

CITATION: *Dunne v Dwyer Quality Homes* [2017] QCAT 262

PARTIES: Bruce Dunne
Heidi Dunne
(Applicants)
v
Dwyer Quality Homes
(Respondent)

APPLICATION NUMBER: BDL105-16

MATTER TYPE: Building matters

HEARING DATE: 22 and 23 June 2017

HEARD AT: Maroochydore

DECISION OF: **Member Howe**

DELIVERED ON: 2 August 2017

DELIVERED AT: Brisbane

ORDERS MADE:

1. The respondent builder pay to the applicants the sum of \$71,217.12 within 30 days of the date of order.
2. The applicants file and serve on the respondent any submissions as to costs together with supporting evidence by no later than 4pm on 11 August 2017 and the respondent file and serve on the applicants any submissions as to costs together with supporting evidence by no later than 4pm on 25 August 2017.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SETTLEMENT OF DISPUTES – where statutory warranty had expired – termite infestation and damage – where contract contained extended 30 year contractual warranty – where warranty described as guarantee – where contract contained warranty as to structural integrity – whether damages should be awarded for breach of

warranty

Building Act 1975 (Qld), s 30(1)(g)
Domestic Building Contracts Act 2000 (Qld), s 51
Queensland Building and Construction Commission Act 1991 (Qld), s 72A(4)
Queensland Building Services Authority Act 1991 (Qld), s 72(8)

Oscar Chess Ltd v Williams [1957] 1 All ER 325
Bellgrove v Eldridge (1954) 90 CLR 613; [1954] HCA 36
Tzaneros Investments Pty Ltd v Walker Group Constructions Pty Ltd [2016] NSWSC 50

APPEARANCES:

APPLICANT: Bruce Dunne and Heidi Dunne represented themselves

RESPONDENT: Wayne Dwyer represented the respondent

REASONS FOR DECISION

Background

- [1] Mr and Mrs Dunne owned land at Indian Creek at the Sunshine Coast. The respondent builder was engaged to build them a house on the land. The owners through Mrs Dunne signed a Master Builders residential building contract with the builder in November 2006. The price was \$256,163 and construction was finished around December 2007.
- [2] The owners realised they had a problem with termites in about 2012. Termites were found under a kitchen bench. They had entered there at the pipe penetration of the slab. Then termites were found in about December 2013 in the laundry. Again the termites entered there at pipe penetrations.
- [3] There was a third breach that followed near the bathroom. It appeared to be caused by a breach of the external perimeter barrier rather than pipe penetrations through the slab. The builder rectified the problems or so it was thought.
- [4] When a fourth breach at the western perimeter at a bedroom was detected in November 2014 the owners complained to the Queensland Building and Construction Commission (QBCC) (then Queensland Building Services Authority). The owners had made previous complaints to the QBCC but given the builder's voluntary rectification work no directions to rectify defective building work were necessary. With the

fourth breach extensive invasive investigations were conducted by contractors engaged by QBCC. During the currency of the investigations however the time limit of 6 years and 3 months after the building work was completed fixed by s 72(8) of the then applicable *Queensland Building Services Authority Act 1991* (QBSA Act)¹ expired and the QBCC determined it could no longer pursue the matter.

- [5] The fourth breach caused significant damage. The termites were treated but not by the builder who considered its obligations under the construction contract had ended with the expiry of the 6 years and 3 months post construction obligation set by the QBSA Act. Furthermore the builder said the owners had not maintained the property properly and that was a likely cause of the occurrence of termites.
- [6] Subsequently, according to the owners, there were two additional intrusions of termites detected, one at a pipe penetration in the ensuite and the last detected in April 2016 in the office near the eastern perimeter of the house.
- [7] The owners have applied to the tribunal for orders that the builder effect repairs and reinstall an effective termite barrier at the property and reimburse the owners their expenses of repair.

Is the claim by the owners out of time?

