IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court

CIVIL APPEAL NO. ABU 024 OF 2021
[Suva High Court Case Number HBC 078 of 2017]

BETWEEN	**:**	**PACIFIC BUILDINGS SOLUTIONS LIMITED**
		Appellant
AND	**:**	**DR RICHARD IRVING SEIDMAN & JULIE SEIDMAN**
		Respondents
Coram	**:**	**Mataitoga, AP** **Qetaki, JA** **Andrews, JA**
Counsel	**:**	**Mr. G. O'Driscoll, on behalf of the Appellant** **Ms. M. Muir and Ms. E. Samuela, on behalf of the Respondents**
Date of Hearing	**:**	**13 November 2024**
Date of Judgment	**:**	**28 November 2024**

JUDGMENT

Mataitoga, AP

[1] I agree with the draft judgement of Andrews, JA.

Qetaki, JA

[2] I have read and considered the judgment of Honourable Justice Andrews, JA in draft and I entirely agree with it, the reasoning and orders.

Andrews, JA

[3] The appellant (Pacific Building Solutions Ltd) has appealed against the judgment of Justice Brito-Mutunayagam, delivered in the High Court at Suva on 12 February 2021,[1] in which the appellant was ordered to pay the respondents (Dr and Mrs Seidman) special damages of $1,032,450.05, and general damages totalling $13,000, on the respondents' claim arising out of a residential building contract between the appellant and the respondents ("the judgment"). Neither party sought to make oral submissions at the appeal hearing, so the appeal has been determined by reference to the parties' written submissions.

Background facts

[4] Prior to the hearing, the parties agreed on a list of 52 Agreed Facts. The following summary is derived from the Agreed Facts and the judgment.

[5] The appellant represented itself to the respondents as "Fiji's leading construction company", with an "established homebuilding division" providing "a one-stop shop that would manage the entire process [of construction of a residence] from documentation, permitting and construction". The appellant represented to the respondents that it would save the respondents from "the costs and difficulties of engaging architects, engineers and project managers to assist with construction of the residence".[2]

[6] On 14 April 2011 the appellant and the respondents entered into a residential building contract pursuant to which the appellant was to design, engineer and construct a residence for the respondents at Taveuni Estates, Soqulu, Taveuni ("the contract"). It was to be a

1 *Seidman v Pacific Building Solutions Ltd* [2021] FJHC 114; HBC78.2017 (12 February 2021).
2 Agreed facts 11 and 50.

"pole house"; that is, supported by pine poles embedded in concrete footings, rather than concrete foundations. A building permit was issued by the Taveuni Rural Local Authority ("the TRLA"), which included conditions (among others) that:[3]

[a] "All works to be certified as structurally safe by a Registered Civil Structural Engineer"; and

[b] "All constructional work shall be to the satisfaction of the [TRLA] and inspection shall be done at every stage of construction".

[7] Construction began in November 2011, and a Certificate of Completion was issued by the TRLA on 20 November 2012. The respondents paid the appellant the contract price, plus variations, totalling $1,032,450,05.

[8] At the time of construction, the respondents resided in California, USA. The appellant's representative, Mr Gary Semaan, provided them with email updates, including photographs, documenting the progress of the building works. The respondents visited from California and inspected the residence in February and June 2012. They informed the appellant of a number of defects in the construction. In September 2013, following a further visit, they notified the appellant of further defects, being leaks in the roofing.

[9] The respondents began living in the residence in November 2014. In January 2015 they notified the appellant of further defects: defects in the concrete footings for the pine poles, cracks in the concrete deck and masonry walls, exposed reinforcing steel, deteriorating concrete, and improperly constructed footings for the support poles.

[10] The appellant's construction manager, Mr Fishenden, conducted an inspection of the residence. During his inspection the respondents showed him a large vertical crack in the side wall connecting the outdoor shower to the rest of the residence, and a long vertical crack in the wall of the toilet room. Following this inspection the appellant produced a 17-

[3] Agreed Facts 27(c) and (h).

point remediation plan, and later sent a crew to effect repairs. The appellant accepted that it was its responsibility to rectify the defects.

[11] Dr Seidman retained a structural engineer, Mr Lodhia, to do a structural survey. Mr Lodhia advised Dr Seidman that the building could not be remediated and should be demolished. On Mr Lodhia's recommendation, the Ministry of Fisheries and Forestry analysed 33 of the pine poles. Mr Fishenden and Mr Fairfax, a director of the appellant, met with the respondents at the residence on 12 August 2015. The respondents presented the appellant with a list of 21 issues requiring attention. They also asked the appellant for a place to be built on an adjoining Lot (which they owned) where they could stay while work was completed. The appellant provided the respondents with a "remediation meeting response" on 31 August 2015 then, following further exchanges between the appellant and the respondents, the appellant provided a 30-item "action statement for remediation" of the house (referred to subsequently as "the remediation plan").

[12] The respondents subsequently triggered the dispute resolution clause in the contract, but the matter was not resolved.

The High Court proceeding

The pleadings

[13] In their statement of claim, the respondents alleged that the appellant breached the contract by failing to construct the residence in accordance with the building plans and specifications and all relevant laws and legal requirements. The respondents also alleged that the appellant had breached its duty of care owed to the respondents to construct a safe, structurally sound, residence, by failing to provide proper foundation and support for the residence, failing to exercise reasonable care and skill in the construction of the residence (in particular its foundations and supporting poles), failing to secure the residence against ingress of water leading to collapse of a ceiling and injury to Mrs Seidman, and failing to provide supporting poles that met with acceptable standards, thus putting the residence and its occupants at risk.

[14] The appellant in its statement of defence said that the respondents had moved into the residence two years after the Certificate of Completion was issued. It acknowledged that there were some defects, but contended that the residence was neither unstable nor uninhabitable. It stated that it had been ready to rectify the defects in line with the remediation plan to ensure that the residence was structurally sound, but the respondents had not permitted it to complete the remediation plan, but consistently requested further work than was required to rectify the actual and perceived problems.

[15] The appellant also stated that it had not been advised of an injury to Mrs Seidman and that the injury (if any) had been caused by Tropical Cyclone Winston ("TC Winston"), not as a result of any culpability on the part of the appellant. It further stated that it had erected a substantial container cottage on the respondents' property for them to live in. It counterclaimed for special damages for the expenses and costs incurred in attempting to rectify the problems with the residence.

[16] The respondents filed a reply to the appellant's statement of defence, stating that the structural defects in the residence had not been apparent or discoverable until they started living there, the container cottage was uninhabitable and had been abandoned by the appellant, the TRLA had not inspected the residence at various stages of construction and would not have been aware of the structural defects when it issued the Certificate of Completion, that Mrs Seidman had been injured when ceiling cladding fell on her head after the appellant had left a gap open at the top of the wall, enabling the ceiling crawlspace to become completely waterlogged. The respondents also contended that the appellant's counterclaim was baseless and vexatious.

Evidence

[17] At the High Court trial, the Judge heard evidence on behalf of the respondents from Dr and Mrs Seidman, Mr Vishal Kumar (TRLA), Mr Nathan Kirk (structural engineer, called as an expert witness), Mr Taniela Whippy (Forestry Officer, Ministry of Forests) and Mr Donald Lew (quantity surveyor, as to remediation costs). On behalf of the appellant, evidence was called from Mr Simon Ahearn (the appellant's project manager), Mr Adrian

Roberts (the appellant's site manager), Mr Vijay Krishnan (structural engineer) and Mr Gordon Jenkins (quantity surveyor, as to remediation costs).

[18] Dr Seidman's evidence was that he told Mr Krishnan that the remediation plan would not work, as it focussed on fixing the poles when the problem was more systemic and widespread, as the ground had not been compacted and the residence sat on rubble. He said he showed Mr Krishnan the progress photographs sent to him during construction and Mr Krishnan told him he would come back with a plan for additional work, but never did so. He also said that the appellant never started remediation work, either to the poles, the footings, or the driveway. He said that the building was not stabilised, although a septic tank was replaced, and the gap in the ceiling, through which water had entered during TC Winston, was closed. He also said that a "container cottage", which was to accommodate him and Mrs Seidman during completion of the work, was never completed.

[19] Mrs Seidman gave evidence as to the condition of the residence as observed when they visited during construction, and after they moved in. She described the pine poles as rotting, such that she could stick her entire finger into numerous poles. She said the solar heater had been installed on the wrong side of the house and was inadequate, the pipes had exploded numerous times, there had been a terrible stench of sewerage and while there was now a functional sewerage tank, it was above ground and blocked the view of the ocean. She further said that the ceilings were bowing down and most of the windows, louvres, and the main door could not be opened or closed.

[20] Mrs Seidman also gave evidence as to her injury, saying that during TC Winston they had sheltered in a store room, where they felt safe as it was supported by concrete blocks, not poles, and had no windows. She was injured when the ceiling fell on her. With respect to the container cottage, she said that it was uninhabitable: it leaked a lot, the floors were uneven, part of the ceilings had fallen down, mushrooms were growing in the floor and kitchen cabinets, and the windows had come cracked.

