

In the High Court of Fiji
At Suva
Civil Jurisdiction

Civil Action No. HBC 78 of 2017

Dr. Richard Irving Seidman

Mrs. Julie Seidman

Plaintiffs

v

Pacific Building Solutions Limited

Defendant

Counsel: Ms M. Muir with Mr P. Katia for the plaintiffs
Mr G. O' Driscoll for the defendant

Dates of hearing : 18th, 19th and 20th February,2019 and 13th March,2019

Date of Judgment: 12th February,2021

Judgment

1. The plaintiffs entered into a Building Contract, (Contract) with the defendant, a builder and general contractor for the construction of a residence on their land in Soqulu, Taveuni. The defendant agreed to provide the design and engineering plans, supply building material and construct the structure and driveway. The colour plans provided by the defendant depicted that the residence would be supported by 66 wooden poles embedded in footings in the ground. The plaintiffs paid the defendant a total sum of \$1,032450.05.

2. The statement of claim continues to state that the plaintiffs observed improperly constructed concrete footings on the base of the poles, cracked, splitting and discoloured poles, circumferential cracks in the concrete outdoor deck, a large vertical crack in the side wall and toilet wall, after they moved into the residence. The defendant proposed remediation plans. The Engineer appointed by the defendant visited the site. He said that he would prepare a conceptual design for appropriate additional works, but no conceptual plan was received. The defendant failed to remediate the fundamental defects and complete the container cottage installed for the plaintiffs to reside during the remediation works, within a reasonable time.
3. The plaintiffs state that the defendant's actions, negligence and omissions constitute a fundamental breach of contract. The defendant breached its duty of care to construct a safe structurally sound residence and was negligent in failing to provide a proper foundation and secure it against ingress of water. The ceiling cladding in the laundry room was water logged. It collapsed and injured the second plaintiff when TC Winston hit Taveuni. The residence lacks proper cyclone resistance. The plaintiffs claim damages.
4. The defendant, in its statement of defence states that the plaintiffs moved into the residence, two years after the Certificate of Completion was issued. The residence is not unstable nor inhabitable. The defendant acknowledges that there were some defects and has been ready to rectify the defects in line with its remediation plan to ensure that the residence is structurally sound. Certain repairs were effected for minor defects, even though it was outside the defects period, after the Certificate of Completion was issued and a serious cyclone. The plaintiffs did not permit the defendant to complete the remediation plan and consistently requested further work than what was required to rectify the perceived and actual problems.
5. The defendant was not advised that the second plaintiff was injured. The injury, if any, was caused by the effects of TC Winston and not due to the defendant's culpability. The defendant states that it erected a substantial container cottage on the property of the

plaintiffs for them to reside. The cottage cost \$100,000.00 approximately and was to be removed once the remedial work was completed.

The defendant counterclaims for special damages for expenses and costs incurred in attempts to rectify the problems with the residence.

6. The plaintiffs, in their reply state that they raised concerns on the findings of the geotechnical report. The structural defects in the residence were not apparent nor discoverable, until they started living in the residence. The container cottage was not habitable. The defendant affixed the cottage on their land and abandoned it. The Taveuni Rural Local Authority, (TRLA) did not inspect the residence at the various stages of construction and would not have been aware of the structural defects at the time it issued the Certificate of Completion. The second plaintiff was injured when the ceiling sheetrock or cladding fell on her head. The defendant had left a gap open between the top of the wall. The ceiling crawlspace was completely waterlogged by the ingress of water. The counterclaim is baseless and vexatious.

The hearing

PW1, (the first plaintiff)

7. PW1, in evidence in chief said that the defendant drew the architectural Plan for their residence. Mr Gary Semaan, (a representative of the defendant) sent him progress photographs during the construction. He was living in California at that time and extremely happy to see the progress at that time.
8. PW3 said that five years after their residence was constructed, he discovered that the defendant negligently got a geotechnical survey done on the adjoining Lot There were huge tons of lava across the Lot on which the residence was constructed.
9. He took possession in 2012. He found evidence of water intrusion each time he visited of the residence in 2013 and 2014. They discovered several defects in the construction in 2014, after they moved in. There were multiple holes in the roof and water was seeping everywhere. He still has buckets to collect water. The walls were destroyed. The ceiling collapsed. There were defects in the plumbing. The driveway was disintegrating

and piles of sand were coming out. He patched it up. There was a 4 inch pool of water next to the garage.

10. The defendant's Construction Manager, Mr Michael Fishenden inspected the building. The defendant's Joiner laid a membrane on top of the link way and the connecting passage, but it still leaks. He replaced three footings of the pine poles in the sleeping quarters and poured concrete, but the footings cracked again. The defects were not fixed.
11. PW1 said that he retained Mr H. Lodhia, a structural engineer to do a structural survey. Mr Lodhia said that it was unlikely that his residence had any structural engineering plans or met any fire cyclone standards. The poles should be checked for defects. The building should be demolished. It cannot be remediated. He forwarded Mr Lodhia's Report to the defendant. The Ministry of Fisheries and Forest analysed 33 poles.
12. He compiled a list of 25 defects. On 31st August, 2015, the defendant forwarded its response and commitment to rectify the 25 items. The remediation was to take 5 months. Six items were rectified. Subsequently, the defendant gave a supplementary 30 item list dated 30th September,2015. Since Mr Lodhia notified that he did not wish to act as Project Engineer, the defendant engaged Mr Vijay Khrishnan to design the remediation plan. PW1 said that he told Mr Khrishnan that the remediation plan would not work. He showed him the progress photographs. The defendant never started remediation works, neither to the poles nor the footings or the driveway. The building was not stabilized other than replacing the septic tank and closing the gap in the ceiling that injured his wife. The container cottage was never completed.
13. He is forced to live in a small portion of the concrete blocked area, of the residence. It is not safe to live in the area with poles and footings. He sealed off the rooms that could collapse. Two structural Engineers told him that the defects cannot be rectified. He has been miserable living in this residence. He has lost three and a half years of retirement. He and his wife cannot sleep.

14. In cross examination, PW1 said that since the remediation plan was inadequate, he showed Mr Khrishnan the progress photographs. He looked at the structure, but he did not come back with a remediation plan, as he said he would.
The container cottage, stabilizer bars, cement and concrete blocks were brought, but never used. He did not move into the cottage, as it was inhabitable.
15. It was put to him that apart from the damage to the ceiling and cracks on the wall, there was no damage to his residence when TC Winston struck Taveuni. He said that houses were flattened in the Southern part. Houses in his area did not suffer severe damage. It was also put to him that he has been living in the residence for two and a half years, since filing this case. He said that he lives in less than a fifth of the residence. It transpired that Tower Insurance had insured the residence on the basis of the Cyclone Certificate issued.
16. In re-examination, PW1 said that the defendant promised to remedy the defects, but did not do so. It never said that it was not responsible for the defects.

PW5,(the second plaintiff)

17. *PW5,(the second plaintiff)* in evidence in chief said that Mr Gary Semaan, the defendant's General Manager told her that the defendant was the biggest and best company in Fiji, a one-stop-shop with their own staff of architects and structural engineers, which would communicate with them weekly and send photographs of the progress of the construction. Her husband and she found that the roof was leaking when they came from California in 2012 and 2013. Paint and debris were dripping with the water. Their holiday was spent cleaning up. She has buckets in her home. There is a crack in the washroom of the Master bedroom. In 2014, they came at least twice for periods of two or three weeks prior to moving in at the end of the year.
18. The pine poles are rotting. She can stick her entire finger in numerous poles. The poles are not embedded on the ground and the concrete around the base of the poles is chipping and rolling down. The solar water heater was installed on the southern part of their residence. In this hemisphere. Solar water heaters have to be on the northern part. The solar system is inadequate and the generator has to be put on, which brings fumes in. She does not have hot water and has

never had a hot shower. The pipes have exploded numerous times as the water comes down the mountain with extreme velocity and pressure. There was a terrible stench for a long time from the sewerage. There is a functional sewer now. It is the only sewage on the island above ground level and spoils her view of the ocean. The ceilings are bowing down. Most of the windows, the louvers and the main door cannot be opened nor closed.