- [8] The house was finished in about December 2007. By Part 4 of the *Domestic Building Contracts Act 2000* (DBC Act)² which then applied the builder warranted that his work would be carried out in a skilful way with reasonable care and skill and pursuant to accepted construction standards. The Master Builders general conditions of contract clause 10.1 adopted those statutory warranties. By s 51 of the DBC Act however, proceedings for breach of the statutory warranties had to be started “*within 6 years and 6 months after*” the work finished.
- [9] That means the owners are out of time with respect to any claim based on breach of the builder’s statutory warranties and the general conditions of contract.
- [10] But there were special conditions of contract agreed to as well. Here the builder agreed to the following special term: “*House has a twenty six week defects liability period and a full thirty year structural guarantee.*” In addition the owners were provided with a separate “guarantee” flyer described variously as a 30 year “*structural guarantee*” and a 30 year “*structure guarantee*” which provided in part: “*...3. This guarantee covers only structural integrity of the footing slab design, and structural construction work by Dwyer Corporation Pty Ltd in the dwelling, but does not include timber shrinkage or movement, surface or shrinkage cracks in*

¹ The equivalent of that provision currently set out in s 72A(4) *Queensland Building and Construction Commission Act 1991* (QBCC Act).

² Repealed – now QBCC Act Schedule 1B.

brickwork, concrete slabs, gyprock, cement, plaster or timber, movement, cracking or lifting of ceramic tiles, or any other matter whatsoever which in the opinion of the Dwyer Corporation Pty Ltd is non-structural.”

- [11] Neither the words structural guarantee, structural construction work nor the expression non-structural are explained or defined.
- [12] Given a contract of guarantee is generally understood in law to be a collateral contract to answer for the debt, default or miscarriage of another person who is or will become liable to the person to whom the guarantee is given, it is fairly clear that that meaning was not the meaning intended to be ascribed to the 30 year guarantee offered here. The narrow legal meaning of the word guarantee cannot have been intended. In clause 3 of the “conditions of guarantee” the reference is to structural construction work performed by Dwyer Corporation Pty Ltd, and in clause 2 preceding that damage caused by any other person, corporation or third party is expressly excluded from claim.
- [13] I conclude what was intended to be offered by the 30 year guarantee was more properly intended to be a 30 year warranty, of similar effect though different ambit perhaps to that of the statutory warranty under the DBC Act, but entirely based on agreement between the parties.
- [14] Lord Denning in *Oscar Chess Ltd v Williams*³ discussed a case involving a warranty as to the age of a motor vehicle in which he regarded the expressions guarantee and warranty used there to be fairly interchangeable: *“In saying that he must prove a warranty, I use the word “warranty” in its ordinary English meaning to denote a binding promise. Everyone knows what a man means when he says, “I guarantee it”, or “I warrant it”, or “I give you my word on it”. He means that he binds himself to it. That is the meaning which it has borne in English law for three hundred years....”*
- [15] How then is the “30 year structural guarantee” to be construed? I conclude it was intended to be a warranty by the builder of the adequacy of the builder’s structural construction work and the builder promised that it would hold good for 30 years.
- [16] Has the warranty been breached? What is the structural construction work warranted? Does it extend to the integrity of the termite management system employed under the contract?
- [17] There are some exclusions from the warranty listed in the “conditions of guarantee”, such as timber shrinkage or movement, surface or shrinkage cracks in brickwork or concrete slabs, gyprock or like, movement cracking or lifting of ceramic tiles *“or any other matter whatsoever which in the opinion of the Dwyer Corporation Pty Ltd is non-structural”*.

³ [1957] 1 All ER 325, 327.