[21] Mr Whippy, a Forestry Officer with the Ministry of Forestry produced the Ministry's report on its testing of 33 poles. The Ministry's testing determined that the poles had not been

sufficiently treated to meet their specifications and hazard level. Only three poles passed the test, and the Ministry considered that the remainder were high risk items, and would rot and deteriorate faster. The poles had cracks that had developed through drying and the cracks had increased after getting wet from rain.

[22] Mr Kumar, health inspector at the TRLA, gave evidence that contractors are required to make appointments with the TRLA to inspect a building at the different stages of construction, and that seven inspections are usually carried out. Mr Kumar's evidence was that in the present case there were inspections of the footing for the garage, a partial inspection when the pine poles were being fixed, and for a final inspection on 18 July 2012. Mr Kumar said that the engineer and the appellant's representative had not engaged with them for that inspection, and he raised concerns that he not carried out all the stages of inspection, and hence were not in a position to issue a Certificate of Inspection. The appellant's builder on site (Thomas) then sent the TRLA a letter, dated 19 November 2012, assuring the TRLA that the building was completed to engineering standards, and requesting a Certificate of Completion. The Certificate was issued following receipt of the letter.

[23] Mr Kirk carried out an inspection and assessment of the residence in March 2018. He was provided with reports by Mr Lodhia, Mr Krishnan, and the Ministry of Forestry, and with incomplete engineering drawings prepared for the residence by Griffiths Structural Engineers prior to any structural works being carried out ("the Griffiths drawings"). He prepared a report dated 20 March 2018. At section 3.1 of his report (headed "A discussion of the defects associated with Lot 79", he commented that "The list of defects that have been identified in the body of the report are numerous and extensive". He then listed defects that were "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 failing.

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 re-fixing of the roof.

7. The fixings to the exterior lining and the exterior lining is difficult to fix as it would require the 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 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.

[24] Mr Kirk said that the Griffiths drawings were not stamped by the TRLA, and contained very limited detail as to the poles. From his own inspection of the poles, he said that they were not sufficiently embedded in the ground, and did not meet the depth specified in the Griffiths drawings. Some of the poles were not founded into the ground, but had raised concrete footings poured around them, some were founded on a pile of rocks with a blot of concrete, and the reinforced concrete footings were not constructed in accordance with the drawings. He said that while concrete had been poured around the footings to remediate them, that was only a "band aid" approach.

[25] Mr Kirk further said that the Ministry of Forestry's analysis of the poles was sufficient to conclude that the poles would be expected to rot and decay before the end of the design life of the building, meaning that the building's lateral stability could be compromised in a cyclonic event or earthquake, and the part of the residence supported by the poles could be blown over and collapse. He said that while it would be possible to remediate the poles and footings, it would be difficult, expensive, and tricky.

[26] In cross-examination, Mr Kirk agreed that underpinning and re-levelling the floor, remediation of bracing, and provision of additional rafters could strengthen the structure. He also said that the container cottage had a lot of water damage, and that its finishings were very messy.

[27] Mr Ahearn, a project manager for the appellant, was sent to Taveuni in late October 2016 to investigate the reason for the delay in completion of the container cottage. His evidence was that Dr Seidman invited him into the house and showed him some small cracks in flooring and the outdoor shower area, and links in the shower area and a link way, but none of it seemed to be terribly significant, He said the house "seemed fine", except for the pine poles. He said he was told that the poles were sub-standard – H4 treated instead of H5 – and not fixed to the ground. As a builder for 25 years he was of the view that the defects were remediable, but Dr Seidman requested that remediation be stopped.

[28] In cross-examination, Mr Ahearn agreed that he was not involved in the construction of the residence and had not visited the project before 2016. He also accepted that although he had the appellant's "remediation meeting response" of 31 August 2015, he was not aware that Mr Lodhia had rejected the plan, and a new one had been prepared. He was not in charge of the remediation; his scope was limited to the cottage. He did not check if the floor of the container cottage was level, and could not remember if he had checked anything else in the cottage. He said he understood that defects had been rectified, but did not go back to check. He said, in re-examination, that the container cottage was occupiable, and he knew that it needed a permit.

[29] Mr Roberts, the appellant's site manager, was engaged to install the container cottage in June 2016. He referred to and explained the appellant's remediation plan dated 30 September 2015. He was not involved in relation to construction of the residence until 2016. He said that the residence had been built very well, to a very good standard, and was "very nice", but there was some "superficial damage". He said the remediation was not major, but some of it was structural, and all remediation work could be completed within around 60 days. He said that the container cottage was a pre-designed temporary residence, not planned for the respondents. He said there were minor issues with the front

door. He said that as the respondents did not move into the cottage, and Dr Seidman would not agree to any acceptable remediation plan, he could not carry on with the remediation work.

[30] Mr Roberts said in cross-examination that he was not "formally" aware that the respondents' engineer, Mr Lodhia, had rejected the remediation plan. He said that even if he had known that Mr Lodhia had rejected the plans he would still have felt that the respondents were unreasonable. He said he did "what I am instructed, I am an employee".

[31] Mr Krishnan said that "his crew" had done a "visual inspection" in 2012, in order to issue a Cyclone Certificate for insurance purposes, which involved scrutiny of the integrity of the external envelope and the roof structure, the roof framing, cladding and cyclone shutters to determine whether the structure met minimum requirements of the Fiji National Building Code. All other areas which were not open to view or exposed were "deemed" to be done in accordance with sound construction practice. In particular, the inspection had not included ascertaining the size of footings, or founding depth. Mr Krishnan acknowledged that Mr Kirk had done a more detailed inspection.

[32] Mr Krishnan also acknowledged that while the roof of the residence was inspected, the inspection had not revealed that the Fire Code requirement of double-sided sisalation had not been complied with, as admitted by the appellant.

[33] Mr Krishnan confirmed that after visiting the site at the time the appellant's remediation plan was put forward, he advised Dr Seidman that he had met with the appellant, and would be coming up with a plan to carry out appropriate additional works that would be needed to ensure long term stability. He later said in cross-examination that he did not recall doing any sketches or plans, then in re-examination that he was "not fully engaged" to do any plans.

[34] Mr Krishnan said in his evidence in chief that no part of the residence was damaged during the "significant" Cyclone Gita and TC Winston. However, he acknowledged in cross-examination that the residence was not affected by Cyclone Gita (as it is located east of

Vanua Levu, and Cyclone Gita hit north of Vanua Levu), and said he would have to check whether TC Winston hit the west coast of Taveuni (where the residence is located).

The High Court judgment

[35] The Judge set out the contending cases at paragraphs 57 and 58 of the judgment:

> *57. The case for the [respondents] is that the [appellant] failed to construct a safe and structurally sound residence. The [appellant] repeatedly failed to provide an adequate remediation plan, remediate the fundamental defects and complete the container cottage within a reasonable time.*
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> *58. The [appellant] 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 [appellant] states that the [respondents] did not accept the plan.*

[36] Having then set out paragraphs 11 to 51 of the Agreed Facts, the Judge went on to consider and make findings as to "the contentions at the forefront of the [appellant's] case", as summarised in the following paragraphs.

> *The appellant's contention that it was not obliged under the contract to remedy any defects, as the defects were brought to its attention after the expiry of the defects liability period*

[37] The Judge set out cl 17(1) of the General Conditions of Contract: "Defects Liability Period":

> *The Builder must rectify defects and omissions in the Works which become apparent and are notified to the Builder during the Defects Liability Period.*

Pursuant to the "Definitions" section of the General Conditions of the contract, the defects liability period was six months from the date of practical completion.

[38] The Judge held, at paragraphs 69 and 70:

> *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 sisalation were not no apparent during the defect liability period.*

In so finding, the Judge referred to and relied on the judgments in *Byrne v J S Hill & Associates Ltd*,[4] and *Pearce & High Limited v Baxter*,[5] and *William Tomkinson & Sons Ltd v St Michael's Parish Church Council*,[6] as to the effect of defects liability clauses. He concluded that a defects liability clause applies to defects which appear during the defects liability period, but does not extinguish an owner's right to recover damages under common law for defective work after the expiry of the defects liability period, unless there is an express provision in the contract to the contrary (which was not the case in the contract between the appellant and the respondent).

The appellant's contention that the building was structurally sound, as it stood intact during Cyclone Gita and TC Winston

[39] The Judge referred to the evidence that neither Cyclone Gita nor TC Winston had severely affected the area in which the respondents' residence is located.

> *The appellant's contention that the building was structurally safe, as a Certificate of Completion and cyclone insurance cover had been obtained, and the respondents' contention that the appellant failed to comply with the requirements of the building permit to have sequential inspections by the TRLA*

[40] Having referred to Mr Krishnan's evidence as to the purpose and extent of his inspection for the Cyclone Certificate, the Judge noted the limited extent of that inspection. He also referred to Mr Kumar's evidence as to the inspections by the TRLA and issuance of the Certificate of Completion.

[41] The Judge found, at paragraph 89 of the judgment, that the appellant had breached two conditions of the building permit, in that it failed to have all works certified as safe by a Registered Civil Structural Engineer, and it failed to ensure that all constructional work

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4 *Byrne v J S Hill & Associates Ltd* [1993] FJHC 49; HBC0228J.90S (11 June 1993).

