Subject: Expert Reports and My Role as a Competent Expert Witness

We are pleased to provide you with a series of five judgments in which I have been recognized as the preferred expert across multiple matters, whether engaged by the plaintiff or defendant. In each case, the courts and tribunals have relied on my impartial and non-advocating findings, which have consistently demonstrated technical competence and credibility.

These judgments highlight my role as an independent expert, ensuring that my assessments, based on sound construction principles and compliance with relevant building standards, are trusted by the legal process.

Key highlights from the attached judgments include:

- **Case: BAKER v TNT Building Trades PL [2023] NSWCATCD**
  My expert assessment regarding defective flashings was fully accepted, and the Tribunal preferred my costings methodology, forming the foundation of the final decision in favour of the homeowner.
- **Case: Genix Building Pty Ltd v Solevski [2023] NSWCATCD**
  In this case, my evidence confirmed defective workmanship in a Class 1 renovation. The Tribunal agreed with all of my findings, which were central to the homeowners' compensation.
- **Case: Abbott v Patterson Built [2021] NSWCATCD**
  My evidence was preferred for this matter for all defects I opined, and on page 90 the member identified to "*prefer the evidence of Mr. Giaouris*".
- **Case: Strata Plan 92283 v Aushome Constructions v Zapphire Investments**
  Acting as the expert for the developer, my evidence was instrumental in refuting several claims of defects in a Class 2 construction, with the Tribunal heavily relying on my expert opinion to reach its decision. Pg 11 of the judgment confirms "***the evidence of Mr. Giaouris should be preferred to that over Mr. Verinder."***

These judgments serve as evidence of my expertise in construction defect assessment and costings. As a certified builder, waterproofing consultant, and expert in quantum assessments under item 24(a) of the updated 2024 code of conduct, I am equipped to provide accurate real-world pricing, unlike some experts who rely solely on retrospective industry rates. My practical and non-advocating approach to expert reporting expedites the resolution of disputes while maintaining the highest standards of independence and impartiality.

I have provided evidence in the tribunal, supreme and district courts now on over 5 occasions.
In addition to my role as an expert, I am one of the country's leading waterproofing consultants, having trained over 2,000 professionals, chaired the Master Builders Waterproofing Technical Committee, and contributed to the revision of Australian waterproofing standards.

We would be happy to discuss any upcoming matters and offer a quotation for expert reports, inspections, or reports in reply. Please do not hesitate to reach out to us with any questions or further inquiries.

We are able to provide fixed fees for our expert reports, and have a team of experienced experts who can assist and meet any reasonable time frame.

Yours faithfully,

Stan Giaouris
B. Building in Construction Management
Cert III in Construction Waterproofing
A4 Certifier & Inspector BDC #05105
Licensed Builder #188343C
D&BPA Reg Building Practitioner BUP#000624
Registered Strata Bond Scheme Inspector (ASBC) #131
Registered Livable Housing Design Assessor #20030
Principal Building Consultant

Attachments

- Judgment - **BAKER v TNT Building Trades PL**
- Judgment - **Genix Building Pty Ltd v Solevski**
- Judgment - **Strata Plan 92283 v Aushome Constructions v Zapphire Investments**
- Judgment - **Abbott v Patterson Built**

Stan Giaouris alleged defective workmanship by the Builder on a Class 1 renovation.
Defects were found 100% in agreement with Mr. Giaouris' evidence.

See yellow highlights from page 42 onwards where the expert evidence is discussed.

Civil and Administrative Tribunal
New South Wales

Case Name:	**Genix Building Pty Ltd v Solevski v Solevski v Genix Building Pty Ltd**
Medium Neutral Citation:	[2023] NSWCATCD
Hearing Date(s):	23 November 2022; 20 February 2023; final submissions 26 April 2023
Date of Orders:	20 October 2023
Date of Decision:	20 October 2023
Jurisdiction:	Consumer and Commercial Division
Before:	P French, Senior Member
Decision:	In application no. HB 22/19265:

(1) The application is dismissed.

In application no. HB 22/26345:

(2) Louie Solevski and Zaneta Solevski do not owe Genix Building Pty Ltd $121,895.68 (or any other amount) in relation to the building work.

(3) Genix Building Pty Ltd must supply Louie Solevski and Zaneta Solevski with keys to all windows and doors supplied under the contract and with the rear security door on or before 27 October 2023.

(4) Genix Building Pty Ltd must pay Louie Solevski and Zaneta Solevski $70,720.93 immediately.