- [18] The Macquarie Dictionary defines the word “structural” as “*of or relating to structure; relating or essential to a structure.*” Structure is defined as “*mode of building, construction, or organisation; arrangement of parts, elements or constituents... a complex system considered from the point of view of the whole rather than of any single part...*” Those definitions introduce a concept of component parts that together make up a whole.
- [19] The installation of a physical termite barrier was insurable in 2007 under the statutory home warranty scheme as primary building work “*that affects the structural performance of the residence*”.⁴
- [20] Volume 2 of the Building Code of Australia (BCA) for 2006 and 2007⁵ link the necessity of incorporating a termite barrier in the construction of a dwelling with the susceptibility of the dwelling’s “*primary building elements*” to termite attack. Houses in Queensland are recognised as being at greater risk of termite attack than other southern states such as Tasmania and Victoria. In Queensland if any of the primary building elements are susceptible to termite attack, then a termite barrier is required.
- [21] If the builder uses such things as steel, concrete, masonry, fibre-reinforced cement or naturally termite resistant timber or preservative treated timber for all primary building elements, no termite barrier is necessary.
- [22] However Queensland defines “*primary building elements*” far more extensively for the purpose of application of the BCA to termite control than most other States. Mr Anderson suggested otherwise was the case when this house was built in 2007, but he was wrong in that assertion. The 2006/7 Queensland definition extends to such things as door jambs, window frames and reveals, architraves and skirtings. The LexisNexis commentary on Volume 2 of the 2005 BCA explains that Queensland’s definition of primary building elements “... *includes within the definition of primary building element all those items which are normally part of the construction of a domestic building and which are so frequently totally destroyed by termites. Many building surveyors and owners have been first alerted to termite invasion by the collapse of an architrave or door frame.*”
- [23] By s 30(1)(g) of the *Building Act* 1975, building assessment work and self-assessable building work must comply with the BCA.
- [24] There was no evidence that treated timber was used here for mouldings. Nor was it apparently used in all building load support components, given a lintel in a bedroom was found to have been attacked by termites. Mr

⁴ As defined in 2007, *Queensland Building and Construction Commission Regulation* 2003, s 11(2)(b).

⁵ Part 3.1.3.

Lindsay said the lintel was not treated timber. He said none of the beams over any of the windows were treated timbers.⁶

- [25] I conclude the BCA requirements dictated that the builder here was required to install a termite management system as an essential structural component in order to protect the primary building elements of the house. As such I determine such barrier itself formed an essential component of the structural construction work without which construction was prohibited. I conclude the termite barrier was therefore covered by the 30 year warranty given by the builder under the contract.
- [26] Expiry of the 6 years and 6 months limitation to the DBC Act statutory warranties (adopted in the general conditions of contract) and the 6 years and 3 months limitation under the QBCC Act rectification period for defective building work have no bearing on the 30 year extended contract warranty of structural integrity.
- [27] If a warranty is breached the usual rule is the other party is entitled to claim damages. The subject claim based on breach of contractual warranty is not out of time.

Has the termite barrier been breached?

- [28] The termite barriers consisted of an external Alterm physical perimeter barrier and individual barriers at points of pipe penetrations through the slab. The termite extermination experts met in conclave. Mr Anderson, engaged by the builder, said that as at the date of their conclave there was insufficient evidence to determine where the first point of entry of termites occurred. Further in his opinion there was insufficient evidence to show that it was the Alterm termite barrier that had been breached. He suggested entry could have been via the front or rear patio slabs added by the owners after the builder had left the site. He did not accept there was evidence of a breach of the barrier at the western boundary of the dwelling near the bathroom.
- [29] Neither he nor Mr Porter, the other termite exterminator expert engaged by the owners, were present when contractors engaged by QBCC investigated by removing brickwork and performing invasive examinations.
- [30] Mr Porter also concluded that on the material presented to them the first point of entry could not be established. However he believed photographs of the Alterm barrier at the western boundary near the bathroom taken by the contractors engaged by QBCC did show a failure of the barrier at that point. Given that, he said the issue about a first point of entry of termites was irrelevant given the Alterm barrier had clearly failed.

⁶ Ex 4, investigation report, 2.