19. PW5 said that she faced a major disruption in her life with constantly having workers and nothing ever getting fixed. During TC Winston, they stayed in the storage room where they felt safe, as it was supported by a concrete block, not poles. It had no windows. She remembered seeing a flash of white and felt her foot and head were hurt very badly. The ceiling had fallen on her. Her husband took all the debris off her.
20. It transpired in cross examination that she did not have photographs of the crack in the washroom nor a medical report of her injury. The solar panel was to be remedied as part of the remediation plan. The stabilizing poles, cement and blocks brought by the defendant were not used, as she and her husband were not satisfied with the remediation plan. The cottage was never completed. It was not habitable. It was put to her that neither a local authority nor the Health Dept had indicated that their residence was unfit for habitation. She said that the residence was not safe.
21. In re-examination, PW5 said that the defendant did not stabilize their residence. They did not move into the container cottage. It leaks a lot and the floor is uneven. Part of the ceilings fell down. Mushrooms were growing in the floor and kitchen cabinets. The windows came cracked.

PW3(Nathan Kirk, Structural Engineer and President of the Fiji Institution of Engineers)

22. PW3 was called as an expert witness. He said that he was engaged by the plaintiffs to inspect and assess their residence and prepare a report. He carried out his inspection on 19th and 20th March,2018.

23. Mr O' Driscoll, counsel for the defendant argued that the Report was not formally before Court, as it was not disclosed in the affidavit verifying list of documents filed by the plaintiff.
24. Ms Muir, counsel for the plaintiffs stated that the Report was enclosed with a letter dated 4th June,2018, addressed to M/s O'Driscoll & Co and accepted by his office on 7th June,2018. She sought leave to produce the Report under Or 24, r 16.
25. Ms Muir cited the case of ***G.P. Reddy & Company Ltd v New India Assurance Company Ltd***, [2011] FJHC 680; HBC 48.2008 (31 October,2011) which held that section 14(1)(a) of the Civil Evidence Act requires expert evidence to be disclosed and if notice has not been given, expert evidence may not be lead unless with leave of court, as upheld on appeal in [2014] FJCA 24; ABU0059.2011(5 March,2014)
26. I granted leave for the Report to be produced, as it was disclosed with adequate notice of seven and a half months before the trial.
27. PW3 said that he was given the following documents: the Report of H. Lodhia, Structural Engineer; incomplete Drawings of Griffiths, Structural Engineers; photographs prior to any structural works being carried out; Report by the Ministry of Forestry; and, the Cyclone Report by Vijay Krishnan.
28. It was concerning that the vegetation, top soil and deleterious material were not removed. The soil should have been compacted and freed of perishable matter, as provided in the Griffiths Drawings.
29. The pine poles were rotting and decaying, as they were insufficiently treated. The building could be pushed over in a cyclone. The same applies to the lack of bracing. He did an assessment of the bracing capacity of the walls. The pole footings were not embedded in sufficient embedment.

30. The witness said that he conducted an analysis of the adequacy of the structure. There were a lot of cracks in the block work walls, as a result of settlement of the underlying ground. There was ponding of water in the basement, as there was insufficient drainage and the floor had settled.
31. The Fiji National Building Code calls for a structure to last 50 years. The building fails to meet the Code in many aspects and it is at a high risk of failure during its lifetime.
32. The inside of the walls has “*gib fireline*” with nail fixings. The exterior was clad with a sort of fiber cement sheeting fastened with nails. The nails were “*insufficient centers for cyclonic wind loads from both the bracing and face loading perspective*” to resist the cladding being sucked off in a cyclonic event.
33. In cross examination, PW3 said that the Griffiths Drawings were not stamped by the TRLA. The Drawings contained very limited details on the poles. The poles were not properly embedded in the ground. There was not much concrete underneath. It was not deep. Concrete was poured round the footings to remediate the problem in a very “*band aid*” approach. The poles were not correctly treated. The poles under the bedroom were tested. It would be difficult, expensive and “*tricky*” to remediate the poles and footings, but it could be done. It would be easier to build a new house than remediate.
34. The settlement of the building and the slope near the North East corner of the building could fall and cause a partial collapse of the structure. That could be remediated by “*underpinning*” and re-levelling the floor. Bracing stiffens the building from getting pushed over. The level of bracing is very low compared to what it should be. It can be remediated by removing all the inner cladding.
35. PW3 agreed that additional rafters could be placed to strengthen the structure. The nails and screws of the solar hot water heater on the roof were not stainless steel. It is a relatively minor repair to change the galvanized strappings used.

36. PW3, in cross examination said that the container cottage on the adjacent a lot had a lot of water damage and the finishings were “*very messy*”.

DW1,(Simon Ahearn, Project Manager of the defendant)

37. DW1 said that he was sent with short notice to Taveuni in late October,2016, to investigate and find out the reason for the delay in the container cottage being completed .

38. The remediation plan required the plaintiffs to vacate their house. There was substantial remediation to be done .There were 6 phases of the remediation works. It was to take sixty days. There were very precise substantial drawings signed by an Engineer. In May, 2016, significant quantities of structural steel, concrete blocks, cement and sand to make concrete, heavy equipment and the container cottage were taken in a barge for the remediation.

39. DW1 said that PW1 showed him some small cracks in flooring and the outdoor shower area and leaks in the link way and the outdoor shower area, but none of it seemed to be terribly significant. It was minor and repairable. The house seemed to be structurally in order, except for the pine poles. He was told that the poles were sub-standard and not fixed to the ground. The pine posts were substandard, H4 instead of H5. As a builder for 25 years, he was of the view that the defects were remediable. PW1 requested that the remediation be stopped.

40. In cross examination, in transpired that he was not involved with the construction and had not visited the project previously. He had the 2015 remediation plan. He was unaware that Mr Lodhia had rejected that plan and Mr Khrishnan, the Consulting Engineer had given a new plan.

41. In re- examination, he said his “*understanding*” was that the cottage was occupiable. Temporary buildings require a permit, but he was unaware if the cottage had a permit.

DW2,(Adrian Roberts Site Manager of the defendant)

42. DW2 said he was asked to install the container cottage in June,2016. He produced the Remediation plans of 30thSeptember,2015. He explained the six phases of the remediation works. The main issue was the stabilisation of the building.
43. Only 3 timber poles that hold the uppermost points of the deck would remain. A steel structure would replace the poles
44. The repair of the gap between the wall and the roof in the game room laundry area in the main house was not 100% completed. The septic tank was replaced, as they found that it was inadequate for the size of the building. The house was built very well to a very good standard. There was some normal “*superficial damage*”. There is a horrible situation in the laundry. He saw a few cracks in and around the stairway area. There are cracks all over any building due to the heat, but houses settle.
45. The remediation were not major. Some of it was structural .The driveway was not structural. It had a lot of rain damage and the drainage needed to be corrected. It would take around 60 days to complete it all.
46. Until the cottage was occupiable, the remediation work could not start. The cottage was a pre-designed temporary residence. It was not planned for the plaintiffs. They were not very content with the cottage. There were minor issues such as the front door .Since they did not move in, he could not carry on with the remediation works. There was a lot of road blocking. PW1 would not agree to any acceptable plan.
47. In cross examination, he said that remediation is a normal for a 3 ½ year old house.