5 *Pearce & High Limited v John P Baxter* [1999] All ER (D) 152; [1999] BLR 101; [1999] CLC 749; (1999) 1 TCLR 157 (15 February 1999).

6 *William Tomkinson v St Michael's Parish Church Council* [1990] C.L.J. 319.

was done to the satisfaction of the TRLA and that inspections were done at every stage of construction.

The Respondents' contention that the appellant had a geo-technical survey done on an adjoining Lot, rather than the Lot on which the residence was constructed

[42] The Judge said, at paragraph 90 of the judgment, that it was "not in dispute" that the geotechnical survey commissioned by the appellant had been done on the adjoining lot (Lot 80) not on the lot (Lot 79) on which the residence was constructed. He referred to Mr Kirk's evidence that a geotechnical survey should have been carried out before any works were commenced, particularly given the sloping nature of the building site. He further referred to Mr Semaan's statement to Dr Seidman on 7 April 2011 that the "risk of hitting large quantities of rock is low", whereas Mr Krishnan had confirmed Mr Kirk's evidence that the pole had been propped on massive rocks under the structure.

The appellant's remediation plan

[43] The Judge referred to the appellant's final remediation plan, which comprised a 30-item action statement with detailed plans, involving six phases of work, including demolition and reconstruction of a linkway, removal and replacement of the pine poles with concrete-encased steel piles, partial demolition of the garage floor for construction of a link beam for the garage, replacement of the existing concrete driveway, and installation of the roof insulation material, roof sheets, and a caretaker's cottage.

[44] The Judge also referred to Dr Seidman's evidence that the remediation plan was inadequate, that he had told Mr Krishnan that it would not work, and that Mr Krishnan had agreed (after a site visit) that additional works were needed to ensure long-term stability of the residence, and he would prepare relevant sketches and notes, but never did so. He also referred to Mr Krishnan's evidence that he had not been "fully engaged" to do any plans for the remediation.

[45] The Judge concluded, at paragraph 101 of the judgment, that Dr Seidman was "not unreasonable in his request for an adequate remediation plan".

The respondents' contention that the container cottage was uninhabitable

[46] The Judge referred to the evidence from Dr and Mrs Seidman as to the state in which the cottage was delivered onto the site, and its condition thereafter. The Judge also referred to the evidence from Mr Ahearn and Mr Roberts, to the effect that the cottage was substantially complete and habitable. He further referred to Mr Ahearn's evidence that he knew a window was leaking but had not checked whether the floor were level, nor as to the condition of the toilets, sinks, doors, windows, or anything else, and to the fact that neither Mr Ahearn nor Mr Roberts was aware whether the cottage had a certificate of conformity. The Judge concluded, at paragraph 107 of the judgment, that the container cottage was not completed.

Conclusion as to the appellant's remediation plan

[47] At paragraphs 108 to 110 of the judgment the Judge concluded, in respect of the appellant's remediation plan:

> *108 In my judgment, the [appellant] has no right to insist on remediating the defects at its costs, for the following reasons. Firstly, the [appellant's] remediation plan was inadequate and the evidence … 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.*
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> *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).*
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> *110 Thirdly, it emerged that [Dr Seidman] was not comfortable to have the [appellant] remediate the defects. [Mr Krishnan], in cross-examination accepted that it is reasonable to accept that a homeowner who finds so many defects in the construction of his house will not trust the builder any more.*

[48] The Judge then undertook an extensive analysis of the evidence given by Mr Kirk and Mr Krishnan, focusing on the defects identified by Mr Kirk in his report as being "difficult to fix". The Judge recorded Mr Krishnan's evidence that he had reviewed Mr Kirk's report, but had not been engaged to inspect the residence. The Judge also recorded Mr Krishnan's

suggestion that Mr Kirk had done his inspection at a at a much later date than construction, such that "things could have deteriorated or foundation areas could have been a bit more exposed", but observed that no evidence had been led by the appellant to support that suggestion.

[49] The Judge concluded:

[a] The appellant did not dispute that the poles were defective. Mr Krishnan 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 was unusual but said that while an involved job, it was not difficult and not impractical. Mr Krishnan accepted that Mr Kirk had done a more detailed investigation, and accepted Mr Kirk's finding that the footings (which he had not scrutinised) were not installed to sufficient depth.[7]

[b] He agreed with Mr Krishnan's evidence that it did not appear to be a major job to demolish concrete slabs and re-do them.[8]

[c] He rejected Mr Krishnan's contention that Mr Kirk's concern that the bracing capacity of the walls was insufficient was not sustainable (because there had been no collapse despite Cyclone Gita and TC Winston), on the grounds that neither cyclone had affected the residence.[9]

[d] He rejected Mr Krishnan's contention that Mr Kirk's concern that the rafters were undersized, leading to a risk of the roof blowing off in a cyclonic event, was based on an incorrect premise (as to internal pressure). The Judge found that the appellant had agreed with internal calculations done by the respondents' engineer, Mr Lodhia. He found that Mr Krishnan's contentions as to the rafters were unsustainable. The Judge also found that Mr Krishnan agreed that the sisalation paper laid between the purlins and the roof needed to be double-sided.[10]

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7 Judgment, paragraphs 122-125.
8 Judgment, paragraphs 131-131.
9 Judgment, paragraphs 132-134.
10 Judgment, paragraphs 135-148.

[e] On the question of whether remediation was feasible, the Judge referred to the evidence given by Mr Kirk and Mr Krishnan:

[i] Mr Kirk said that the whole structure, in particular the foundations, had to be pulled apart as it would be extremely difficult to underpin the structure without removing some of it. He said that it was likely to be a challenging, extremely difficult undertaking to transfer the vertical and lateral loads to some other foundation system. Mr Kirk said that the roof, interior and exterior cladding, and some of the floors had to be pulled out to do the underpinning. A significant proportion of the residence would have to be disassembled: basically, the entire residence had to be pulled apart.[11]

[ii] Mr Krishnan agreed that there was significant remediation work to be done for a relatively new house, but the remediation plan depended on the methodology adopted by the builder and, given the significant amount of remedial measures to be taken, its practicality was best judged by the builder. Mr Krishan accepted that various areas would need to be dismantled for the repairs. In response to Mr Kirk's statement that transfer of the vertical and lateral loads was likely to be challenging and extremely difficult, Mr Krishnan said that the contractor had a design solution.[12]

[f] The Judge referred to *Lal v Chand*,[13] in which it was held that the lower court had been correct to accept the evidence of an engineer who had actually dug up foundations and inspected them closely. He concluded that Mr Krishnan had reservations as to the construction and inadequacy of the appellant's final remediation plan.

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11 Judgment, paragraphs 151-152.
12 Judgment, paragraphs 153-154.
13 *Lal v Chand* (1983) 29 FLR 71 (28 March 1983).

[g] The Judge also referred to the judgment of the High Court of Australia in *Bellgrove v Eldridge,*[14] where, having found that a builder had substantially departed from the specifications as to foundations, such as to threaten the building's stability, the Court held that demolition and rebuilding was a reasonable response, and under-pinning and replacement of the existing foundations "would constitute but a doubtful remedy".[15] The Court also ordered the builder to pay damages in the amount paid by the owner to the builder.

[h] The Judge therefore accepted Mr Kirk's evidence that replacement of the foundations by underpinning would be extremely difficult without removing the structure above them, and was not feasible. He further found that the appellant proposed replacing the 66 pine poles supporting 75 percent of the residence with steel and concrete piles, when the pine poles were a prominent feature of the residence – apart from supporting it. The Judge held that the respondents were entitled to have a residence constructed in accordance with the contract and specifications.[16]

Damages

[50] The Judge recorded that the respondents did not seek reinstatement costs, as they were building a residence on another Lot. In the light of his finding that it was not feasible to remediate the residence, the Judge did not consider it necessary to consider the evidence given by the quantity surveyors, Mr Jenkins and Mr Lew. The Judge held that the respondents were entitled to damages for defective construction, for the total sum paid to the appellant, being $1,032,450.00.[17]

[51] The Judge rejected the appellant's contention that the respondents had been living in the residence and would be unjustly enriched if they were granted damages. He recorded that the respondents' evidence that they were living in less than one fifth of the residence, and had closed off the master bedroom area had not been challenged, and concluded that the

14 *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613.
15 *Bellgrove v Eldridge,* at paragraph 7.
16 Judgment, paragraphs 154-159.
17 Judgment, paragraphs 162-164.

respondents had not had the use and enjoyment of the integral part of the residence. He further noted the submission for the respondents that the appellant could remove all the materials on the land, once the court orders had been complied with.[18]

[52] On the respondents' claim for general damages for loss, quiet enjoyment of their residence, inconvenience and mental distress, the Judge referred to the respondents' evidence that they were greatly inconvenienced by the stench from the "supposed septic tank" (in fact two connected water tanks), they had to have buckets in the house to deal with recurring leaks, the solar heater did not work, with the result that they have no hot water and the generator has to be used, leading to fumes, the deteriorating concrete driveway, the ceiling bowing down, the louvres that cannot be opened or closed, and the humiliation of living in a house that is falling down, together with the aggravation of trying to get the defects resolved. The Judge awarded the respondents $10,000 for inconvenience and loss of quiet enjoyment of their residence.[19]