(5) The application is otherwise dismissed.

In both applications:

(6) Genix Building Pty Ltd must pay Louie Solevski and Zaneta Solevski their costs of the proceedings as agreed or assessed.

Catchwords:	BUILDING AND CONSTRUCTION – *Home Building Act 1989 (NSW)* – contract – failure to comply with contracting requirements for residential building work – failure to comply with insurance requirements for residential building work – quantum meruit – statutory warranties – due care and skill – compliance with law
Legislation Cited:	Environmental Planning and assessment Act 1979 (NSW) Home Building Act 1989 (NSW) – ss 7, 10, 11, 188, 18BA, 18F 48MA, 92, 94 Home Building Regulation 2014 (NSW), ss 5, 53
Cases Cited:	BCC Trade Credit Pty Ltd v Thera Agri Capital No 2 Pty Ltd [2023] NSWCA 20 Bellgrove v Eldridge (1954) 90 CLR 613 Dyjecinska v Step-Up Renovations (NSW) Pty Ltd [2023] ZNSWCATAP 36 Jones v Dunkel (1959) 101 CLR 298 Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705 Latoudis v Casey (190) 170 CLR 534 Oshlack v Richmond River Council (1998) 193 CLR 72 Vujica v TNM Roofing Pty Ltd [2022] NSWCATAP 305
Texts Cited:	National Construction Code
Category:	Principal judgment
Parties:	In application no. HB 22/1926: Genix Building Pty Ltd (Applicant) Louie Solevski (First respondent) Zaneta Solevski (Second respondent)

	In application no. HS 22/26345:
	Louie Solevski (First applicant)
	Zaneta Solevski (Second applicant)
Representation:	Counsel:
	V R W Gray (Genix Building Pty Ltd)
	Solicitors:
	Corporate and Civil Legal (Genix Building Pty Ltd)
	Hancock Alldis and Roskov Lawyers (Louie and Zaneta Solevski)
File Number(s):	HS 22/19265 and HS 22/26345
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 There are two applications before the Tribunal in these proceedings.

2 The first application in time (HS 22/19265) is an application by Genix Building Pty Ltd for an order pursuant to s 48O(1)(a) of the *Home Building Act* 1989 (NSW) (the Act) that would require Louie and Zaneta Solevski (the homeowners) to pay it a total of $121,895.68 in principal and interest it claims is owing to it under a contract for residential building work dated on or about 2 October 2021 which it contends the homeowners have unreasonably refused to pay. This application was made to the Tribunal on 3 May 2022 (the builder's application).

3 The second application in time (HS 22/26345) is an application by Louie and Zaneta Solevski for an order pursuant to s 48O(1)(b) of the Act that would declare that the amount claimed by the builder is not due and owing to it by them. The homeowners also apply for an order pursuant to s 48O(1)(a) of the

Act that would require the builder to pay them $72,960.36 by way of compensation for the costs they contend they will incur in rectifying the builder's defective work. This application was made to the Tribunal on 14 June 2022 (the homeowners' application).

4 For the reasons set out following, the builder's application has been dismissed. The builder failed to comply with the contracting requirements for residential building work and, by operation of s 10 of the HB Act, is therefore prevented from enforcing the terms of its contract with the homeowners, including in relation to the payment of the contract price. The builder has attempted to recover the amount it claims as outstanding on a quantum meruit, but there is no satisfactory evidence to support this claim.

5 It follows from this that in the context of the homeowners' application they are entitled to an order pursuant to s 48O(1Xb) of the Act that the amount claimed by the builder is not due and owing. The homeowners have also established that the building work carried out by the builder failed to comply with the terms of the contract and was in other respects seriously defective contrary to the statutory warranties contained in s 188 of the HB Act. The builder has been ordered to perform the contract by supply keys and a security door to the homeowners within 7 days, and to otherwise pay the homeowners $70, 720.93 in damages which is the cost they have established they will incur in rectifying the incomplete and defective work.

Procedural history

6 The builder's application was first listed before the Tribunal differently constituted, for directions on 30 May 2022. Mr Gorgi and Mihail Mihajlov attended that listing of the application on behalf of the builder represented by their solicitor, Corporate and Civil Legal. Louie and Zaneta Solevski also attended that listing of the application represented by their solicitor, Hancock, Alldis, Roskov. The dispute could not be resolved. The homeowners indicated to the Tribunal an intention to file a cross-application in addition to defending the builder's claim. Consequently, the Tribunal made directions for the filing

and service of the crossclaim, and for the filing and exchange of evidence in relation to both the builder's and the foreshadowed homeowners' application. Leave was granted to both parties to be represented by an Australian Legal Practitioner in the proceedings. The proceedings were otherwise adjourned to a Special Fixture Hearing.