DW3,(*Vijay Krishnann, Principal of Engineer Designs Ltd, Civil, Structural and Geotech Engineers*)

48. DW3 said that his “crew” inspected the building in 2012, to provide a Cyclone Certificate for insurance purposes. They did a visual inspection.
49. His company basically certify that a structure is in compliance with the minimum requirements of the Fiji National Building Code. The minimum requirement under the Fiji National Building Code for wind velocity is 66m per second for a Category 3 cyclone. They did not notice anything seriously wrong structurally, but he is now aware that there have been some issues. The first plaintiff raised a number of issues. He reissued a certificate in 2016.
50. He visited the residence subsequently for the remediation works. The six phases in the remediation plan will address the deficiencies which are apparent and those agreed to by the defendant to rectify. He said that he could not comment on the non-structural works such as the finishings.
51. In cross examination, DW3 said that his crew did a visual inspection. It is not identifiable from the photograph, whether the poles were founded at safe depth below ground.. There is no Engineers’ Certificate nor is the plan stamped or certified by an Engineer, while the remedial plans do.
52. I will analyse the evidence of DW3 and PW3 in detail, in my determination.

DW4,(*Gordon Jenkins Quantity Surveyor*)

53. DW4 produced his assessment of the cost of remediation works by the defendant, in a sum of \$112,690.00. Mr O’Driscoll pointed out to him that he had not priced certain items. His final figure taking into account those items was \$ 145,165.00. He said that he did not calculate a time frame for the works, as is usually provided.

54. In cross examination, DW4 accepted this his report was based on incomplete information. He said that it was “*obvious*” that he was not able to give an accurate estimate of costs, as he did not have the defendants’ Remedial Work Drawings nor PW3’s Report. It transpired that he did not half the information William Associates had. In re examination, he said that he can estimate the cost taking into account the said documents.

PW6, (Donald William Lew)

55. Ms Muir called PW6, to rebut the evidence of DW4. He produced his Report of 5th March, 2019. He said that DW4’s assessment is vague and deficient. It does not depict the full extent of work to be done. The defendants’ Remedial Work Drawings are deficient, as it only concentrates on the sub-structure and not the super structure works. The wall linings have to be taken off, as the bracing is not sufficient. He has not seen such extent of remedial work for a 5 year old house.

56. DW4 has not taken account of cost of mobilization, running a worker’s camp for a contractor and workmen, taking the foundation down to bedrock, hydraulic jacks and a specialist from Australia or New Zealand to operate it and the time taken to complete the works. PW6 said that the total costs would be \$ 800,000 to \$ 900,000 VIP, with a construction period of 9 to 12 months.

The determination

57. The case for the plaintiffs is that the defendant failed to construct a safe and structurally sound residence. The defendant repeatedly failed to provide an adequate remediation plan, remediate the fundamental defects and complete the container cottage within a reasonable time.

58. The defendant accepts that it was its responsibility to rectify the defects caused by its workmanship, as stated in the agreed facts. It proposed remediation plans culminating in a 30 item action plan with detailed Plans covering six phases of remediation works. The defendant states that the plaintiffs did not accept the plan.

59. The minutes of the PTC contain 52 Agreed facts, which include the following:
11. ***the Defendant represented itself to the Plaintiffs as ...Fiji's leading construction company providing a one-stop-shop solution to residential home building that would manage the entire process from documentation, permitting and construction.***
 15. *The Defendant, in contemplation of the execution of a building contract.. conducted a site visit of the Plaintiffs' land and arranged for a geotechnical survey to be conducted at the Plaintiffs' expense by WesEng Consulting Ltd, a reputable company ...*
 16. *The geotechnical survey made the following particular conclusions and Recommendations*
 - a) *No footings should bear on the entire topsoil layer or the weak top subgrade (at least 1m).*
 - b) *The footings should bear on subgrade which has an allowable bearing capacity equal greater than 100kPa (bearing capacity to be confirmed by the Structural Engineer or Architect).*
 - c) *From the DCP results, an allowable bearing capacity greater than 140kPa is at least at a depth of 1m from natural ground level.*
 - d) *Should the contractor feel that after the footings are excavated, the subgrade does not have an allowable bearing capacity equal or greater than 140kPa, further DCP tests should be carried out to ensure compliance with the structural drawings.*
 - e) *It is recommended that DCP tests should be carried out with the excavated footing base during the construction phase to confirm any changes to the soil allowable bearing capacity.*
 - f) *No slope stability analysis has been carried out, but the Designer should take into account slope stability issues such as ..*
 17. ***The Defendant sent an email to the Plaintiffs on 7 April 2011 saying that the risk of hitting large quantities of rock was low and that it was best to proceed with the current plan and not change the plans to accommodate the soil test.***
 - 21 ***The Defendant through Gary Semaan provided assurances to the Plaintiffs that it could deliver all the services and perform the Contract and deliver a 'turnkey' residence while the Plaintiffs resided in the (US).***
 25. ***The colour plans provided by the Defendant to the Plaintiffs on 18 May, 2011 showed that the house would be supported by 66 wooden poles embedded in footings in the ground.***
 27. ***The building permit was issued subject to the following particular conditions:***
 - © ***All works to be certified as structurally safe by a Registered Civil Structural Engineer...***
 - (h) ***All constructional work shall be to the satisfaction of the Taveuni Rural Local Authority and inspection shall be done at every stage of construction...***

(j) Upon completion of the building, the owner must obtain a Completion Certificate.

28. *The residence was constructed over a 12 month period between November 2011 and November 2012.*
31. *The first named Plaintiff inspected the residence on or about 25 June 2012 and informed the Defendant by email dated 2 July, 2012 of various defects in the residence that he noticed at that time including the following ...:*
33. *One Thomas (Tommy –Contractor) sent a letter dated 19th November 2012..to the Taveuni Rural Local Authority requesting assistance and assuring the Health Inspector that the building was completed with engineering standards.*
34. *A Certificate of Completion was issued by Taveuni Rural Local Authority on 20 November 2012 after receipt of this letter.*
35. *The Plaintiffs paid the contract price plus variations to the Defendant*
in
the amount of \$1,0207209.19 leaving a balance due of FJD \$ 5,240.88 which was also paid.
36. *The Plaintiffs notified the Defendant of their difficulties obtaining cyclone insurance by email dated 5 March 2013.*
38. *The Plaintiffs notified the Defendant in September, 2013 of persistent roof leaks at the connecting walkway and the main entrance of the residence.*
39. *The first named Plaintiff observed further defects in the roofing such as holes in the roofing material causing leaks.*
40. *The Plaintiffs began residing in the residence full time in or about November, 2014.*
41. *The Plaintiffs notified the Defendant in January 2015 of defects observed in the concrete footings for the pine poles and cracks in the concrete deck and masonry walls, including exposed reinforcing steel, deteriorating concrete and improperly constructed footings for support poles.*
44. *...the Plaintiffs showed Mr. Fishenden a large vertical crack in the side wall connecting the outdoor shower to the rest of the bure and a long vertical crack in the wall of the toilet room.*
45. *Following Mr. Fishenden’s inspection the Defendant produced a 17 point remediation plan and later sent a crew led by their employee Ahmed Faruk to effect the repairs.*
46. *At all material times the Defendant accepted that it was the Defendant’s responsibility to rectify the defects in the residence caused by its workmanship.*
47. *On 24 May, 2015, after meeting with Mr. Lodhia, the first named Plaintiff sent an email to the Defendant addressed to Michael Fairfax complaining that the footings of the residence are shallow and the structural integrity of the construction is in question.*