[53] Turning to Mrs Seidman's claim for damages in respect of the injury she suffered when the ceiling of the storage area collapsed (after become waterlogged following water ingress through a gap in the ceiling) and fell on her head, the Judge recorded the evidence given by Dr and Mrs Seidman that she suffered concussion, her head and ankle hurt badly, she was taken to hospital for treatment, and could not walk for three to four days. The Judge recorded early in the judgment (at paragraph 20) that Mrs Seidman did not have a medical report of her injury. However, he recorded that it was not disputed that the ceiling had collapsed, and that the gap had subsequently been closed. He awarded Mrs Seidman damages of $3,000 for pain and suffering.[20]

The appellant's counterclaim

[54] The Judge recorded that the appellant stated in its counterclaim that it had erected a substantial container cottage on the property for the respondents to reside in (to be removed

[18] Judgment, paragraphs 165-169.
[19] Judgment, paragraphs 170-180.
[20] Judgment, paragraphs 181-185.

once remedial work was completed), at a cost of approximately $100,000, and counterclaimed for special damages for expenses and costs incurred in attempts ti rectify the problems with the residence. The Judge recorded that the appellant had not led any evidence in support of the counterclaim, and that he had found that the remediation plan was inadequate and the container cottage was not completed. The Judge declined the counterclaim.[21]

The Appellant's appeal

[55] The appellant set out 19 grounds of appeal. They are repetitive and may be summarised as falling into four broad groups:

[a] The 6th, 8th, 4th and 15th grounds, which relate to the Judge's consideration of the construction defects, the defects liability period and the appellant's remediation plan;

[b] The 1st, 5th, 18th, 2nd, 7th, and 3rd grounds, which relate to the Judge's consideration of witnesses' evidence;

[c] The 10th, 12th, 13th, and 14th grounds, which relate to the Judge's consideration of documentary evidence; and

[d] The 9th, 16th, 17th, 11th, and 19th grounds, which relate to the Judge's consideration and assessment of damages.

[56] The grounds of appeal will be addressed in accordance with the above grouping. Given the detailed analysis of the High Court judgment in paragraphs [35] – [53] above, it is not necessary to refer in detail to the judgment.

[21] Judgment, paragraphs 186-189.

A. Construction defects, the defects liability period, and the appellant's remediation plan

(i) The defects liability clause (6th and 8th grounds of appeal)

[57] Mr O'Driscoll submitted for the appellant that the Judge had wrongly circumvented the defects liability clause (8th ground of appeal), and erred in finding that major defects would not have been apparent in the defects liability period (6th ground of appeal), in that he overlooked the fact that for the period of ten months after completion in 2012 there was no one in the residence. He submitted that a prudent landowner would have discovered defects (whether major or minor) within the defects liability period. He further submitted that evidence given by Mr Ahearn and Mr Roberts (that buildings deteriorate over time, and the effect of TC Winston) begged the question as to what damage was due to lapse of time, the weather, or substandard building work.

[58] Ms Muir submitted that the appellant misunderstood the judgment: she submitted that the Judge clearly said that the defects liability period of six months only applied to defects that had "become apparent" during that time, not latent defects. On that basis the Judge found that latent defects, which are discovered later, do not fall under the defects liability clause but are covered by the common law. She submitted that the Judge correctly found that the defects liability clause gives an owner an additional remedy, but does not extinguish the owner's right to claim under common law.

[59] Ms Muir further submitted that while the appellant asserts that buildings will deteriorate, over time, and that the damage may have resulted from other causes, it is important to note that at the material time, house was new to few years old. The respondents were given possession in late 2012, they had holidays there in 2013 and 2014, and moved in permanently in 2014. Their evidence was that they found water leaks inside house on their very first stay, and notified the appellant immediately, then raised serious complaints as to defects after they moved in. She submitted that defects as to footings not being properly done, and poles not being affixed properly and not secured at an adequate depth, leading to the residence shifting, and cracks appearing, cannot be seen as normal deterioration, when those defects were identified only three years into the residence's 50-year expected lifetime.

Discussion

[60] The Judge referred to the provisions of the contract, and to appropriate authorities as to the common law principles as to latent defects. The appellant has not established that the Judge erred in his understanding of the defects liability clause, or as to the application of the common law to latent defects. The appellant's 6th and 8th grounds of appeal cannot succeed.

(ii) The appellant's remediation plan (4th and 15th grounds of appeal)

- 4th ground of appeal

[61] In respect of the appellant's 4th ground of appeal, Mr O'Driscoll submitted that the appellant's remediation plan was widely referred to and relied on by the appellant to show that it had taken considerable trouble to remediate issues with structure. He submitted that the Judge wholly disregarded its existence and relevance. Mr O'Driscoll submitted that the plan not only outlined necessary corrective action, but also substantiated the appellant's commitment to resolving structural problem in professional and diligent manner. He submitted that the plan was certified by qualified registered engineer, thus underscoring its reliability and soundness.

[62] Mr O'Driscoll submitted that ignoring this key evidence was an error of law, which deprived the appellant of a fair and balanced assessment of the evidence, and the oversight affected the outcome, leading to a wrong decision being made. He submitted that had the Judge properly considered the remediation plan, the judgment would likely have been different.

[63] Ms Muir submitted that the respondents had given the appellant the opportunity to remediate, but the more the respondents investigated, the more serious defects were found, and the more unsafe the structure appeared. She referred to Mr Lodhia's advice that the building could not be remediated (recorded in the judgment at paragraph 11), and Mr Kirks's evidence that it would be very difficult, expensive, tricky to remediate poles and footings, and it would be easier to build a new house (recorded in the judgment at paragraph 33).

[64] Ms Muir submitted that the appellant's remediation plan was reviewed and rejected by the respondent's engineer Mr Lodhia. She referred to Mr Krishnan's evidence that the appellant promised to amend the plan to address concerns raised by the respondents as to footings and foundations, but never did so, and relied on the rejected remediation plan at trial.

[65] Ms Muir submitted that the Judge did not ignore the existence of the appellant's remediation plan, but was well aware of it, the plan was continually referred in the judgment in the course of the Judge's summary of witnesses' evidence, and it was addressed in detail in paragraphs 94 – 115 of the judgment. She submitted that the Judge discussed the contents of plan, noted Dr Seidman's objection that the plan was not adequate and Mr Krishnan's agreement that "appropriate additional works" would be needed "to ensure long term stability", and Mr Krishnan's admission that he did not actually produce a plan for the additional works, as he was not engaged by the appellant to do so.

Discussion

[66] Far from "wholly ignoring" the appellant's remediation plan, the Judge gave it careful consideration and concluded on the evidence that it was inadequate, that it would require the residence to be dismantled, and that it was not in accordance with the plans and specifications of the original building contract. Further, Mr Krishnan accepted that it was reasonable for a homeowner finding so many construction defects to not trust builder any more.

[67] There is no basis at all for the appellant's submission that Judge "wholly ignored" the appellant's remediation plan. The appellant has not established the 4th ground of appeal.

- *15th ground of appeal*

[68] Mr O'Driscoll further submitted, in respect of the 15th ground of appeal, that the Judge failed to consider that the appellant had attempted to remediate the residence, and the respondents had failed to mitigate their loss. He submitted that the appellant had incurred costs in the vicinity of $200,000 in a genuine effort to rectify the situation, and the Judge

ought to have considered the appellant's efforts to rectify potential damage and loss through remediation work, as a relevant and material fact. He submitted that the Judge singularly failed to do so.

[69] Mr O'Driscoll also submitted that the respondents refused to co-operate in facilitating remediation work (by moving into the container cottage), and this failure demonstrated their failure to mitigate their loss, and the Judge failed to account for that factor. He submitted that if given due weight, it would have significantly reduced the respondents' entitlement to damages, if not wiped it out altogether.

[70] Ms Muir submitted that the respondents mitigated their loss by allowing the appellant to remediate defects in residence rather than immediately hiring another builder. Further, she submitted that the appellant is misguided in claiming that the respondents delayed remediation by not moving into the container cottage. She referred to the Judge's finding, on the evidence, that the container cottage was not completed and was uninhabitable**.** She further submitted that the appellant had not produced any evidence in the High Court as to the cost of its remediation efforts to date, and cannot to evidence to this Court on appeal when it had the opportunity to do so, but failed, in the High Court. She added that there was evidence before the High Court that the appellant had taken away those building materials it had transported to the site to use in the proposed remediation.

Discussion

[71] The appellant has not established that the Judge failed to consider the appellant's efforts to rectify the defects, or that the respondents failed to mitigate their loss. As to the alleged costs incurred by the appellant, I accept Ms Muir's submission that no evidence was adduced by the appellant in the High Court as to any costs it incurred in attempting to remediate (whether that was $100,000 (as claimed in the counterclaim) or $200,000 (as claimed in the appellant's appeal submissions)). Nor was any attempt made to do so in this Court. Further, in light of the Judge's finding that the container cottage was not completed, it cannot be contended that the respondents failed to mitigate their loss. The 15th ground of appeal cannot succeed.