- [31] Both experts relied in large part on the reports of the contractors investigating the owners complaints about termite infestations. Those contractors, Mr Boyce and Mr Lindsay, gave evidence at hearing, as too did Mr Lowrie, the QBCC building inspector supervising the contractors. Both contractors are builders. Both were very firm and very clear in their evidence at hearing that their investigations showed the Alterm termite barrier at the western perimeter near the bathroom had been breached by termites.
- [32] Mr Boyce said he saw a point of entry by termites through the silicone attaching (parging) the Alterm barrier to the concrete slab. His evidence was the concrete slab was very “bony” there, pitted with holes allowing termites to breach the Alterm which was supposed to be parged to the slab with silicone. In his opinion there was minimal silicone used and the termite barrier had poorly adhered to the slab. He saw termite tracks through the parging.
- [33] Mr Lindsay was equally adamant that the western perimeter wall near the bathroom was the major point of entry of the termites. It was put to him that his report prepared prior to hearing was equivocal on this issue, but he explained that his report was a running commentary and in so far as he initially referred to the entry there as only “likely”, that was before he removed bricks. What he found when he removed bricks to investigate further convinced him that the western boundary near the bathroom was, in his words, “absolutely” the point of entry. Mr Lindsay said the Alterm barrier had failed at that point. There were termite tracks through the parging. The barrier had pulled away from the slab.
- [34] Mr Lowrie, the QBCC building inspector said the investigations had started at bi-fold doors at the southern rear of the property where termites had been found and then the termites tracked back to find their point of entry. This was because the point of entry may have been attributable to work done post-construction by the owners rather than attributable to the work of the builder. The point of entry was tracked to the western boundary near the bathroom. He said the point of entry was there between the Alterm barrier and the slab. He had concluded the Alterm barrier had failed at that point. He also said there was a separate breach at a penetration of the slab under the laundry cabinet. Under the legislation however,⁷ time had run out before he could issue any directions to the builder to rectify the new barrier breach as defective building work.
- [35] I accept the evidence given by Messrs Lowrie, Boyce and Lindsay. They were very definite about entry of termites through the parging between the Alterm barrier and the slab at the western boundary near the bathroom. Their evidence was entirely credible. They were there on site. I conclude termites entered the house at the western boundary near the bathroom by entering between the Alterm barrier and the slab.

⁷ QBCC Act, s 72(8).

If so, what was the cause of the breach?

- [36] As found, termites entered the house at the western boundary near the bathroom by breaching the Alterm barrier. The whole idea of the physical Alterm barrier was to prevent that occurring.
- [37] Mr Boyce's evidence was that on 10 December 2013 he had found a concealed breach at a pipe penetration through the concrete slab under the laundry cupboard and then on 14 January 2014 he discovered a breach at the Western boundary. He said *"In all areas where the Alterm physical barrier was exposed there was a lack of termite resistant silicone used to properly adhere the Alterm barrier to the concrete slab."*⁸
- [38] He also commented that the slab was very "bony" and porous allowing termites' cavities to enter the house around the Alterm barrier.
- [39] Mr Lindsay's investigation occurred over various days between 4 May and 26 May 2015 acting on instructions from the QBCC. He removed several bricks from the house exterior to expose the Alterm barrier. He was certain that the barrier at the Western boundary was defective. He concluded there was insufficient termite resistant silicone applied which resulted in an ineffective barrier system.⁹ The barrier had been poorly parged to the slab outside the front bedroom (near the bathroom) at the western boundary.¹⁰
- [40] Mr Lowrie said part of the patio slab at the rear doors was removed to check for termite entry there, given termites were found in the bi-fold doors there. There was no termite entry there. Then the termites were tracked back from the doors to the western boundary near the bathroom. He was satisfied that was a point of entry by termites, if not the only one. He was satisfied the entry there was through the parging of the Alterm barrier.
- [41] Mr Porter did not make a site visit but had recourse to photographs taken at the time of the invasive investigation by Mr Lindsay. The former said the photographs showed the lack of silicone used to parge the barrier to the slab. In his opinion the photographic evidence showed there was insufficient silicone used to achieve correct adhesion. That was the cause of the failure of the barrier.
- [42] In contrast, Mr Anderson also gave his opinion similarly based only on the photographic evidence, but he thought that showed there was adequate silicone utilised in the parging. He said he could not see any mud tube through the parging.
- [43] There was a suggestion by Mr Anderson that a leaking shower attracted termites and may have caused the Alterm barrier parging to deteriorate

⁸ Ex 3.