48. *On .. 7 March 2016 the Plaintiffs met with the Defendant's new general manager Jon Italiano ..and (he) provided a timeline for the remediation.*
49. *The Plaintiffs forwarded a copy of the pole report from the Ministry of Fisheries and Forestry, Defendant of Forestry, on the analysis results...*
50. *The parties discussed remediation and the Plaintiffs asked for a place to stay to be built on the adjoining Lot 78 for (them).. to occupy while the detective supporting poles were replaced and remediation works done.*
51. *On 31 August 2015 the Defendant emailed the Plaintiffs a general remediation plan ...labeled 'REMEDIATION MEETING RESPONSE'.*
52. *The Plaintiffs were not satisfied with the remediation plan proposed by the Defendant and the parties exchanged .. correspondence and eventually the Defendant came up with a more detailed remediation proposal on 1 October 2015.*
- 46 *The 30 item action statement included the following commitments*
- (a) *Remediation works to be redesigned in accordance with current Fiji Building Code and Defendant to engage an engineer from list of certified engineers provided by Mr. Lodhia.*
 - (b) *Defendant to fabricate air flow deflection encasement to the generator exhaust discharge.*
 - (c) *Solar hot water unit to be relocated.*
 - (d) *Mains water connection to be repaired as required.*
 - (e) *Structural remediation to raise the area under the entry and kitchen as it was designed to be filled and the concrete wall has been constructed as a retaining wall.*
 - (f) *Storm water and sewer installation to be inspected and corrected to code.*
 - (g) *Inspection chambers for septic system to be lowered to reduce visibility of PVC fittings.*
 - (h) *Documentation for caretaker's cottage to be completed "this coming week".*
 - (i) *Bedroom 2 water leak – roof and flashing to be checked and corrected, and interior finishes to be corrected.*
 - (j) *Core to be taken from the garage floor slab as well. (emphasis added)*
- 50 *The Plaintiff entered into the Contract... pursuant to which the Defendant was to design, engineer and construct the residence in an appropriate and skilful way, with reasonable care and skill..*
- 51 *At all material times, the Defendant represented itself as "a one stop shop" that would save the Plaintiffs from the costs and difficulties of engaging*

architects, engineers and project managers to assist with the construction.. (emphasis added)

60. The statement of claim pleads the following particulars of breach:
- (a) *Failure to obtain design or inspection certificates as required by Clause 2.2 of the Fiji National Building Code (the “Code”);*
 - (b) *Failure to adhere to wind design criteria specified in the Code for Cyclone resistance;*
 - (c) *Failure to embed supporting pine poles 1500mm deep as required by the plans;*
 - (d) *Failure to treat pine poles to level H5 as required by the Code;*
 - (e) *Failure to complete all steel cross bracing required by the plans;*
 - (f) *Failure to fix steel cross bracing adequately;*
 - (g) *Failure to wrap poles in plastic where in contact with concrete;*
 - (h) *Failure to install double sided sisalation in the roof as required by the plans and fire rating requirements of the Code;*
 - (i) *Failure to install footings to concrete slabs and masonry walls as required by the plans and the Code;*
 - (j) *Failure to comply with requirements of building permit to have sequential inspections at all stages of construction;*
 - (k) *Failure to supply stamped signed structural engineering drawings for the residence;*
 - (l) *Failure to construct the driveway properly;*
 - (m) *Failure to adhere to recommendations and requirements stated in geotechnical survey for ground works and supporting poles for the residence;*
 - (n) *Failure to obtain geotechnical survey on Lot 79;*
 - (o) *Floor of garage is 2 inches off its plum line causing problems with the garage doors;*
 - (p) *Defective concrete made with large stones used to build driveway;*
 - (q) *Failure to install septic tank in compliance with Code; and*
 - (r) *Failure to properly install solar hot water heater.*

The contentions at the forefront of the defendant’s case

61. The defendant contends that it was not obliged contractually to remedy any defects, as the defects were brought to its notice after the expiry of the defect liability period.
62. Clause 17(1) of the General Conditions of the Contract titled “*Defects Liability Period*” reads :

*The Builder must rectify defects and omissions in the Works **which become apparent** and re notified to the Builder during the Defects Liability Period...(emphasis added)*

63. The nature and effect of a defective liability clause was elucidated with clarity and authority in the following two cases cited by Ms Muir in her closing submissions.

64. In *Byrne v JS Hill & Associates Ltd*, [1993] FJHC 49; HBC 0228J.90S (11 June, 1993) Fatiaki J (as he then was) stated :

The nature of such a term is described by the author of Hudson's Building and Engineering Contracts (10th edin) at p.388 as being:

"... a clause which requires the contractor, on being called on to do so, to rectify all defects which may appear during a fixed period after completion of the work and entry into occupation by the employer."

*Two important 'features' are immediately discernible from the above, firstly, the 'maintenance period' begins to run from '**completion of the work**' and secondly, rectification is intended to cover only defects that '**appear**' during the 'maintenance period'.*

*In any event a "**defects liability clause**" does not preclude an action for damages for breach of contract nor does it apply where the contract has been prematurely determined. At best it is a factor to be considered by the Court on the question of the reasonableness of the employer's actions in seeking to mitigate his loss.*

65. In *Pearce & High Limited v Baxter*,(CCRTF 98/0972/2 (15th February,1999) Lord Justice Evans stated that the defect liability clause applies to

"defects [etc] which appear" during the period has to be read objectively, as a description of those defects to which the clause applies. The defects must become apparent, meaning become patent rather than remain latent, during the notice period, regardless of whether any particular person has actual knowledge of it...

...Clause 2.5(the defects liability clause) gives the employers an express right to require the contractor to return, as well as to the contractor himself the right to return and repair the defect himself, if he is willing to do so.It is necessary to cite authority for the proposition that such a right cannot be excluded except by clear, express words or by a clear and strong implication from the express words used or by a clear and strong implication from the express words used. ..

..It gives both parties the express rights referred to above, both of which are likely to be a great practical value to the party concerned,

without impinging on the employer's common law right to recover damages for the contractor's previous breach..(emphasis added)

Lord Justice Evans cited the following passage from the judgment of Judgment of H.H Judge Stannard in *William Tomkinson v St Michael's P.C.C.* 1990 C.L.J. 319:

*'It requires very clear words to debar a building owner from exercising his ordinary rights of suing if the work done is not in accordance with the contract' – per Edmund Davies L.J. in **Billyack v Leyland Construction Company Limited** [1968] 1 All E.R. 783 at p, 787 E-F. .*

*....the true function of clause 2.5 is in my judgment firstly to confer a remedy for defective works on the employer, i.e. the right to require the contractor to make them good. Such a provision is generally to be regarded as providing an additional remedy for the employer, and not as releasing the contractor from his ordinary liability to pay damages for defective works: **Hancock v B.W. Brazier (Anerley) Limited** [1966] 2 All E.R. 901 per Lord Denning M.R. at p.904F-1 .. (emphasis added)*

66. It is clear that the clause applies to defects which appear during the defect liability period and gives an owner an additional remedy to request his contractor to rectify apparent defective work. It does not extinguish his right to recover damages under common law for defective work after the expiry of the defect liability period, unless there is express provision in the contract to the contrary.
67. In the present case, the contract does not release the defendant from its common law liability to pay damages for defective work.
68. Ordinarily, defects are detected by an architect or engineer. In the instant case, the defendant represented that it was a triumvirate, which would provide the services of an architect, engineer and contractor, as stated in the agreed facts.
69. In my view, the defect liability period contemplates the rectification of minor defects which are “*apparent*”, as expressly provided in clause 17(1) and not latent structural defects, which do not emerge during the short defect liability period.

70. I am satisfied from the evidence as reviewed below, that the defects, in particular, the condition of the poles, foundation, footings rafters and sissilation were not apparent during the defect liability period.
71. Next, it was contended that the building was structurally sound, as it stood intact during Cyclone Gita and TC Winston.
72. DW3 said that no part of the residence collapsed during these significant cyclones. In cross examination, he admitted that the residence was not affected by Cyclone Gita, as it is located East of Vanua Levu and that cyclone hit North of Vanua Levu. He said that he had to check if the damaging winds of TC Winston hit the West coast of Taveuni.
73. PW1 said that TC Winston did not severely affect his residence on the West coast, except for new cracks on the wall. His neighbours' 50 year old flimsy house had minimal damage.
74. Mr O' Driscoll put it to PW3 that although TC Winston did not hit land in Taveuni, it brought a significant amount of rain. PW3 said that Taveuni was a reasonable distance from the centre of the cyclone.
75. Next, the defence argued that the building was structurally safe, as a Cyclone Certificate, Certificate of Completion and insurance cover was obtained.
76. DW3 said that his "crew" did a "visual inspection" in 2012 and "nothing more", to issue a Cyclone Certificate for insurance purposes. They did not ascertain the size of the footing, founding depth etc. DW3 said that "our inspection was based for the issuance of a Cyclone Certificate and generally this relates to the scrutiny of the integrity of the external envelope and the roof the roof structure, the roof framing, cladding and cyclone shutters". All other areas that were not open to view or not exposed were "deemed" to be done in accordance with sound construction practice, as qualified in the Cyclone Certificate. He stated that PW3 had done a more detailed investigation.