B. Consideration of witnesses' evidence

Mr Kirk's evidence (1st, 18th and 5th grounds of appeal)

- *1st ground of appeal*

[72] The appellant's 1st ground of appeal was the Judge should not have allowed Mr Kirk's report on his investigation of the residence to be produced in the High Court. Mr O'Driscoll submitted that the report had not been properly disclosed to the appellant, and had not been given to the appellant for review and potential rebuttal by having its own expert peruse, examine, and critique it. He submitted that there had been no acknowledgement of the existence of the report at the Pre Trial Conference, and the Minute of the conference did not reflect the report.

[73] Mr O'Driscoll referred to O24 rr 2 and 3 of the High Court Rules, which provide that documents that are intended to be relied on by a party in Court must be listed in the party's List of Documents. He submitted that neither Mr Kirk's report nor a letter of 4 June 2018 (from the respondents' solicitors to the appellant's solicitor, enclosing a copy of the report) were listed. He submitted that the appellant had objected to admission of the report at trial, pursuant to O24 r16: which provides that if a party fails to comply with the Rules as to discovery, the party may not produce a document without leave of the Court, and Court make such order as Court thinks just. He also referred to O34 r2 as to Pre Trial Conferences, which provides that the matters to be covered at the conference include the exchange of experts' reports and submitted that neither Mr Kirk's report nor the respondents' solicitors' letter was referred to in the Pre Trial Conference Minutes.

[74] Ms Muir submitted that Mr Kirk's report had been disclosed to the appellant by way of a letter from the respondents' solicitors to the appellant's solicitor dated 4 June 2018, enclosing a copy of the report "as discovery and disclosure to the [appellant]". She further submitted that O24 r 16(1)(a) provides that an "undiscovered" document shall not be produced without the leave of the Court. She submitted that in the present case the Judge had granted leave, and this Court should not overrule exercise of discretion, as no harm suffered had been suffered. She also submitted that Mr Kirk's report was dated 20 March 2018, some 11 months after the respondents' List of Documents was sworn and filed.

Further, it was an expert's report prepared for the purposes of the litigation after discovery had been concluded, and was disclosed to the appellant in a timely fashion.

[75] Ms Muir referred to the Judge's discussion of the appellant's objection to production of Mr Kirk's report, in paragraphs 23 to 26 of the judgment. The Judge granted leave for Mr Kirk's report to be produced, on the grounds that it had been disclosed to the appellant 7 ½ months before the trial.

Discussion

[76] The 1st ground of appeal is misconceived. First, this was a report prepared by an expert witness for the purpose of the litigation, as opposed to a document created at the time of the matters that were the subject of the litigation, for the purposes of the litigation. Secondly, the report was provided to the appellant's solicitor in June 2018, more than seven months before the trial which began on 18 February 2019. The appellant was not deprived of any opportunity to refer it for review and potential rebuttal by having its own expert peruse, examine, and critique it. Thirdly, the Judge had a discretion as to whether to grant leave for Mr Kirk's report to be produced at the trial, and the appellant has not established that the Judge erred in the exercise of his discretion to grant leave. The appellant's 1st ground of appeal cannot succeed.

- *18th ground of appeal*

[77] The appellant's 18th ground of appeal contended that the Judge ought to have excluded Mr Kirk's report on the grounds that he had a conflict of interest. Mr O'Driscoll submitted that Mr Kirk's engineering firm was a client of the respondents' solicitors, and failed to disclose that fact. He submitted that the failure to disclose a conflict contravenes the principles of fair trial and natural justice, and undermines the integrity of Mr Kirk's evidence. He submitted that for this reason, Mr Kirk's report should have been declared inadmissible.

[78] Mr O'Driscoll submitted that an expert witness should be dealt with at arms' length, as the witness must be independent and impartial. He submitted that the respondents had an obligation to disclose any potential conflict of interest but failed to do so, and the admission of Mr Kirk's report compromised the fairness of proceeding, because the appellant did not

have the opportunity to challenge his credibility or impartiality, so could not properly test his evidence. He submitted that the appropriate remedy for non-disclosure is to exclude Mr Kirk's report, then remit the matter for reconsideration

[79] Ms Muir submitted that Mr O'Driscoll's submission is "backwards": that if an expert witness had previously been retained by the appellant, and had confidential information of the appellant in his possession that could affect the appellant's case, then that could constitute a conflict of interest on the part of the expert. She submitted that there could also be a conflict on the part of the solicitor if the solicitor had contacted or communicated with the other side's expert witness.

[80] She submitted that neither alternative appears to arise here: she submitted that it is notable that the appellant has neither explained how there is a conflict of interest, nor put anything before this Court to substantiate its allegations. She submitted that this ground of appeal is baseless and vexatious, is nothing more than desperate attempt to eliminate Mr Kirk's evidence, after the fact.

Discussion

[81] Ms Muir's submissions must be accepted. There are no grounds for excluding Mr Kirk's report, or indeed any of his evidence, on the grounds of a "conflict of interest". The appellant has not established the 18th ground of appeal.

- *5th ground of appeal*

[82] The appellant's 5th ground of appeal is that the Judge failed to consider concessions made by Mr Kirk. Mr O'Driscoll submitted that Mr Kirk gave evidence that his expertise is in engineering. Both Mr Ahearn and Mr Roberts both said remediation could be done. Mr Kirk accepted at the end of his cross-examination that remediation could work, but he could not give an estimate of cost. Mr O'Driscoll submitted that if the Judge had properly considered Mr Kirk's area of expertise, and his concession that the structure could be remediated, the judgment would likely have been different.

[83] Ms Muir submitted that the appellant's submission ignored the many paragraphs in the judgment discussing the issue of remediation, contrasting Mr Kirk's evidence with Mr Krishnan's (in particular at paragraph 112 and following). The Judge found that Mr Krishnan had reservations about the appellant's remediation plan, and conceded that part of the upper structure would have to be dismantled. Ms Muir submitted that the Judge devoted several pages of the judgment to a description of the various defects in the structure, starting with the foundations, and including references to the evidence of Mr Kirk and Mr Krishnan, and discussing the ease or difficulty of remediating the defects.

[84] Ms Muir submitted that the appellant suggests that the Judge should have preferred the opinions of Mr Ahearn and Mr Roberts, employees of the appellant, over those of two different, independent, structural engineers. Further Dr Seidman gave evidence that Mr Lodhia had advised that the building should be demolished; remediation was too difficult and expensive, and it was better to dismantle and build a new house. She submitted that the Judge was correct to accept Mr Kirk's evidence – especially in the light of the appellant's failure to amend the remediation plan to include necessary additional works agreed to by Mr Krishnan. She submitted that Mr Ahearn and Mr Roberts were not expert witnesses, had not conducted any thorough inspection of the structure, had not written any reports, but blindly accepted the appellant's remediation plan.

Discussion

[85] It is apparent from the judgment that the Judge considered the evidence given by Mr Ahearn and Mr Roberts. The appellant has not established that the Judge erred in preferring Mr Kirk's evidence to that of Mr Ahearn and Mr Roberts. Mr Kirk's evidence was based on his detailed investigation of the site, the structure of the residence, and the various reports. As Ms Muir submitted, neither Mr Ahearn nor Mr Roberts gave evidence of having carried out a thorough investigation (or indeed any investigation at all) or preparing a report. Further, their evidence could not be sustained against all the evidence given by Mr Kirk, including photographs provided to the respondents during construction, Mr Lodhia's advice and Mr Krishnan's reservations, and the Judge's rejection of their evidence regarding the container cottage.

[86] The appellant has not established the 5th ground of appeal.

(ii) Evidence of Mr Ahearn and Mr Roberts (2nd and 7th grounds of appeal)

- *2nd ground of appeal*

[87] The appellant's 2nd ground of appeal was that the Judge disregarded the evidence given by Mr Ahearn and Mr Roberts. Mr O'Driscoll submitted that both were qualified and well-trained builders of long-standing, and they testified that the defects were minor, and rectifiable (some in fact had been rectified). He submitted that the respondents had not called evidence from a builder, at all. He submitted that the Judge ignored both the evidence given Mr Ahearn and Mr Roberts, and the absence of any evidence by a builder, for the respondents. He submitted that this Court should conclude that the High Court's assessment of damages is unsustainable, and a fresh assessment is required, to ascertain the respondents' actual loss.

[88] Ms Muir submitted that Mr Ahearn was sent to Taveuni in late October 2016 to check on the installation of the container cottage, as remediation required the respondents to vacate the residence. Dr Seidman invited Mr Ahearn into the residence, and showed him the cracks in the flooring, and leaks in linkway and outdoor shower, which appeared to be minor. Mr Ahearn was told that the poles were substandard, and not fixed to ground. Mr Ahearn was of the view that the defects were remediable. Mr Ahearn's evidence was that the residence seemed to be "OK", except for the pine poles, which were substandard. The appellant's proposed solution was to remove them, and place a steel and concrete frame under the house.

