continued construction on other parts of the works.

    b. The other works the builder could have commenced without the electrical details include mechanical services rough-in, hydraulic services rough-in (Activities 10 and 12) and external works (Activities 63 to 72).

    c. These other works are forecast to be completed around 31 May 2007, at which point the builder would not have been able to proceed further with construction.

    d. To avoid delays, the builder would have needed information on the electrical plans no later than:

        i. 2 April 2007 to avoid delays to the Remaining Works Program forecast completion date.

        ii. Mid December 2007 to avoid delays to the Contract Completion Date.

    e. **Construction could not continue after 31 May 2007 without the GPO location. The location of GPOs is needed to know where to fix support brackets for GPOs which would then be hidden following the fixing of plasterboard and other internal linings. If the GPOs were not located, the interior works would have stopped. The only works that could have continued at that time would have been the external works.**

5 Conclusion

79. I am of the opinion:

    a. The builder could have continued construction on other parts of the works.

b. **The builder could have continued with external works and mechanical and hydraulic services rough-in.**

c. **These other works are forecast to be completed around 31 May 2007, at which point the builder would not have been able to proceed further with construction.**

d. **As at the 31 May 2007, the builder would have needed information on the location of the GPOs to continue works, noting that the builder would have needed the following information to proceed without delay to the:**

i. Forecast completion date:

1. Location of GPOs by 2 April 2007 (Paragraph 78).
2. Design and position of the Ground Level to First Level stairs by 15 May 2007 (Paragraph 38).
3. Front façade detail by 26 June 2007 (Paragraph 60).
4. Water tank and pump variation direction by 4 July 2007 (Paragraph 68).

ii. Contract Completion Date:

1. Location of GPOs by no later than mid December 2007 (Paragraph 78).
2. Design and position of the Ground Level to First Level stairs by no later than January 2008 (Paragraph 38).
3. Front façade detail by no later than early March 2008 (Paragraph 60)." (emphasis added)

[68] While it can be accepted that other works of the type identified by Mr Axman-Friend could have continued, his evidence, consistent with that of Mr Simeone, also makes it clear that instructions about the electrics were necessary not only to complete the contract but also to permit meaningful building works to continue on and from June 2007. And while, at least in theory, the contract could still have been completed within the time stipulated in the contract, 13 April 2008,[53] there were two major problems confronting Spectrum. First, as Mr Axman-Friend conceded, the type of works he identified might well involve an inefficient, out of sequence approach to

[53] Instructions (plans) would have been required by no later than 31 May 2007.

construction on the part of Spectrum.[54] More importantly though is the fact that, notwithstanding a number of attempts on the part of Spectrum to get instructions about the hydraulics and electrics from 4 March 2007[55] to 27 April 2007,[56] no response was received from Mehran or its agent, Mr Simeone.

[69] For some reason, Mr Axman-Friend did not deal with hydraulics as a discrete matter in his report. However, it seems tolerably clear from his answers in cross-examination, that both the electrics and the hydraulics required clarification before the project could proceed in a meaningful way from June 2007. In this regard, Mr Simeone had advised Mehran as early as 9 March 2007 that the architects needed to provide hydraulic plans, among other things "*to get this development back on track*".[57]

[70] Clause 16 of the contract provides:

> "16.1 **Builder's entitlement to suspend the Works**
>
> The Builder may, without prejudice to any of the Builder's rights under this Contract or at law, suspend performance of the Works where the Owner;
>
> (a) fails to comply with any of its obligations under Clause 7;
>
> (b) fails to comply with any of its obligations under Clause 11;
>
> (c) fails to provide the Builder with any information requested by the Builder under Clause 9;
>
> (d) takes Possession of any part of the Works without the prior written consent of the Builder prior to paying the final progress payment;
>
> (e) unreasonably fails to consent to any variation under Clause 13 or Clause 14 or fails to sign a variation document provided by the Builder;
>
> Or
>
> (f) is in breach of any term of this Contract.
>
> 16.2 **Written notice to suspend the Works**
>
> The Builder must immediately notify the Owner in writing of the suspension and the grounds for the suspension. The Date for Practical Completion is deemed to be automatically

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54 See T3-69 to T3-71.
55 Exhibit 22.
56 Exhibit 27.
57 Exhibit 20 at p 15.

extended by a period equivalent to the date the Builder gives its notice of suspension until the date the Builder recommences the Works on the Land.