77. DW3 said that the roof was inspected, but that inspection did not reveal that the defendant had admittedly not complied with the Fire Code to use double sided sissilation, as emerged at the trial.
78. In my view, the TRLA would not have been aware of the structural defects when it issued the Certificate of Completion, as it did not make sequential inspections at the various stages of construction and the Certificate of Completion was issued on an assurance given by the defendant's builder, as I find in the succeeding part of my judgment.

The Building Permit

79. The plaintiffs contends that the defendant failed to comply with requirements of the building permit to have sequential inspections by the TRLA.
80. Condition 8 required that :*“All construction shall be to the satisfaction of the Taveuni Rural Local Authority and inspections shall be done at each stage of construction”*.
81. PW2,(*Vishal Kumar, Health Inspector,TRLA*) said that a contractor is required to make an appointment with the TRLA to inspect the building at the different stages of construction, to ensure that the conditions of the building Plans are adhered to. The TRLA carry out 7 inspections.
82. In the instant case, after the initial site inspection they were called for the inspection of the footing for the garage, a partial inspection, when the pine poles were being fixed and the final inspection on 18th July, 2012. PW2 said that unfortunately, the Engineer and the defendant's representative did not engage with them on 18th July,2012. The TRLA raised concerns that they had not carried out all the stages of inspection and hence they were not in a position to issue a Certificate of Completion. In support, he produced his written note expressing their concern.

83. By letter of 19th November, 2012, Thomas/Tommy, who they knew was the defendant's builder on site, assured the TRLA that the building was completed with engineering standards and requested the Certificate of Completion. A Certificate of Completion was admittedly issued after receipt of this letter.
84. I note that the defendant was permitted to sub contract under the Contract, but was not relieved of its liability.
85. The evidence of PW2 that contractors are required to make appointments with the TRLA to inspect the building stands to reason, as they would not know when each stage of construction is completed.
86. Moreso, it was the defendant's responsibility to make the required appointments, as it admittedly represented to the plaintiffs that it was a one stop shop that would manage the entire process from documentation to construction and deliver a "turnkey" residence.
87. The next breach was the failure to obtain stamped structural engineering drawings. Condition 3 of the Building Permit provides that "*All works to be certified as structurally safe by a Registered Civil Structural Engineer*" at each stage of construction..
88. PW2 said that the TRLA only received the architectural Plans. DW3 said that there were no stamped signed structural engineering drawings for the residence.
89. In my judgment, the defendants breached Conditions 3 and 8 of the Building Permit.

Geo technical survey

90. It is not in dispute that the defendant got a geo technical survey done on the adjoining Lot and not on the Lot on which the residence was constructed, as emerged in the cross examination of DW4.

91. PW1 said that there were tons of lava on the land, on which their residence was constructed. PW3 said that typically a geotechnical investigation should have been carried out prior to any works being carried out, particularly given the sloping nature of the site.
92. On 7th April, 2011, Mr Gary Semaan informed PW1 that he spoke to his Construction Manager and a civil contractor in Taveuni and “*believe the risk of hitting large quantities of rock is low...we are confident that the risks on this project are low*”.
93. It emerged that the structure was founded on rock. DW3, in evidence in chief confirmed PW3’s evidence that the poles have been propped on massive rocks under the structure.

The remediation plan proposed by the defendant

94. The defendant’s final remediation plan comprised a 30 item action statement with detailed plans. There were six phases of works which included demolition and reconstruction of the link way, removal and replacement of the pine poles with concrete encased steel piles, partial demolition of the concrete floor for construction of a link beam in the garage, replacement of the existing concrete driveway and installation of the roof insulation material, roof sheets and a caretaker’s cottage.
95. PW1 said that the remediation plan was inadequate. He told DW3 that the remediation plan would not work. DW3 was focused simply on fixing the poles, but the problem was more systemic and widespread. The ground had not been compacted. The residence sits on rubble. He showed all the progress photographs to DW3, so that he knows the failings in his plan and will re-evaluate it. DW3 agreed that it was necessary to do a site visit and have additional excavations done to see whether there has to be a modification of the structural remediation plan he drafted. He came to the residence with DW2, who dug out 3 meter deep pits.
96. On 27th July, 2016, PW1 wrote to Mr Khrishnan as follows:

Thank you for making the time to meet Edwin and myself..

I had not looked at these photos since 2012 and with additional knowledge I have acquired, they make me worry about the scope of remediation planned. We agreed that you will meet me at my home for your inspection on August 8th.

Based upon your review of the structurals by Mr. Gerry Griffiths, and the Wes Eng Geotechnicals, you are authorized by me to instruct Adrian Roberts as to what excavation or opening of slabs, cracks in cinderblock walls before your arrival. He can also rip up portions of rockpile that Tommy constructed as a mock retaining wall.

Hopefully, your analysis will allow Adrain to seamlessly complete his first scope of work and continue without any interruption to complete the additional remediation that will be necessary on both the main building and garage.

I understand this is a challenging situation as the plans as drafted by Griffiths seem to conform to a rather flat terrain and Tommy had no one to turn to as no structural engineer was involved after the initial draft of November 2011 prior to groundbreaking and no inspections were performed during construction by local authorities causing them to refuse to issue a Certificate of Completion without reservation.

I have come to realize that just as there was no protection to any of the poles interface, there is no protection of the interface with bearer beams lying on bare cinderblock.

The house is moving and cracking and requires everyone to focus on the problem and come up with a solution IF there is one. Finger pointing is counterproductive.

For 1 million dollars, I am entitled to a structurally sound home. I sincerely hope there is a real solution. .. (emphasis added)

97. PW1 said DW3 told him that he will submit new notifications of his remediation plan, but none were sent to him. The plans do not exist. The defendant generated paper and repeated pledges, which were not met.
98. DW3 confirmed that he visited the residence in regard to the remediation. At the site, a few pits were dug. He admitted that normally, pits should have been dug before the remedial plan was made.

99. On 11 August, 2016, DW3 informed PW1 that he will be providing sketches as follows:

Thank you for your email and the additional photos.

I had a meeting with PBS yesterday which I must say was quite productive. We had a thorough review of the possible foundation remedials and I will be coming up with a plan to carry out appropriate additional works that will be needed to ensure long term stability of all three buildings in terms of settlement effects due to gravity loads as well as stability against sliding that can be triggered by an earthquake or infiltrated ground water.

I will prepare relevant sketches and notes to reflect safe founding on the underlying basalt substrate. Workmanship defects evident on the superstructure can be rectified by Adrian to industry best practice.

I hope to have the conceptual design ready for both parties early next week for their perusal and prior approval before embarking on the structural details. (emphasis added)

100. DW3 agrees that “appropriate additional works will be needed to ensure long term stability of all three buildings”. In cross examination, he said that he does not recall doing any sketches or plans. In re- examination, he explained that he was not “fully engaged“ to do any plans.

101. It follows and I find that the first plaintiff was not unreasonable in his request for an adequate remediation plan.

Container cottage

102. PW1 said that he had to arrange for the transport of the cottage via the golf course, but it was never functional. It had broken locks, broken windows and non closing frames of windows. The floor had buckled, standing water all over, rotten wood and mushrooms growing under the floor and kick board. The ceiling was broken,
103. PW5 said the cottage comprises two containers next to each other, but were not sitting levelly. It leaks a lot and the floor is uneven. Part of the ceilings fell down. The windows came cracked. Mushrooms were growing out of the kitchen cabinets. The cottage is not habitable.