⁹ Ex 4, Statement of Evidence dated 9 February 2017.

¹⁰ Ibid, 13.

and lose adhesion to the slab. The evidence however was that the leak had been fixed though on the evidence when was not clear nor the extent of the leaking. Mr Anderson referred to a Dow Corning document on silicone pavement sealants saying that that product was not recommended for use where continuous water or moisture exposure was expected. He did not claim the silicone parging product used with the Alterm barrier was the same product however. It clearly was not. As such I fail to see the relevance of the evidence. Mr Porter suggested Mr Anderson was wrong on the point given a Dow Corning warranty assessment claim he had accessed did not exclude claims on the basis of exposure to water. I am not clear how that warranty claim is said to be linked to the parging silicone either. Mr Porter did point out as a general proposition however that silicone is actually intended to stop water entry – that is what its job is. I conclude there is no evidence that moisture from the shower caused the Alterm barrier to fail.

- [44] I accept the evidence of the two builders and the building inspector that the barrier was breached at the western side of the house near the bathroom. They were there on site. Mr Anderson was not. Mr Porter supports the building builders' evidence. I find the Alterm barrier at that point failed because there was most probably both insufficient silicone used to parge the barrier to the slab, and also because the slab there was "bony" and pitted which inhibited good sealing.

Does the owner's construction of slabs at front and rear or pathways lacking 75mm inspection zones affect the builder's liability?

- [45] The builder claimed the owners breached the requirement of a 75mm observation zone between soil level and the Alterm barrier when they constructed patios front and rear and concrete paths around the house. The experts disagreed as to the significance of that. Mr Porter was of the opinion that less was sufficient to do its job in showing termite trails. He was comfortable with the reduced observation area above pathways which was generally on average about 40mm around the house. He also said there was a sufficient termite barrier added to the patio slab added by the owners and Mr Lowrie found no evidence of termite entry at the patios.
- [46] There is no evidence that the patio slabs or pathways and reduced visual inspection zones contributed to the failure of the Alterm barrier.
- [47] It was also pointed out by the builder that the owners were advised from time to time during annual pest treatments to remove timber and garden waste that would be attractive to termites from the garden and yard surrounds. However there was nothing significant or out of the ordinary about those items of potential attraction identified in the pest inspection reports, which appear to be generic observations only, nor is there any evidence that the presence of such items contributed to the physical failure of the termite barrier.

- [48] In all the circumstances, I find the 30 year structural warranty has been breached and the owners are entitled to damages from the builder in respect of that breach.

Damages for Breach of Warranty

- [49] In building cases the general rule is that the innocent party is entitled to recover as damages the cost of rectifying defects. The defect here is the termite barrier. As stated by the High Court in *Bellgrove v Eldridge* concerning the owner's right there to claim the cost of demolition and reconstruction "... the respondent was entitled to have a building erected upon her land in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her."¹¹
- [50] Neither of the termite extermination experts addressed the possibility of replacement of only that part of the barrier that was discovered by invasive investigation to have failed. Certainly Mr Porter said in his reports of 17 July 2016 and 24 October 2016 that the Alterm termite barriers were not properly formed during construction, which suggests his position is the entire barrier should be replaced. His evidence about rectification was premised on total replacement. Mr Anderson did not address the possibility of partial rectification work in his reports and evidence either.
- [51] There is an exception to the *Bellgrove v Eldridge* principle where the work proposed to rectify defects is unreasonable in the circumstances. Is there evidence that there are parts of the exterior termite barrier which it would be unreasonable to replace?¹²
- [52] I conclude there is no evidence to suggest that it is unreasonable to replace the entire barrier. It is impossible to know whether the remainder of the barrier holds true. Accordingly it is reasonable to require the builder to replace the entire barrier system. In any case there is an argument that the exception of reasonableness does not arise for consideration given in *Bellgrove v Eldridge* the court observed that work necessary to rectify defects in buildings may frequently require removal or demolition of some part of the structure, and where the issue is the stability of a house the issue of reasonableness of demolition or re-erection does not arise.¹³ Certainly termite activity is no mean threat to the stability of a house structure.
- [53] At hearing both Mr Anderson and Mr Porter accepted that an acceptable method of rectification was injection of foam termiticide around the entire dwelling beneath the Alterm barrier. That would obviate the necessity of removing bricks. A hole would be drilled in the vertical mortar joints

¹¹ (1954) 90 CLR 613, 617; [1954] HCA 36.