16.3 **Owner to remedy breach within 7 Days**

The Owner must remedy the breach or breaches stated in any suspension notice given to the Owner in accordance with Clause 16.2 within seven (7) days after receiving the notice from the Builder.

16.4 **Builder must recommence the Works within 14 days of Owner remedying breach**

The Builder must recommence the carrying out of the Works within fourteen (14) days of the breach or breaches stated in the suspension notice being remedied by the Owner."

[71] Essential elements of the entitlement to suspend works are first, the failure to comply with prescribed obligations under the contract on the part of the owner. Second, the builder must give written notice immediately advising of the suspension and the reasons for it.

[72] On 11 May 2007 Spectrum advised Mr Simeone as follows:[58]

> "Hi Cass, I have removed the scaffolding today, and virtually have no way to recover from the loss till now, the cost of scaffolding since the job was stoped (sic) is over $50,000.
>
> I had meeting with the doctor at the airport last Wednesday, he promised to clarify things within a week, in good faith I waited hoping resolution.
>
> I have asked for information without getting any reply, you refuse my variation, and also stopped the job, **I will do no more there until everything is clarified**. There will be charges for the scaffolding and also site establishment **to restart the job**.
>
> You told me you will give me something in writing tomorrow, can you also forward to me all my emails to you since I have changed my computer and lost the data." (emphasis added)

[73] That correspondence is poorly worded and somewhat confusing. That is hardly a surprise given that English is very much the second defendant's second language, as evidenced by the transcript of his evidence and other correspondence tendered during the course of the trial. That said, the correspondence makes it clear that Spectrum

58 Exhibit 31.

was suspending works until, albeit among other things, the information requested was provided.

[74] As identified above, Spectrum had been seeking instructions about a number of matters in addition to those concerned with the electrics and hydraulics. These included instructions about the stairs, the front elevation cladding and a dispute about variations to the contract. The details about the last of those matters was never made clear. In any event, while the issues concerning the stairs and the cladding were resolved, Mehran continued to refuse to provide any instructions concerning the electrics and hydraulics.

[75] In those circumstances, it would have been unreasonable to expect Spectrum to have continued working on site in an ad-hoc or out of sequence manner, hoping that those instructions would arrive in time to finish both houses within the contracted timeframe. To put it another way, Spectrum was legally entitled to suspend works under the contract. That is so because Mehran was in breach of important conditions of the contract. Namely, to consult it in a genuine way to resolve ambiguity and, not to hinder Spectrum's ability to carry out its contractual obligation. As is discussed below, it is more likely than not that Mehran had no intention of resolving the issues associated with the electrics or the hydraulics.

[76] In regards to the issue of suspension of works, the plaintiff has not satisfied me that the suspension of works on the part of Spectrum was unlawful. Quite the contrary, the evidence is such as to establish that Spectrum has good reason to lawfully suspend works, pursuant to Clause 16.1 of the contract in or about May 2007. It follows that I am unable to accept that the suspension of works amounted to a repudiation of the contract.

Mehran's termination of the contract

[77] Turning then to the termination on the part of Mehran. The notice of intention to terminate is grounded on two events. First, the suspension of works and second, failure to carry out works in accordance with the architect's plans.[59] For the reasons given, there was no lawful basis for terminating the contract on the basis of the suspension of works. As to the defective works, Mehran relied on the variations

[59] Exhibit 111

and/or defective works identified in the report of Jeffrey Hills and Associates.[60] It identified the following alleged defects:

(i) the house on Lot 39 had the wrong front elevation;

(ii) the house on Lot 38 had the wrong front elevation;

(iii) the ground floor suspended balcony was constructed with the wrong shape;

(iv) the basement/garage areas had been "drastically increased" by nearly 300 per cent;

(v) stairs from basement to ground floor not constructed in accordance with the plans;

(vi) the eastern walls on both houses were not constructed in accordance with the plans;

(vii) the boundary line retaining walls were constructed in such a way as to prevent practical ingress and egress to and from the laundry area of the house on Lot 39;

(viii) the construction left a void between the two houses was left with a 3 m drop;

(ix) the two houses were constructed with timber frames and cladding, whereas they should have been "250mm cavity brick veneer construction;" and

(x) There was no evidence showing that the western walls of both houses were constructed to achieve the specified fire-rating.