104. DW1 said that that he was sent to Taveuni in late October,2016, to investigate and find out the reason for the delay in the container cottage being completed and to make sure that it was habitable in the shortest possible time. The cottage was “*substantially complete*” and habitable. It needed finishing. His involvement was to complete it with Adrian Roberts, the site supervisor.
105. It transpired that DW1 had not checked if the floor of the cottage was levelled nor the condition of the toilets, sinks, doors windows or anything else. It was put to him that the windows were cracked and leaked, the cupboards and doors could not be opened. He knew the window was leaking on top. PW1 had pointed out some defective items. He believed the defects were rectified.
106. DW1 and DW2, who were involved in the installation of the cottage were unaware if the cottage had a certificate of conformity.
107. I conclude that the container cottage was not completed.
108. In my judgment, the defendant has no right to insist on remediating the defects at its costs, for the following reasons. Firstly, the defendant’s remediation plan was inadequate and the evidence (as referred to below) establishes that the plan would require the whole structure to be dismantled. It was not in accordance with the plans and specifications in the Contract and not feasible. The construction was fundamentally defective.
109. Secondly, the “ *licence* (conferred on the contractor by the defect liability clause) *to return to the site after practical completion for the purpose of remedying defects*” was extinguished on the expiry of the defect liability period, as Judge Stannard stated in *William Tomkinson v St Michael’s P.C.C.*, (*supra*).

110. Thirdly, it emerged that the PW1 was not comfortable to have the defendant remediate the defects. DW3, in cross examination accepted that it is reasonable to expect that a homeowner who finds so many defects in the construction of his house will not trust the builder anymore.

111. Justice Akenhead in *Mul v Hutton Construction Limited* [2010] EWHC 1145 (TCC) (21 May, 2010) as cited by Ms Muir, stated:

It will often be the case that the Employer can be said to have failed to mitigate his or her damage if he or she fails to give the contractor to opportunity to put right the .. the culpable defects... However, it is not invariably the case that the Employer would have failed to mitigate damage in failing to give the Contractor this opportunity, examples might be where there were such whole scale defects that no reasonable employer could be expected to have that Contractor back on site., (emphasis added)

112. PW3 in his Report states the following defects in the construction are difficult to fix:

1. *The pole foundations. It appears that there is agreement between all that these are inadequate from a treatment and stability perspective. The vertical and lateral loads will need to be transferred through some other foundation system. This is likely to be a challenging and extremely difficult undertaking to do it correctly.*
2. *The pad foundations are likely to continue to settle which as a minimum will result in continued cracking. The pad for the retaining wall near gridline C is too small should the original amount of backfilling be supplied. This could result in the retaining wall becoming unstable and falling.*
3. *The slope adjacent to the NE corner of the site is in danger of failing during a seismic or rain event which could undermine this corner and cause the partial collapse of the structure.*
4. *Water ponding due to differential settlement can be a health issue and is inconvenient to remove.*
5. *The lack of adequate bracing in most circumstances could cause the house to collapse in a cyclonic event. This would be difficult to rectify and would likely cause the dismantling of much of the structure.*
6. *The rafters being undersized would likely require the removal and refixing of the roof.*

7. *The fixings to the exterior lining and the exterior lining is difficult to fix as it would require dismantling of the walls (along with the rectification of the lintels).*

There are a number of other items that are not so difficult to rectify but the sum total of all of these things together would add up to the dismantling of the entire house and even if a rectification strategy were attempted it would be unlikely to rectify all of the deficiencies identified in the above report.

113. DW3, the Engineer called by the defendant said that he reviewed PW3's Report, but did not carry out any independent investigations. He was not engaged to inspect the residence. He received the Report recently.

114. He said that since PW3 inspected the building at a much later date after the construction "*things could have deteriorated or foundation areas could have been a bit more exposed*"(emphasis added). No evidence was led by the defence to support this suggestion.

115. I will in the first instance deal with the evidence on the foundation.

The Foundation

116. PW3 said that the presence of very dark soil indicates high level of organic content. There were large loose rocks which are not suitable for founding a building. The house was founded on basalt, which is volcanic hard rock. The photographs indicate that this test was not met. There was no evidence that the soil was compacted and filled nor that a compaction test had been carried out and approved by a registered testing Authority, as stipulated in the Griffiths Drawings.

117. DW3 said that it is difficult for him to comment on the founding material and founding depth, as he did not carry out an inspection. He accepted PW3's detailed investigation, Most of the excavation would have been backfilled and covered up, but there were exposures of rock. He did not dispute the presence of organic material. He said that certainly it should have been removed, but the finding that the ground condition under

the structure is inadequate due to high organic content in the soil and large loose rocks is challengeable, as the structure would have shown evidence of much greater distress.

Pine poles

118. The residence comprises three buildings, which is supported by long pine poles, except for the garage, which has no pine poles. The sleeping quarter is supported 100% by pine poles. It is connected by a covered link way to the main building, which has 75 to 80% pine poles and cinder block concrete walls, which represent 20% of the building.
119. PW2 and PW4, (*Taniela Whippy, Forestry Officer at Ministry of Forestry*), confirmed the evidence of the plaintiffs and PW3 that some of the poles were rotting and decaying. PW2 said that they observed that the pine posts were cracking and rotting when they inspected the building on the complaint of the first plaintiff that there were several defects.
120. PW4 produced the Report of the Ministry. The Ministry determined that the poles were not sufficiently treated to their specifications and hazard level. Only three poles passed the test. The rest are a high risk item and will rot and deteriorate faster. PW4 said that he carried out the inspection and found that the poles had deteriorated to a stage where rotting has started. The poles had cracks that had developed through the drying of the poles. Due to getting wet by rain, the cracks had increased. The poles had knot mounts and branch stubs embedded in the wood. Thirty three poles were analyzed.
121. PW3 said that the analysis of 33 of the 66 poles was sufficient to draw a conclusion on the condition of the poles. The poles would be expected to rot and decay before the end of the design life of the building. This means that its lateral stability could be compromised in a cyclonic event or earthquake and the part of the residence supported by pine posts could be blown over and collapse.
122. The defendant does not dispute that the pine poles are defective. DW3 agreed that placing steel and concrete next to the existing poles, shifting the load to the new poles

and then taking out the pine poles is unusual. It is not difficult, but it is an involved job. He does not believe that it is impractical.

123. PW3 said that the supporting pine poles were not sufficiently embedded and did not meet the depth stipulated in the Griffith Drawings. Some of the foundations for the poles were not founded into the ground and instead had raised concrete footings poured around them. Some were founded on a pile of rocks with a blot of concrete, as depicted in a photograph. The reinforced concrete footings were not constructed in accordance with the Drawings.
124. PW2 said that the TRLA advised the defendant to meet the required depth.
125. DW3 accepted PW3 finding that the footings were not installed to sufficient depth into solid ground, as it was his detailed investigation. He did not scrutinize the footing depths in detail. PW3 had done a more detailed investigation by excavating around the footings.

Pad foundations

126. DW3 said that it was difficult for him to comment on PW3's concerns that the pad foundations are likely to settle and will result in continued settlement, as he has not seen the actual situation. It depends on the extent of deterioration or lack of integrity that surfaced after any further excavation works around the pad to expose it was carried out. If the poles are adequate, it should be acceptable to remediate their bases with concrete pads and ensuring that it's founded and reinforced on good ground and reinforced appropriately. The pad is not the best detail. He would have done something more positive and secure. It has got massive rocks under the structure. The structure is founded on rock. He could not see to what depth the concrete pad goes down to. The defendant needs to ensure that that footing is taken down to sound subgrade rather than relying on those rocks. It is an involved job, since the rocks and rock placement has to be removed and then go down to subgrade.