[89] Ms Muir submitted that Mr Ahearn was not involved with the construction of house, and had not visited the site previously. He had seen the appellant's first remediation plan, which was out of date, but was not aware that the respondents' engineer (Mr Lodhia) had rejected it. She submitted that in evidence at the trial, Mr Ahearn accepted that he did not have a lot of information, and he had not seen the appellant's file on the residence: the primary purpose of his visit to Taveuni was to find out what had happened with container cottage.

[90] Ms Muir submitted that Mr Ahearn referred to substantial drawings signed off by an engineer, calling them "substantial remediation to repair all of the known defects", but later admitted that he was not involved in most of the remediation points, and that the plan also required removing the roof and replacing the defective sisalation with the correct type.

[91] She submitted that the Judge took Mr Ahearn's evidence on board, and did not err in preferring Mr Kirk's evidence: Mr Ahearn was not involved with or present during construction of the residence, he only briefly toured the residence, had an out of date remediation plan, and was present at the residence to check on the container cottage. In contrast, Mr Kirk conducted a thorough inspection and assessment, and gave evidence as an expert witness.

[92] Ms Muir also submitted that the appellant's submission ignored the fact that Mr Ahearn's evidence as to the habitability of container cottage was strongly contradicted by Mrs Seidman and Dr Seidman, and that in re-examination he said that it was his "understanding" that the container cottage was occupiable. She submitted that the Judge was fully justified in disregarding Mr Ahearn's evidence as unreliable. Further, Mr Ahearn was not proffered as an expert witness, and he had not carried out any kind of thorough inspection.

[93] With regard to Mr Roberts, Ms Muir submitted that he was tasked to install the container cottage. He produced remediation plans, and said that the main issue was stabilisation of the building. Mr Roberts gave evidence as to the replacement of the pine poles with a steel and concrete structure. Ms Muir submitted that the removal of 63 out of the 66 poles supporting the residence could hardly be described as "not major", as Mr Roberts claimed.

[94] Mrs Muir submitted that Mr Roberts had admitted that the septic tank had to be replaced, the gap between wall and roof in the store room had not been 100% remedied, there was a "horrible situation" in the laundry , he saw cracks in the stairway, and the driveway had a lot of rain damage and drainage needed to be corrected.

[95] She submitted that the Judge was correct to prefer Mr Kirk's evidence over that given by Mr Ahearn and Mr Roberts.

Discussion

[96] Ms Muir's submissions must be accepted. First, the Judge did not "disregard" the evidence given by Mr Ahearn and Mr Roberts. The Judge considered their evidence. Secondly, their evidence was not sufficient to establish that it should have been accepted in preference to that of Mr Kirk. Neither of them gave any evidence as to carrying out any detailed inspection of the residence; indeed their evidence was that their involvement with the property was limited to issues as to the container cottage, and in that respect, neither carried out a sufficient inspection so as to become aware of the issues as to its floor, windows, doors, or leaks, or as to discover whether the cottage had a certificate of conformity. The appellant has not established that the Judge was wrong to accept Mr Kirk's evidence. The 2nd ground of appeal cannot succeed.

- *7th ground of appeal*

[97] The appellant's 7th ground of appeal is that the Judge failed to consider Mr Ahearn's evidence as to remediation work and the container cottage. He submitted that the appellant had built a "perfectly habitable" container cottage. As Mr O'Driscoll noted in his submissions, there is a duplication between the 7th and 2nd grounds of appeal. However, Mr O'Driscoll went on to submit that it should have been abundantly clear to the Judge that efforts were made by the appellant to remediate, but the respondents did not co-operate.

[98] Ms Muir conceded that the appellant had installed a single footing for the outdoor shower, replaced the defective overflowing septic tank with one that sat above ground, and partially fixed a gap in the wall. She submitted that these did not excuse the appellant's failure to remediate all the serious structural and other substantial defects, including the 66 poles and their defective footings.

Discussion

[99] As for the 2nd ground of appeal, the appellant has not established that the Judge failed to consider Mr Ahearn's evidence. The 7th ground of appeal cannot succeed.

(iii) Mr Krishnan's evidence (3rd ground of appeal)

[100] The appellant's submission was that the Judge failed to give proper consideration to Mr Krishnan's evidence. Mr O'Driscoll submitted that Mr Krishnan issued Cyclone Certificates in 2012 and 2016. TC Winston hit on 28 February 2016, and Cyclone Gita hit in 2015. It was submitted that by virtue of the certificates, Mr Krishnan must have been satisfied that the residence met the criteria for certification. He also submitted that Dr and Mrs Seidman said that the residence was affected by TC Winston; they took refuge in a room which had a gap at the top with wind and rain coming horizontally through the gap, causing part of the ceiling to collapse. He submitted that Dr Seidman later suggested that TC Winston been a "negligible event", but went on to submit that had that been so, there was no reason to accept that the gap caused the ceiling of the room to collapse.

[101] Ms Muir referred to Mr Krishnan's evidence that he did not inspect the residence, but sent his crew for a visual inspection of the completed structure, and the crew took photographs. Mr Krishnan acknowledged that it cannot be seen from the photographs whether the pine poles were founded at a safe depth, as the footings were covered up. He also acknowledged that his crew never inspected the footings or founding depth, and that the inspection was for a Cyclone Certificate and focussed on the roof, cladding, cyclone shutters, and external envelope. In that respect he acknowledged that his crew did not notice the appellant's failure to use double-sided sisalation (as the Fire Code requires). Mr Krishnan conceded that Mr Kirk had done a more detailed investigation than he had. Ms Muir submitted that Mr Krishnan confirmed in evidence that he had not visited the residence until later, for the purpose of remediation work.

[102] Ms Muir submitted that the Cyclone Certificates cannot be accepted as proof that that the structure was safe, nor that it was constructed in compliance with the requirements, as there is cogent evidence to the contrary.

Discussion

[103] It is clear on the evidence that the inspection by Mr Krishnan's crew before the Cyclone Certificates was not a detailed inspection of the structural strength of the residence. It is

also clear that TC Winston was not "negligible": the evidence before the High Court was that the residence was not hit by the full strength of either TC Winston or Cyclone Gita, although TC Winston brought heavy rain that caused the ceiling of the room where Dr and Mrs Seidman were sheltering to collapse and fall. It is clear from the analysis of the High Court judgment (set out earlier in this judgment) that the Judge considered the evidence of Mr Krishnan and Mr Kirk in detail. The appellant has not established that the Judge was wrong to prefer Mr Kirk's evidence over that of Mr Krishnan. The 3rd ground of appeal cannot succeed.

C. Consideration of documentary evidence (10th, 12th, 13th and 14th grounds of appeal)

(i) The Certificate of Completion, Cyclone Certificate and insurance cover (10th ground of appeal)

[104] Mr O'Driscoll submitted that a Certificate of Completion and the Cyclone Certificates had been issued, and were in evidence. Insurance cover had been provided. He submitted that there was no evidence that any of these had been withdrawn or revoked, and there was no evidence that the property was condemned. He further submitted that the respondents had occupied the residence, and sheltered in it during TC Winston. He submitted that the Judge should have concluded that the residence was "perfectly habitable" – albeit with some remediable defects.

[105] Ms Muir submitted that any prima facie evidence of compliance with the regulations, or structural strength of the residence that might have been inferred from the Certificates and insurance cover is rebutted and contradicted by cogent evidence, in particular from Mr Kumar and Mr Kirk. She submitted that the Judge was entitled not to draw any inference as to compliance. She referred to the conditions to the building permit, in particular that a registered structural engineer was to be engaged by the contractor, and a certificate was to be provided by the engineer at the end of construction. She submitted that no engineering plans had been supplied, and there was no engineer's certificate.

Discussion

[106] Mr Kumar's evidence as to inspections by the TRLA and the Certificate of Completion was telling. The contractor did not make appointments for required inspections during

construction, and the Certificate of Completion was issued without a final inspection being carried out but on the basis, only, of the appellant's building contractor's assurance that all requirements had been complied with. The Cyclone Certificates have been considered in the previous section of this judgment. The appellant has not established that the Certificate of Completion, Cyclone Certificates, and issuance of insurance cover can be taken as evidence as to the structural strength of the structure of the residence, or as to full compliance with all regulatory requirements, or that the residence was "perfectly habitable" but with remediable defects. The 10th ground of appeal cannot succeed.

(ii) The Cyclone Certificates (12th ground of appeal)

[107] The appellant's 12th ground of appeal is largely repetitive of its 3rd ground. Mr O'Driscoll submitted that at paragraph 76 of the judgment the Judge referred to Mr Krishnan's evidence as to what was *not* done for purposes of issuing a Cyclone Certificate. He submitted that those matters were not relevant to whether a Cyclone Certificate was issued, and the Cyclone Certificates must be considered prima facie evidence of what they attested to, unless compelling evidence was adduced to challenge them. He submitted that the Judge did not give sufficient consideration to Mr Krishnan's certification. He submitted that there was no evidence that the Cyclone Certificates had been revoked or withdrawn, and the Judge failed to recognise that they remain valid and effective certification as to the structural integrity of building.