[78] As to the first two alleged defects, the front elevations of the two houses were in fact built according to the plans. Both the author of the report and Mr Ripley, relied on by the plaintiff, simply got the two street addresses mixed up. As to the third, here I am prepared to accept the evidence of the first defendant. It seems tolerably clear that an experienced builder could turn a curved shape into a square shape, with little effort at a cost between $2,000.00 to $3,000.00.[61]

[79] As to the area of the basement/garage areas, as discussed above, the evidence such as it is, leaves me far from satisfied that this was done without the authorisation of the doctor.

[80] As to the fifth item, during the cross-examination of Mr Haines, a building inspector called on behalf of the plaintiff, his evidence was quite clearly to the effect that the issue about head height had been resolved for one of the houses and could be expected to be resolved for the other with one day's work at a cost of about $1,000.00.[62] It is

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60 Exhibit 63 at pp 3 – 5.

61 Exhibit 127 at p 5, para [4.1.4]. See also T6-31 at lines 1 – 8 and T5-23, per the first defendant.

62 T2-56 at lines 1 – 7 and T2-57 at lines 1 – 22.

true that the stairs are not curved as per the architectural plans. However, it is also true that, despite Spectrum involving A & S Stairs Pty Ltd to try and find a solution, it was going to be impractical to construct curved stairs in the form intended by the plans. The approach to this issue adopted by Spectrum was not only a practical one, but is also an approach consistent with the doctor's evidence to the effect that he wanted Spectrum to do whatever was necessary to finish the two dwellings.[63]

[81] Turning then to the sixth item, being the eastern walls of both houses. The plans showed curved walls with curved windows in the location where it was intended to have the curved stairs.

[82] It is difficult to know where the truth lies about how the intended curved section of wall was constructed as a straight wall. Both the doctor and Mr Simeone were adamant that they did not direct the first defendant to carry out those works. On the other hand, the first defendant was adamant that it was Mr Simeone who directed him to do those works that way. What is uncontroversial though, is that that work was carried out by Spectrum and it departs from the plans. It also seems to me to be less than likely that such a departure from the plans would have occurred without the first defendant's prior knowledge.

[83] That said, this work occurred in or between February and March 2007. And, despite Mr Simeone knowing about this departure from the plans, it was not used against Spectrum as a defect until 11 July 2007. Having regard to the state of the evidence and my assessment of the doctor and the first defendant as witnesses, the conclusion that I have reached is that this work was carried out by Spectrum in an attempt to get the houses to lock up as quickly as possible in accordance with the wishes of Mehran as passed on by the doctor. And, insofar as these works might constitute defects, they were accepted by Mehran as being an outcome that was acceptable and would not warrant rectification, let alone termination of the contract.

[84] In respect of the location of the boundary line retaining walls and the resultant lack of access to the laundry, that situation seems to be the result of at least two things. First, the incorrect details about the contours of the site. Second, a lack of judgement on the part of Spectrum. The lack of judgement on the part of Spectrum does not

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63 T1-36 at lines 43 – 48 and T1-38 at lines 27 – 35.

equate to fault though. It would have been prudent for Spectrum to bring, what must have been an obvious problem, to the attention of Mehran in writing before carrying out the works. However, as Mr Simeone said in his evidence, in the circumstances Spectrum had no choice but to deviate from the plans.[64]

[85] Mr Simeone's evidence in cross-examination was consistent with what he told the doctor in writing on 9 July 2007. In that document, Mr Simeone made it tolerably clear that this situation was not caused by Spectrum. As he stated:

> "*it was all very well…to say that the house have [sic] not been built per plans. However we need to determine why this has happen [sic] in order to determine who is at fault*."[65]

[86] Finally in respect of this issue, Mr Ripley, a retired building inspector who used to work for Jeffrey Hills and Associates, was called by the plaintiff. He had not seen the relevant survey data or the relevant engineering drawings. However, he did accept that if the builder had built in accordance with those drawings, then the departure from the plans would not amount to a defect.[66] On the evidence before me, I agree with that concession by Mr Ripley. As Mr Simeone said, the builder did not have any other choice.

[87] In respect of the void, identified as the eighth defect in the report, that also seems to be the result of incorrect contour information (again, not the fault of Spectrum) combined with the dramatic increase in the basement and garage excavations. Both Mr Rahmanian, an experienced architect and builder and Mr Helmold, also an experienced architect and contractor, expressed that opinion. They also expressed the opinions that the work carried out by Spectrum was carried out in an appropriate workmanlike manner. And, that the issue of the void could be addressed by either backfilling or constructing a deck over the void.[67]

[88] Both solutions to address the void could have adverse consequences for the window spaces in the basement, particularly the backfilling solution. However, in light of my conclusion that the additional excavation works were carried out in accordance with

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[64] T1-85 at lines 12 – 44.
[65] Exhibit 35.
[66] T3-34 at lines 10 – 45 and T3-35 at line 1.
[67] Exhibit 124 at p 10, per Mr Rahmanian and Exhibit 127 at p 7, para [4.1.9] per Mr Helmold.