127. DW3 said that the structure may be safe but it could be subject to some instability if there is a shake or a seismic event. It could get affected, as it is sitting on a large volcanic rock under the structure. He would not have done it that way, but the residence has been stable for a number of years. Nothing has actually collapsed. There has been slight settlement on the slabs on the ground.

Slope stability

128. PW3 said that there is no evidence that the corner of the main house, which is a near a steep slope had been assessed for stability. The slope could potentially collapse in the event of rain or an earthquake undermining the house and causing a collapse of that corner. DW3 said that a construction methodology is required to build on a sloping site.
129. I note that the geo technical study on the adjoining Lot states that that a slope stability analysis was not carried out.

Water ponding

130. DW3 said that PW3's concern is that there's been some settlement of the slabs on the ground.
131. I would agree with DW3 that it does not appear to be a major job to demolish the slabs and re-do it.

Bracing

132. PW3 said that the progress photographs depicted that the bracing capacity of the walls was insufficient. Some were too far apart. There was no diaphragm installed. The lack of bracing could result in the building being pushed over. There were a number of locations with "tie down rods" within the walls, the rods run vertically through a wall and have bolts and nuts on the top and the bottom to hold the top plate to the bottom plate to try and attempt to transfer load from a cyclone to the footings. In some cases, bolts and nuts were not installed. All the cladding has to be taken off to improve the fixings.

133. DW3 said that he believes PW3's concern on the bracing is not sustainable. It is not contained in the remedial plan. His disagreement is premised on the ground that there has neither been any collapse nor failure of any braced wall, despite two significant cyclones.
134. I have found that the two cyclones did not affect PW1's residence .Accordingly, DW3's contention on the bracing fails.

Rafters

135. PW3 said the rafters were undersized and there is a risk of the roof blowing off in cyclonic event. In cross examination, he agreed that additional rafters can be added.
136. DW3 said that additional rafters are not required. PW3's conclusion is based on the premise that there should be full internal pressure.
137. There was a divergence of opinion between the PW3 and DW3 on the issue of the internal pressure.
138. PW 3 said that the rafters have to be designed for full internal pressure.
139. DW3 said that he disagrees with PW3 and "*another engineer who had done an earlier report*" for the plaintiffs on that matter.
140. It suffices to state that the defendant had agreed with Mr Lodhia on the internal pressure calculations. I refer to the following email from Mr Micheal Fishenden of the defendant of September 17, 2015, to PW1 which reads:

We wish to request your approval and direction to Mr. Lodhia to carry out the structural Engineering requirements for the remediation works, the new build requirements including the inspection and certification on completion

*Following our recent meeting with Mr. Lodhia, **PBS agreed with the Code understanding especially for the internal pressure calculations and building tie-down requirement. There was a clear acknowledgment by both parties of the fixtures, products and***

elements that do not current fully comply under testing criteria to the current code. Mr. Lodhia clarified that these elements will be clearly listed and the revised code parameters are undertaken to notify the elements and mitigate exposure as per the current code provisions.

Mr. Lodhia's concern is that he was engaged to act on your behalf Mr. Seidman, we wish for him to do exactly this as this eliminates the design to review process and provides definite direction to the issues without further delay.

Could you please discuss this with Mr. Lodhia to gain clarity to his position. (emphasis added)

Sissilation

141. PW3 said that the insulation used did not comply with the fire rating requirement of the Fiji Building Code, which requires double layer fire rated sissilation. Single layer sissilation is not fire rated. In order to upgrade the lintels and replace the rafters and the sissilation, the entire roof has to be removed. Sissilation stops the spread of fire and reduces the amount of radiated heat that comes into the house.
142. DW3 agrees that the sissilation paper laid between the purlins and the roof should be double sided.
143. The remediation plan provides for the installation of specialized roof insulation and replacement of roof sheets.
144. Item 7 of PW3's Report states that it is difficult to fix the exterior linings, as it would require the dismantling of walls.
145. DW3 said that Item 7 relates to the screw fixing of the claddings to the structural members which is the studs. If there had been some missing screws or connections, it is easy to provide the additional screws. It does not require dismantling.
146. I find that DW3 accepted most of the findings of PW3 except with regard to the bracing, rafters and internal pressure and dismantling of the walls.

147. I have found that DW3's contentions on the bracing and rafters are not sustainable. The defendant has accepted Mr Lodhias' view on the internal pressure issue, as noted above.

148. In *Lal v Chand & Ors.* [1983] 29 FLR 71 (28 March 1983) as referred to by Ms Muir, there was conflict of expert evidence from the engineers. It was held that the lower court made a correct inference in accepting the evidence of an Engineer who had actually dug up the foundations and inspected them closely.

149. In *Byrne v JS Hill & Associates Ltd*, (*supra*) Fatiaki J (as he then was) stated :

It must be remembered that building a house is different from drawing plans on paper and that rectification of defective building work can often only be effected with great difficulty and considerably more expense than constructing a completely new building.

In this case the plaintiffs' claim that it was the very basis or essence of their contract with the defendant that the defendant would build the study and bathroom in a 'good and workmanlike manner' consistent with the finishes in the existing structure. This standard of workmanship was not provided by the defendant as promised and in that failure the plaintiffs were entitled to treat the contract as having been repudiated by the defendant.

*The defendant company for its part whilst not condoning poor workmanship began by denying that its workmanship was defective then later without necessarily admitting any defective workmanship claimed that the work was incomplete and that it should be allowed to complete it and alternatively, that it was entitled to exercise a right to remedy any defects during what is commonly termed in the industry as the '**maintenance period**'. In this latter stance presumably the defendant accepted that there were some 'defects' in the work. (emphasis added)*

150. The facts in *Bellgrove v Eldridge*, [1954] HCA 36 closely parallel the instant case. A builder, who had agreed to build a two storey villa had substantially departed from the specifications on the composition of concrete in the foundations of the building. The trial judge found that there had been a very substantial departure from the specifications, and such departure resulted in grave instability in the building. It was held that demolition of the building and rebuilding was reasonable and necessary to provide a

building in conformity with the contract. The judgment of the High Court of Australia stated at pgs 617 to 619:

In the present case, the respondent was entitled to have a building erected upon her land in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. (emphasis added)

151. On the question of remediation, PW3 stated that the whole structure has to be pulled apart, particularly the foundations to remediate the defects. It would be extremely difficult to underpin it without removing the structure above. A lot of the footings are under the building. The roof, interior and exterior cladding and some of the floors have to be pulled out to do the underpinning.
152. He said that as regards the main bedroom, steel beams could be placed from one side to the other, but that would be very difficult to do, as the building would have to be jacked up, moved or disassembled. The rafters and wall panels will have to be taken off, footings and reassembled. The concrete slab in the garage would have to be replaced. A significant proportion of the residence would get disassembled. PW3 concluded that basically the entire building has to be pulled apart.
153. DW3 agreed that there was significant remediation work to be done for relatively a new house. The remediation plan depends on the methodology adopted by the builder. The practicality is best judged by the builder given the significant amount of remedial measures to be done. He accepted that various areas would need to be dismantled for the repairs.
154. His response to PW3's statement in his Report that it "*is likely to be a challenging, extremely difficult undertaking*" to transfer the vertical and lateral loads.. through some other foundation system", was that there was a design solution by the Contractor.

155. In my view, it is evident that DW3 had reservations on the construction and inadequacy of the final remediation plan.

156. I would hence accept PW3's evidence that the replacement of the foundations by underpinning would be extremely difficult without removing the structure above and is not feasible.

157. As the High Court of Australia stated in *Bellgrove v Eldrige*, (*supra*):

..under-pinning by the piecemeal replacement of the foundations would, at the very best, constitute but a doubtful remedy. To give to the respondent the cost of a doubtful remedy would by no means adequately compensate her, for the employment of such a remedy could not in any sense be regarded as ensuring to her the equivalent of a substantial performance by the appellant of his contractual obligations. (emphasis added)

158. The defendant proposed to put steel and concrete piles to replace the 66 timber poles supporting 75 % of the residence. The timber pine poles are a prominent feature in the residence apart from supporting the residence.