[108] Mr O'Driscoll also submitted that the Judge failed to recognise that matters listed in paragraph 76 of the judgment had no relevance to the issue of a Cyclone Certificate, which is concerned solely with structural integrity, in relation to capacity to withstand cyclonic conditions. Other matters such as non-structural defects, and aesthetic concerns, are irrelevant. He submitted that the Judge had improperly relied on matters outside the question of structural integrity, and considered extraneous issues, while failing to properly assess the weight of the Cyclone Certificates, and their ongoing validity, leading the Judge into a factual and legal error.

[109] Ms Muir submitted that Mr Krishnan admitted that he had not inspected the residence himself, and that it cannot be seen from photographs taken by his crew whether the pine poles founded at a safe depth, as the footings covered up. The crew's inspection focussed on the roof, cladding, cyclone shutters and external envelope, but that inspection failed to reveal the appellant's failure to use double-sided sisalation, as required by Fiji Fire Code.

[110] As said previously, the Cyclone Certificates cannot be said to be prima facie evidence as to the structural integrity and safety of the residence and, in particular as to the nature of the pine poles and their founding and footings. Mr Krishnan, by his own admission, did not do the detailed investigation required for that purpose. He conceded that Mr Kirk had done a more detailed investigation. The appellant's 12th ground of appeal cannot succeed.

(iii) The Certificate of Completion (13th ground of appeal)

[111] The appellant's 13th ground of appeal is that the Judge misconstrued the effect of the Certificate of Completion issued by the TRLA. Mr O'Driscoll submitted that the Certificate of Completion is prima facie evidence of compliance with relevant building regulations and completion of inspections. In reliance on *R v Westminster City Council*,[22] he submitted that such certificates are presumptively valid unless there is cogent evidence to contrary. In the present case, he submitted, the Certificate of Completion reflects that necessary inspections and compliance checks were conducted by or on behalf of the TRLA. He submitted that Mr Kumar had mentioned some inspection visits, and the Certificate of Completion should not lightly have been dismissed by the Judge.

[112] Mr O'Driscoll submitted that the Judge under-emphasised Mr Kumar's evidence: He submitted that Mr Kumar had direct knowledge of the inspection and approval process. He submitted that Mr Kumar's evidence confirmed the building underwent "some, if not all, inspections" and approval was duly granted. Mr O'Driscoll submitted that the Judge's focus on letter sent by the appellant's contractor, without giving weight to the rest of Mr

[22] *R v Westminster City Council* [1996] 2 All ER 302.

Kumar's evidence was an error, as Mr Kumar expressly confirmed the performance of "some, if not all" inspections.

[113] Ms Muir submitted that Mr Kumar's evidence was that seven inspections are normally undertaken before a Certificate of Completion is issued. Mr Kumar's evidence is that he did a site inspection, an inspection of the footings for the garage, and a partial inspection of the pine poles. He said in cross-examination that he told the appellant's building contractor that some pine pole footings did not meet the depth requirement stated on plans for the residence, that the builder was to complete all footings then call for another inspection. However, the builder did not call for another inspection. Mr Kumar's evidence was that the builder did not call for next three stage inspections, therefore never established that the footings were constructed to meet the required standards.

[114] She submitted that Mr Kumar's evidence was that at the time of the final inspection, he said that as not all inspections had been done, he could not issue a Certificate of Completion. Mr Kumar also said the appellant's engineer had to give an undertaking to write to the TRLA, so that it could consider whether a Certificate of Completion should be issued. However, the building contractor (Thomas) wrote, claiming the residence had been built to engineering standards, and the TRLA then issued a Certificate of Completion.

[115] Ms Muir submitted that on the basis of the evidence before him, the Judge was entitled to disregard the Certificate of Completion, as the evidence conclusively established that proper procedures were not followed by the appellant's contractor, and the contractor obtained the Certificate of Completion not on merit, but by claiming that the residence had been built according to the required standards, having provided no proof.

Discussion

[116] Ms Muir's submissions must be accepted. First, it cannot be said that Mr Kumar completed "some if not all" of the required inspections (that is, allowing the possibility that all inspections were completed). His evidence was to the contrary: some inspections were undertaken, but not all (that is, not allowing that all inspections were completed). Secondly, Mr Kumar's evidence is cogent evidence that the Certificate of Completion

cannot be accepted as presumptively valid. Indeed, in the light of Mr Kumar's evidence, the weight of the evidence is that the Certificate of Completion is invalid. The appellant has not established its 13th ground of appeal.

(iv) The Geotechnical Survey (14th ground of appeal)

[117] Mr O'Driscoll submitted that the Judge misconstrued the effect of the geotechnical survey. He submitted that no expert evidence was adduced by either party to the effect that the geotechnical survey raised any issue as to the suitability of ground on which the house built. He also submitted that there was no evidence that a geotechnical survey had not been carried out on the site on which the residence was actually built. Accordingly, he submitted, the Judge's conclusion that the geotechnical survey indicated the unsuitability of the land was a fundamental error of law and fact, and there was no evidence for such a conclusion.

[118] He further submitted that there was no evidence that the geotechnical survey related to a different site. Therefore, he submitted, the Judge was not entitled to rely on conjecture to determine that the ground beneath residence was not suitable for the purpose of building on it and the Judge's finding that the geotechnical survey showed that the ground was unsuitable was unsupported by any evidence before him. He submitted that this was a grave error of law and fact.

[119] Ms Muir submitted that the appellant's submission was "blatantly incorrect". She submitted that the appellant had admitted in Court (through its solicitor) that the geotechnical survey had been done on wrong lot, while cross-examining Mr Lew, the respondents' quantity surveyor. She also referred to Item 23 of the Agreed Facts, as to the fact that the building site was incorrectly identified by the appellant in the contract as Lot 80, and that the residence was built in the correct lot (Lot 79).

[120] Ms Muir also referred to Mr Kirk's evidence as to the ground conditions under the residence which, he said "appeared to be wholly inadequate for founding a building" and that "there were also large loose rocks which are not suitable for founding a building on".

She submitted that it is abundantly clear on the evidence that the geotechnical survey was carried out on the wrong lot, and that the ground on Lot 79 was not suitable to build on.

[121] She submitted that had the appellant commissioned a geotechnical survey for Lot 79, its unsuitability would have been discovered prior to building work, and that the appellant's error in using the wrong lot number on documents has caused the respondents considerable damage

Discussion

[122] The appellant's submission that there was "no evidence" that the geotechnical survey was done on the wrong lot is untenable. The appellant's 14th ground of appeal cannot succeed.

D. Awards of damages (9th, 16th, 17th, 11th, and 19th grounds of appeal).
(i) Misapplication of authorities (9th, 16th, and 17th ground of appeal)

[123] The appellant's 9th, 16th, and 17th grounds of appeal are that in awarding special damages the Judge misapplied the authorities cited in the High Court judgment. In respect of the 9th ground of appeal, Mr O'Driscoll submitted that in awarding special damages in the full contract sum the Judge misapplied *Byrne v J S Hill*;[23] (which he submitted was clearly distinguishable, on the grounds that is that case, there was no defects liability clause, whereas there was a defects liability clause in the present case). He further submitted that the Judge omitted to make sufficient reference to *Pearce & High Ltd v Baxter*,[24] by omitting reference to the Court's discussion of damages. In respect of the 9th ground of appeal, he submitted that the Judge's error was to award special damages in the sum paid by the respondents to the appellant.

[124] In the 16th ground of appeal Mr O'Driscoll submitted that the Judge misapplied *Byrne v J S Hill* and *Bellgrove v Eldridge*,[25] both of which, he submitted, are distinguishable. He submitted that the Judge's reliance on them led to his incorrect conclusion as to damages.

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23 Footnote 4, above.
24 Footnote 5, above.
25 Footnote 14, above.

He submitted that the Judge's error was not awarding damages in the amount required to remediate the defects.

[125] In the 17th ground of appeal, Mr O'Driscoll submitted that the Judge misapplied the judgment of the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth*,[26] when failing to award damages that were reasonable and appropriate to the cost of remediation.

[126] Ms Muir submitted that the High Court Judge cited the authorities for the principles they expressed, and it was not necessary that in each case the principles were applied to facts similar to the present case. As she put it, it is of course the case that the facts of individual cases will be somewhat different. However, she submitted that the facts in *Bellgrove v Eldridge* came very close to those in the present case.

[127] Ms Muir further submitted that even if it were the case that the High Court Judge should have awarded damages founded on the costs or rectifying the defects then the sum awarded, when properly assessed, would likely have been about the same as the special damages awarded in favour of the respondents.

[128] Ms Muir then submitted that the appellant had failed to adduce appropriate evidence as to the cost of remediation, despite having been allowed an adjournment to call a quantity surveyor, Mr Jenkins. She referred to the Judge's assessment of Mr Jenkins' evidence at paragraphs 53– 54, and 56. Ms Muir submitted that Mr Jenkins accepted that his report was based on incomplete information, saying that it was "obvious" that he was not able to give an accurate estimate of costs, as he did not have a copy of Mr Kirk's report, or the appellant's working drawings for the remediation plan. The Judge recorded, at paragraph 56, that Mr Jenkins had not taken into account costs of "mobilisation, 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.

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[26] *Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8; [1995] 3 All ER 268; [1996] AC 34.