Mehran's instructions, those adverse outcomes were but flow on consequences of that decision.

[89] Before closing on this topic, I should record that I did not consider the evidence of those architects to have been shaken to any material extent in cross-examination and that I accept their evidence on those matters. An attempt was made to discredit Mr Rahmanian by reference to disciplinary action brought by the BSA.[68] It can be accepted that such action was taken. However, it would seem that the breach leading to the investigation was more of a technical nature than anything else.[69] In any event, the matter did not adversely affect either his credit or reliability of a witness.

[90] As to the ninth item of alleged non-compliance, while there was no complaint about the quality of workmanship, it is pointed out correctly that the timber frame and cladding did not accord with the approved development plans.[70] That this occurred though is not all that surprising as both the architectural and structural drawings showed timber frames with lightweight cladding. Mr Helmold, consistent with the evidence of the first defendant, reported that the footings would not take the weight of a brick wall.[71]

[91] The final matter raised in the Jeffrey Hill report is that concerned with the intended firewalls. The evidence is that the western elevation walls for both dwellings should have been constructed to the prescribed fire rating. That was not done and no satisfactory explanation was advanced on behalf of the defendants as to how that defect occurred.

[92] Other defects were identified including head clearance in the basement to ground floor stairwell and the step-down to the enclosed entry area to prevent water penetration.

[93] As to the first of those matters, the evidence reveals that this defect had already been rectified in one of the houses and could have been readily rectified at little cost in the other house. As to the issue of water penetration, that no step-down was provided for was clearly a defect in that it did not accord with the plans. That said, solutions to

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68 See T6-39.
69 T6-44 at line 37 – 47 and T6-45 at lines 1 – 42.
70 Exhibit 8.
71 Exhibit 127 at p 7, para [4.1.10].

the problem while not perfect, existed and would not warrant,[72] as Mr Haines contended, demolition.[73]

[94] In any event, neither of the last two defects formed any part of the reasons relied on to issue the termination notices.

[95] Having regard to the matters referred to above concerning the ten alleged defects, it is hardly surprising that on 23 July 2007 Spectrum contacted the doctor to ask for a 30-day extension to "*clarify a few mistakes your experts have made*."[74] Many of the alleged defects were not defects at all and,[75] even in those circumstances where there was a material departure from the plans, there was a reasonable explanation for that departure, [76] and/or the alleged defects could have been readily rectified.[77]

[96] It is true that a number of items of non-compliance with the plans and specifications had not in fact been rectified at the date of termination by Mehran. However, that failure has to be seen in context. The relationship between the parties was clearly antagonistic and had been for some time. As Mr Simeone put it, they had been at loggerheads and Spectrum had still not been provided with instructions about the electrics and hydraulics. Spectrum had been accused of a number of defects where, for the reasons given, there were either no defects or, where there were, most could be readily rectified and, of themselves could not warrant termination. In this regard, as Mr Simeone pointed out to the doctor in July 2007, the reasons for the deviations from the plans were not clear.[78]

[97] On balance, I consider the only legitimate ground that could warrant the issue of the termination notices was that concerned with the construction of the firewalls. While that defect could be resolved in respect of the house on Lot 39, to rectify the wall on Lot 38 would require access to the adjoining property to allow scaffolding to be put in place. I was not taken to any evidence to show that permission from the owners of the adjoining property had been given or was likely to be given.

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[72] See examples at T2-60 at lines 34 – 37, T2-61 at lines 1 – 13 per Mr Haines. See also T6-27 at lines 13 – 48, T6-28 at lines 1 – 30 per Mr Rahmanian and Exhibit 127 at p 9, per Mr Helmold.
[73] T2-54 at lines 1 – 14.
[74] Exhibit 115.
[75] See Exhibit 63 at Items (i), (ii), (iv), (vii) and (ix).
[76] Ibid at Items (v), (vi) and (vii).
[77] Ibid at Items (iii) and (viii).
[78] Exhibit 35.