¹² *Tzaneros Investments Pty Ltd v Walker Group Constructions Pty Ltd* [2016] NSWSC 50, [127].

¹³ (1954) 90 CLR 613, 619.

(perpend) between bricks and foam injected through the hole. Injecting a Termidor product would require annual inspections with an ongoing cost to the owners and provide a limited warranty life of only 8 years. Injecting a Termseal Ura-Fen product was more expensive but had a longer warranty and lifespan in excess of the balance 30 year structural warranty period without obliging ongoing costs to the owners. This was an option for the outside barrier but not the interior penetrations. The cost of the Termseal Ura-Fen treatment was \$6,990 and I conclude it is the preferable treatment in the circumstances, recommended by both termite treatment experts. Neither expert suggested at hearing that bricks should be removed to physically apply a new Alterm of similar barrier.

- [54] Mr Lindsay initially estimated a cost of \$131,066¹⁴ to remove brickwork and reinstate the dwelling after replacement with a new physical termite barrier. In part those costs included removal of bricks \$19,820; removal of services (gas hot water and bottles, air-conditioning, taps, downpipes) \$2,920; supply and installation of new brickwork at completion \$33,680; new render to brickwork at completion \$12,450; painting to new render \$11,750; reinstate services \$4,380; difficult access cost of \$4,500; and a 15% builder's margin of \$15,544.
- [55] Mr Lindsay also provided an estimate of the cost associated with the necessary work to permit injection of the foam termicide. That estimate totalled \$88,434.48. In this estimate he included the cost of drilling holes \$3,780; removal of services \$2,925; remove concrete front and rear porch \$3,650; reinstate concrete \$3,875; reinstate sandstone front entrance \$2,940; reinstate front porch tiling \$1,235; render to new brickwork \$12,960; painting new render \$11,750; remove and reinstate bases of cupboards bathroom, ensuite WC \$1,834; reinstate services \$3,280; machine hire \$1,840; remove waste \$4,460; difficult access \$5,000; supervision \$5,640; protect surfaces \$1,280; builder's margin 20% \$13,289.80.
- [56] Why the second estimate which does not require removal of brickwork includes \$12,960 for "render to new brickwork" and \$11,750 for painting new render is not explained. Similarly there is no mention of removal or reinstating the front entrance sandstone in the earlier estimate nor for that matter mention of tiling costs. The builder's margin also changes from 15% to 20% in the second estimate without explanation.
- [57] Mr Dwyer says the quote by Mr Lindsay is excessive. The only estimate of costs provided by Mr Dwyer however is an estimate for the replacement of the front and rear patios for \$4,230.20. Mr Lindsay says Mr Dwyer's calculations are based on costs to a developer rather than a builder called on to rectify existing defective building work. I accept Mr Lindsay's submission on that but do not accept his inclusion of costs associated with new render and painting of new brickwork is appropriate. Nor do I understand the change to a 20% builder's margin from 15% in his earlier

¹⁴

Ex 4.

estimate involving removal of brickwork. The charge of \$5,000 for “difficult access” is unexplained and I understand its necessity where the task is removing bricks around the entire outside perimeter of the building, but not where the task is drilling holes in mortar between bricks and where the builder has also charged for removal of obstructing services. The costs associated with penetrations (remove and reinstate bases of cupboards in bathroom ensuite WC \$1,834) are appropriately left for consideration under that head of claim.