159. In my judgment, the plaintiffs was entitled to have a residence constructed in accordance with the Contract and specifications.

160. In *Ruxley Electronics and Construction Ltd v Forsyth*, [1995] 3 All ER 268 Lord Jauncey of Tullichettle at pg 272 said:

More recently, in what is generally accepted as the leading authority on the measure of damages for defective building work, Lord Cohen in East Ham BC v Bernard Sunley & Sons Ltd [1965] 3 All ER 619 at 630, [1966] AC 406 at 434-435 said:

'...the learned editors of HUDSON'S BUILDING AND ENGINEERING CONTRACTS (8th ed, 1959) say, at p. 319, that there are in fact three possible bases of assessing damages, namely, (a) the cost of reinstatement; (b) the difference in cost to the builder of the actual work done and work specified; or (c) the diminution in value of the work due to the breach of contract. They go on (ibid): "There is no doubt that wherever it is reasonable for the employer to insist upon re-instatement the courts will treat the cost of

re-instatement as the measure of damage.” In the present case it could not be disputed that it was reasonable for the employers to insist on re-instatement’

In C R Taylor (Wholesale) Ltd v Hepworths Ltd [1977] 2 All ER 784 AT 791, referred with approval to a statement in McGregor On Damages (13th edn, 1972) paras 1059-1061 that in deciding between diminution in value and cost of reinstatement the appropriate test was the reasonableness of the plaintiff’s desire to reinstate the property and remarked that the damages to be awarded were to be reasonable as between plaintiff and defendant....

At pg 275, Lord Jauncey said:

What constitutes the aggrieved party’s loss is in every case a question of fact and degree. Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing.

At pg 276:

However, I should emphasise that in the normal case the court has no concern with the use to which a plaintiff puts an award of damages for a loss which has been established. Thus, irreparable damage to an article as a result of a breach of contract will entitle the owner to recover the value of the article irrespective of whether he intends to replace it with a similar one or to spend the money on something else.(emphasis added)

161. In ***East Ham BC v Benard Sunley & Sons Ltd***, [1965] 3 All ER 619 stone panels fixed to the external walls of a school fell off, owing to defective fixing by the contractor. It was held that the contractor was liable for the cost of reinstating the stone panels.
162. The plaintiffs do not seek reinstatement costs. PW1 stated that he is building a residence on another lot.
163. In my judgment, the plaintiffs are entitled to damages for the defective construction and their claim of the total cost paid to the defendant in a sum of \$1,032,450.00.

164. In the light of my finding that it is not feasible to remediate the residence, I do not consider it necessary to consider the evidence of the Quantity Surveyors, DW4 and PW6.
165. The defendant contended that the plaintiffs have been living in the residence and would be unjustly enriched if they are granted damages.
166. Ms Muir cited the case of *Manohan Aluminium & Glass (Fiji) Limited v Fong Sun Development Limited*, (Civil Appeal No. ABU 0018 of 2015 (8 March 2018)). In that case, it was held that in the absence of a prorated breakdown distinguishing between goods and services, it would not be correct to hold that the respondent benefited by faulty windows installed by the appellant. Jameel JA said:
- There can be no unjust enrichment based on goods and services manufactured and delivered in breach of contract.*
167. The evidence of the plaintiffs that they live in a small profile, less than one fifth of the residence, which has no pine poles and have closed the Master bedroom area has not been controverted.
168. In my view, the plaintiffs have not had the use and enjoyment of the integral part of a residence.
169. As Ms Muir submits in her closing submissions, the defendant can remove all the materials on the land once my Orders have been complied with.
170. The plaintiffs claim damages for loss, quiet enjoyment of their residence, inconvenience and mental distress.
171. PW1 and PW2 stated that they were greatly inconvenienced by the stench from the septic tank.

172. PW1 said that sewage was coming out of the “*supposed septic tank*”, which had been created using two water tanks that were connected. His property smelt of feces for a few months.
173. PW2 confirmed that they found that the septic tank was overflowing, which was unusual for a new building.
174. DW2 said that the septic tank was replaced, as they the tank initially installed was insufficient for the size of the residence.
175. I am satisfied that the plaintiffs were inconvenienced with the stench from the tank, although TRLA had not issued a notice in that regard.
176. PW5 said that she has buckets in her home, due to the recurring leaks. The solar water heater does not work. They do not have hot water. The generator has to be used and fumes come out. The driveway consists of deteriorated concrete. The ceiling is bowing done. Most of the louvers cannot be opened nor closed. She feels humiliated to live in a house that is falling down. They could not have community meetings in their residence, as nobody comes. She feels humiliated as everyone in the island knows that they live in a house that is falling down.
177. PW1 said that he and his wife have had sleepless nights and have been aggravated trying to get the defects resolved.
178. In *Byrne v JS Hill & Associates Ltd*, (*supra*) the plaintiffs were awarded general damages of \$1000.00 in 1993, for inconvenience and disruption to their daily lives and quiet enjoyment of their house.
179. In the present case, the plaintiffs have been inconvenienced from 2014, when they moved into their residence. They have been living in less than one-fifth of the house. Only the septic tank has been replaced and the gap in the ceiling closed. They have been hassled with inadequate remediation plans.

180. I award the plaintiffs a sum of \$ 10,000.00 for inconvenience and loss of quiet enjoyment of their residence.

Injury to the second plaintiff

181. PW1 said that the second plaintiff, his wife, got injured after TC Winston. There was a two feet gap negligently left between the first and second floors in the cinder block area, the safe portion of the residence. The cement board soaked ceiling collapsed on her head. She suffered a brain concussion. He took her to hospital.

182. PW5 said that the ceiling fell down on her. Her head and ankle hurt very badly. She went to hospital for treatment. She could not walk for 3 to 4 days.

183. *Keating on Construction Contracts*, (9th Ed) at paragraph 7-006 states:

Personal Injury. A contractor will be liable if a claimant suffers personal injury because of the contractor's negligence. In one case, contractors were held liable in negligence to a claimant who was injured by a falling concrete canopy... (footnotes omitted)

184. It is not in dispute that the ceiling collapsed and the gap was closed subsequently.

185. I am satisfied that the plaintiff befell injuries and suffered pain and suffering. I award the second plaintiff damages in a sum of \$ 3000.00 for pain and suffering.

Counterclaim

186. The defendant states that it erected a substantial container cottage on the property of the plaintiffs for them to reside which cost \$100,000.00 approximately. It was to be removed once the remedial work was completed. The defendant counterclaims for special damages for expenses and costs incurred in attempts to rectify the problems with the residence.

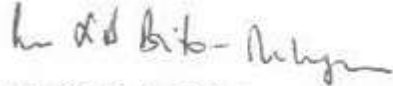
187. I have found that the defendant's remediation plan was inadequate and the container cottage was not completed.

188. The defendant did not lead any evidence in support of this claim..

189. The counterclaim is declined.

190. **Orders**

- (i) The defendant shall pay the plaintiffs general damages in a sum of \$ 10000.00 together with interest at 6% from date of service of writ,(5th April, 2017) to date of hearing (18th February,2019).
- (ii) The defendant shall pay the plaintiffs special damages in a sum of \$ 1,032,450.05 together with interest at 3 % from date of service of writ (5th April, 2017) to date of hearing (18th February,2019).
- (iii) The defendant shall pay the second plaintiff general damages in a sum of \$ 3000.00 together with interest at 6% from date of date of service of writ (5th April, 2017) to date of hearing (18th February,2019).
- (iv) The defendant shall pay the plaintiffs costs summarily assessed in a sum of \$ 12,000.


A.L.B. Brito-Mutunayagam
JUDGE
12th February,2021