[98] That is, I am satisfied that, at face value the failure to construct a fire rated wall on the western elevation of the house on Lot 38 was a material breach of the building contract which would justify termination.[79] I would note here that this is the only basis that would justify the issuing of the termination notices. The suspension of works on the part of Spectrum was lawful and the evidence does not warrant a finding that Spectrum was either unable or unwilling to complete the contract.

[99] That a substantial breach has been established is not the end of the matter. Condition 20.3 provides that an owner may not terminate the contact if the owner is itself in substantial breach at the time.

[100] For the reasons discussed when dealing with the issue of Spectrum's suspension of works, at the time of that suspension, Mehran was itself in substantial breach of the contract. The evidence is also such that it leaves me with the clear impression that Mehran had no intention of ever giving instructions in respect of the electrics and hydraulics. The evidence is clear that by as early as June that company was contemplating legal action.[80]

[101] In this context, the termination notices were, in my view, likely to have been a tactical ploy on the part of Mehran to put itself in the strongest position for the upcoming litigation. As identified above, the notice of intention to terminate was littered with a number of false allegations of defects. That was so notwithstanding the clear warning by Mr Simeone on 9 July 2007, who advised that the issue of fault in respect of a number of issues was far from clear. He even went so far as to warn; "*you must give your legal representative only facts that we can prove in order for him to do his part correctly*."[81] That warning was clearly ignored. The conduct after the service of the termination notices was also inconsistent with a genuine intent to end the contracted arrangements between the parties. On 11 August 2007, the first defendant corresponded with the doctor advising, among other things, that he was prepared to return to the projects subject to certain matters being addressed including instructions about the electrics and hydraulics.[82] In response, on 14 August 2007, Mr Simeone requested certain information and asked Spectrum to continue to the lock up stage.[83]

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79 Exhibit 2 at p 14, 20.1(e).
80 Exhibit 107.
81 Exhibit 35.
82 Exhibit 117.
83 Exhibit 41.

On the same day he sent another piece of correspondence passing on a number of so-called "requests."[84]

[102] When being cross-examined on the second of these documents, Mr Simeone seemed to be trying to give the impression that he was simply trying to get the doctor and the first defendant to speak to each other.[85] If he was trying to give that impression, I do not accept it. Both documents which post-date the termination notices make it clear that Mr Simeone was speaking to the doctor, who in turn was issuing instructions to be passed on to Spectrum to continue working on both houses.

[103] That correspondence requesting Spectrum to carry out works as late as 14 August 2007 is consistent with the allegation that Spectrum had been carrying out work on both sites up to about August 2007.[86] On the other hand, it is at odds with the allegations that on or about March 2007, Spectrum had unlawfully suspended works and thereby evidenced an intention no longer to be bound by the contract.[87] I am not aware of any evidence of Spectrum suspending works in or about March 2007.

[104] In any event, regardless of what the true interest of the termination notices might have been, the termination was unlawful as a consequence of the operation and condition 20.3 of the contract.

[105] It is now well established that a breach of contract by repudiation only occurs if a party evinces an intention no longer to be bound by the contract or the party shows an intention to fulfil the contract only in a manner substantially inconsistent with the party's obligations under it and not in any other way.[88] In *Ogle v Comboyuro Investments Pty Ltd Barwick CJ said:* [89]

> "*Of course, if that termination had been wrongful, and the appellant had treated and accepted it as a repudiation by the respondent, the consequence or termination of the contract by the appellant would equally have afforded the appellant a defence to the claim for specific performance.*"

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84 Exhibit 32.

85 T2-8 at lines 8 – 33.

86 Amended Statement of Claim at para 8A.

87 Ibid at paras 9C-9I.

88 *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 625-626, *Lourinda v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623, 634, 643, 658 and 664-667.

89 (1976) 136 CLR 444 cited with approval in *Champion Homes Sales Pty Ltd v DCT Projects Pty Ltd* [2015] NSW SC 616 at [120].

[106] The notice of termination issued by Mehran makes it clear that it no longer considered itself bound by the contract. There was, for the reasons given a breach of the contract by repudiation on the part of Mehran. That repudiation in turn was accepted by Spectrum by the operation of its notice of termination dated 30 August 2007. It must follow that I find that the defendants have a defence to the claims brought against it by the plaintiff and, accordingly, that the plaintiff's claim against both defendants must be dismissed.

Orders

1. The claim against the first defendant is dismissed.

2. The claim against the second defendant is dismissed.

3. I will hear further from the parties as to any consequential orders.