- [58] In the circumstances I conclude the following costs are reasonable builder costs necessary to effect the experts’ suggested method of rectification of the defective exterior termite barrier by injecting Termseal Ura-Fen foam:

Drill holes in each brick perpend	\$ 3,780.00
Removal of services	\$ 2,925.00
Remove concrete/sandstone and concrete front/rear	\$ 3,650.00
Reinstate concrete	\$ 3,875.00
Reinstate sandstone	\$ 2,940.00
Install tiling	\$ 1,235.00
Render/paint*	\$ 2,000.00*
Reinstate services	\$ 3,280.00
Machine hire	\$ 1,840.00
Remove waste and house clean	\$ 4,460.00
Supervision	\$ 5,640.00
Protect surfaces	\$ 1,280.00
Builder’s margin at 15%	<u>\$ 5,535.75</u>
Sub-total	\$42,440.75
GST	\$ 4,244.07
QBCC Insurance**	<u>\$ 373.30</u>
Total	\$47,058.12

* The sum of \$2,000 has been allowed as an estimated reasonable cost for rendering and painting disturbed perpend and sundry external areas other than at the site of intrusive investigation requiring removal of brickwork which reinstatement costs are included in the further items of additional work below.

** The cost of rectification of internal penetrations \$1999 included in the insurance price.

- [59] There is also the cost estimate of \$13,970 by Mr Lindsay for repair costs associated with the invasive investigation and to rectify internal termite damage. In *Bellgrove v Eldridge* it was made clear that the award of damages for breach of contract in construction cases extended to consequential damages.¹⁵ Falling within such category are the necessary invasive investigation costs which were necessary to identify termite entry, cause and damage. There appears to be no specific challenge to Mr Lindsay’s estimate of such costs and they should be allowed.

- [60] Then there is the cost of rectification of termite barriers at pipe penetrations through the slab. There were a number of such breaches.

¹⁵ (1954) 90 CLR 613, 617.

The barriers were defective. That does not appear to be contested. Two previous penetration points have been found to be defective and repaired by and at the expense of the builder. But the owners say there are at least two more similarly defective barriers at pipes that penetrate the slab base that should be replaced. That claim is not contested in any meaningful way by the builder. The cost of preparing for replacement of those additional penetrations is referred to in Mr Lindsay's quote for the external work – (remove and reinstate bases of cupboards in bathroom ensuite WC \$1,834). The actual cost of the new barriers to black plastic pipe penetrations the owners set at \$165 though without explanation for that calculation. There must be a cost for such however. It is reasonable in my view to allow these further small sums. Without replacement of the remaining faulty internal penetrations the entire structure may well be put in jeopardy of termites again. I allow those costs which total at \$1,999.

- [61] The owners also claim \$1,760 for cost of termite treatment. I take the reference to termite treatment to refer to the cost of such things as bait stations. There are no invoices to support the claim. Mr Lindsay said he found two termite bait boxes attached to the bedroom wall near where the breach of the Alterm barrier was found. Costs of bait boxes vary significantly. In the circumstances a fairly conservative award is called for. An amount of \$600 is allowed.
- [62] Finally there is a claim for rent reimbursement. The house in question is an investment property and it is rented. The owners claim the tenants will have to vacate the house for approximately two weeks whilst repairs are done. The builder thinks not. There are no estimates from the builders how long rectification work will take. The interior work will be reasonably significant, as too the work at both entrances. I conclude there may well be a liability concern to the builders engaged to perform the rectification work. I also conclude it will be reasonable for the tenants to be relocated for one week whilst the intrusive work is done. The owners claim \$1200 for two weeks. One week at \$600 is allowed.

Summary of Rectification Costs

[63]	Termseal Ura-Fen treatment	\$ 6,990.00
	Builder costs associated with Termseal Ura-Fen treatment	\$47,058.12
	Further builder repair costs	\$13,970.00
	Internal penetration repairs	\$ 1,999.00
	Termite treatment	\$ 600.00
	Tenant housing cost	<u>\$ 600.00</u>
	Total	\$71,217.12

- [64] The owners are entitled to recover from the builder damages in the sum of \$71,217.12. The owners also claim¹⁶ reimbursement of expert witness costs and other unarticulated expenses. Further submissions in that regard are required.

¹⁶ Ex 1, page 3 item (6).