[129] Ms Muir submitted that Mr Jenkins' assessment of remediation works ($145,165.00 VEP) was not, therefore, a reliable estimate. She contrasted it to the estimate prepared by the respondents' quantity surveyor, Mr Lew, taking all relevant factors into account (including a construction period of 9 to 12 months) ($800,000-$900,000 VIP). She submitted that if the true cost of reinstatement were taken into account, the award of special damages would likely have been of a similar magnitude as that awarded to the respondents.

Discussion

[130] The appellant has not established that the Judge erred in referring to the authorities, in the manner he did, in order to set out the principles on which he concluded (at paragraph 162 of the judgment) that "the [respondents] are entitled to damages for the defective construction and their claim of the total cost paid to the defendant …" The authorities were relevant for their discussion of the issue as to whether a defective building should be rectified, or dismantled and a new structure built. Matters such as whether or not there was a defects liability clause are not relevant to determination of the rectification/dismantle and rebuild issue.

[131] The judgment of the High Court of Australia in *Bellgrove v Eldridge* is of assistance in determining the rectification/dismantle and rebuild issue in this case. The factual background in *Bellgrove v Eldridge* is very similar to the present case. There, it was found that a building was constructed with foundations that were not in accordance with the specifications, resulting in a serious threat to its stability. The question considered by the High Court of Australia was whether the building should be demolished and another erected, or whether stability might be assured by under-pinning or replacing the existing foundation.

[132] The Court said, in *Bellgrove v Eldridge*, at paragraph 7:

> *As to what remedial work is both "necessary' and "reasonable" in any particular case is a question of fact. But the question of whether demolition and re-erection is a reasonable method of remedying defects does not arise when defective foundations seriously threaten the stability of a house and when the threat can be removed only by such a course. That work, in such circumstances,*

is obviously reasonable and in our opinion, may be undertaken at the expense of the builder.

[133] The Court went on in paragraph 7 to refer to evidence from some witnesses that stability "might be assured by underpinning the existing foundation" and to evidence from another witness who said he "would not consider that course at all, as "he did not consider such a course practical". The Court concluded that underpinning "would constitute but a doubtful remedy" and that demolition and rebuilding was the only practicable way of dealing with the situation. The High Court dismissed the builder's appeal against the lower Court's order to pay the owner the full amount she had paid him.

[134] As Ms Muir submitted, the high Court Judge in the present case heard and considered evidence as to whether the residence should be demolished (as the respondents claimed) or rectified (as the appellant claimed). At paragraph 156 of the judgment, the Judge concluded, on the evidence, that replacement of the foundations by underpinning would be extremely difficult without removing the structure above, and was not feasible.

[135] Accordingly, the appellant's 9th, 16th and 17th grounds of appeal must fail.

(ii) Were the respondents unjustly enriched? (11th ground of appeal)

[136] Mr O'Driscoll submitted that in rejecting the appellant's submission that the respondents would be unjustly enriched by an award of damages, the Judge misapplied the judgment in *Manohan Aluminium & Glass (Fiji) Ltd v Fong Sun Development Ltd*,[27] in which the Court of Appeal upheld a High Court finding that an owner had not been unjustly enriched by virtue of their having continued to use defective windows installed by a contractor. Mr O'Driscoll submitted that in the present case the respondents were unjustly enriched by having the structure of the residence on site, including materials brought on for remediation, which were unlikely to be salvageable now. He further submitted that the Judge appeared not to have considered the respondents' duty to mitigate their loss.

[27] *Manohan Aluminium & Glass (Fiji) Ltd v Fong Sun Development Ltd* [2018] FJCA 23; ABU0018.2015 (8 March 2018.

[137] Ms Muir submitted that there has been no unjust enrichment. She submitted that the respondents had paid a very large sum of money to the appellant in 2011 and 2012 for construction of the residence, and while the appellant has had the use of the money ever since, the respondents did not receive what they had bargained for, and suffered through years of additional cleaning up after leaks, dealing with cracks and stuck windows, doors, and cupboards, together with mental and emotional distress, embarrassment and inconvenience while seeking a remedy for their dilemma. She further submitted that the contract price they paid did not have the purchasing power now that it had when they paid it. She further submitted that the Judge had considered the appellant's argument that the respondents were unjustly enriched, and rejected it.

Discussion

[138] It must be noted, first, that the appellant's argument as to unjust enrichment in the High Court was based on the fact that the respondents had been living in the residence. The appellant's argument was rejected on the basis of the respondents' uncontroverted evidence that they had lived in a "small profile", of less than one fifth of the residence (which had no pine poles) and had closed off the Master bedroom area, and had not, therefore, had "the use and enjoyment of the integral part of [the] residence".

[139] In *Manohan*, Jameel JA found that the owner was not unjustly enriched by having the "use" of defective windows supplied by the contractor, which, 12 years after the breach remained in place. The appellant has not established that the Judge's reference to the decision in the present case amounted to a "misapplication". Notwithstanding the different facts in *Manohan* and the present case, the principle remains. The appellant's 11th ground of appeal cannot succeed.

(iv) Mrs Seidman's personal injury claim (19th ground of appeal

[140] Mr O'Driscoll submitted that the Judge's award to Mrs Seidman on her claim for damages in respect of the injury she suffered during TC Winston is fundamentally flawed, because there was no evidential support for it. He submitted that it is a well-established principle of

tort law that a claimant must provide evidence to substantiate their claim for damages resulting from personal injury. He submitted that damages for personal injury must be founded on credible evidence, particularly through medical reports and expert testimony as to the existence and extent of the alleged injury. Without such evidence, he submitted, Mr Seidman's claim lacks foundation and could not lawfully have been upheld.

[141] Mr O'Driscoll also submitted that the absence of medical evidence raises concerns as to the fairness of the proceedings. He submitted that the right to a fair trial necessitates parties being afforded the opportunity to present evidence in rebuttal. He submitted that Judge's award in absence of medical evidence effectively denied the appellant the opportunity to challenge that claim, based on unsubstantiated evidence. He submitted that this ground of appeal should be allowed and the award to Mr Seidman set aside.

[142] Ms Muir submitted that the appellant's submissions disregard the fact that both Dr Seidman and Mrs Seidman gave evidence in the High Court regarding the occasion during TC Winston when Mrs Seidman was hit by a collapsing ceiling. She submitted that the respondents have not asked for compensation for medical expenses – they only sought general damages in respect of the appellant's negligence which caused personal injury to Mrs Seidman. She submitted that the evidence given by Dr and Mr Seidman is sufficient to establish that personal injury did occur.

Discussion

[143] While it cannot be disputed that any claim in respect of an injury must be supported by credible evidence before an award of damages can be made, Mr O'Driscoll did not refer the Court to any authority to the effect that medical evidence, in particular, must be adduced in support of the claim.

[144] The evidence before the High Court may be summarised as follows:

[a] Dr Seidman's evidence in chief (at p 889-891 of the High Court Record): He said he and Mrs Seidman were sheltering from TC Winston in a room in the cinder block basement section of the house, there was a gap between that room

and the floor above which had not been closed, but was concealed by the ceiling, rain came rushing in and soaked the cement board ceiling, which collapsed and hit Mrs Seidman on the head. He took Mrs Seidman to hospital. Dr Seidman was cross-examined on his evidence, but only as to photographs taken of the ceiling gap and white material on the floor of the room.

[b] Dr Seidman produced a copy of an email he sent to the appellant on 27 February 2016 in which he said (amongst other things relating to construction defects requiring addressing):

> *When Cyclone Winston struck, my wife and I went to what we thought was safest place in the house which was the laundry room. Unfortunately, water started gushing from the down lights and the wet drywall collapsed on my wife on her head and ankle. She has been diagnosed as having a brain concussion and ankle sprain, at the hospital.*

There was no suggestion by the appellant, following this email, that the incident had not occurred, or that Mrs Seidman had not suffered injury.

[c] Mrs Seidman said in evidence (recorded at p 1036 of the High Court record), that an employee of the appellant told them that the strongest room in the house would be the storage room "down below", and they were sheltering there, then she just remembered seeing a flash of white, and that was the last thing she remembered until her husband was taking debris off her. She did not "remember much right then other than the hurting, hurting, hurting". She said her head hurt so badly she understood now why there are construction hats. She said she could not walk well for three or four days. In cross-examination, she was asked if she had a medical report and her answer was "with me, no".

[145] The Judge was required to have sufficient credible evidence before him before an award of general damages could be justified. The evidence of Dr Seidman and Mrs Seidman in relation to Mrs Seidman having been hit on the head when the ceiling collapsed was not challenged. On the evidence before him, it was open to the Judge to make the award he did. The appellant has not established that the Judge erred in making the award.

ORDERS

(1) The appeal is dismissed and the High Court judgment is affirmed.

(2) The appellant is to pay interest on the judgment debt to the respondents at 4 percent per annum, from the date of the High Court judgment until the same is satisfied.

(3) The appellant is ordered to pay the respondents costs, summarily assessed at $5,000, to be paid within 28 days of the date of this judgment.

Hon. Mr. Justice Isikeli Mataitoga
ACTING PRESIDENT COURT OF APPEAL

Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL

Hon. Madam. Justice Pamela Andrews
JUSTICE OF APPEAL