7 The applications were next listed for a one-day Special Fixture Hearing on 23 November 2022. The hearing proceeded on that occasion but could not be completed. It was adjourned part heard. The hearing was completed at a one day Special Fixture Hearing conducted 20 February 2023.

Evidence and hearing

8 Both parties complied with the Tribunal's directions for the filing and exchange of the documentary evidence that they intended to rely on for the final hearing. That material, as set out in the Registry's 'Submissions and Documents Report was admitted into evidence in its totality. This evidence includes a Memorandum of Conclave between the parties experts dated 19 August 2022, which includes a Scott Schedule. Both parties also complied with the Tribunal's post hearing directions for the filing of submissions. I have considered those submissions.

9 During the hearing the following documents were specifically exhibited:

Builder

(a) Genix Building, Quotation GNX 131, dated 10 September 2021 (Exhibit G1),

(b) Statement of Gorgi Mihajlov dated 20 June 2022 (Exhibit G2),

(c) Statement of Mihail Mihajlov dated 20 June 2022 (Exhibit G3),

(d) Statement of Gorgi Mihajlov dated 7 August 2022 (Exhibit G4),

(e) John Cunniffe, Annexure to the Joint Report dated 19 August 2022 in the matter of Solevski v Genix Building dated 22 August 2022 (MF1, then Exhibit G6),

(f) Article, 'Corrosion of Aluminium and Aluminium Alloys' (Exhibit G7),

(g) 'Mr Giaouris method to replace flashings' (Exhibit G8) (incorrectly referred to as Exhibit G6 in the transcript),

(h) h. Australian Owner Builder Centre, Statement of Attainment, Louie Solevski, 21 August 2021 (Exhibit G9) (incorrectly referred to as Exhibit G7 in the transcript),

(i) bundle of photographs of building works in progress including views of the 'alfresco' area (Exhibit G10) (incorrectly referred to as Exhibit G8 in the transcript).

U) PAC Private Accredited Certifiers completed Complying Development Application form. (Exhibit G11) (incorrectly referred to as Exhibit G9 in the transcript),

(k) PAC Private Accredited Certifiers letter dated 23 September 2021 advising that the application for complying development had been approved (Exhibit G12) (incorrectly referred to as Exhibit G10 in the transcript).

(l) Text message exchange between Mihail Mahajlov and Louie Solevski dated 10 December 2021 (MFl2, then Exhibit G13) (incorrectly referred to in the transcript as Exhibit G11).

Homeowners

(a) GMP Consultants, Engineering plans for the building works dated 08.21 (Exhibit S1)

(b) PAC Private Accredited Certifiers, Approved architectural plans for the building works, 23 September 2021, (Exhibit S2),

(c) Photograph of the formwork for the extension slab of the alfresco area during construction before concrete was poured, including a depiction of Gorgi Mihajlov working on site (Exhibit S3),

(d) Photograph of steel beam being delivered to the interior of level two of the dwelling with Gorgi Mihailov guiding its placement (Exhibit S4),

(e) Photograph of Gorgi Mihalov hosing the ground level building works in the area of the balcony extension (Exhibit S5),

(f) Photograph of the installation of the formwork for the extension slab of the alfresco area during construction before concrete was poured, including a depiction of Gorgi Mihajlov cutting formwork for installation (Exhibit S6),

(g) Photograph of Gorgi Mihajlov aerating concrete of the extension slab shortly after it being poured (Exhibit S7),

(h) Bundle of photographs depicting Gorgi Mahajov engaging in various activities associated with the building works on different dates (as indicated by clothing worn) (Exhibit S8),

(i) WhatsApp message exchange between Mihail Majahlov and Bonde and Natalie Solevski between 27 July 2021 and 2 August 2021 (Exhibit S9),

U) The Construction Advisor (Stan Giaouris), Expert Building Defects Report. 22 July 2022 (Exhibit S1O),

(k) The Construction Advisor (Stan Giaouris), General Building Defects Report), 1O February 2022 (Exhibit S11),

(l) PAC, Mandatory Inspection Report, signed Nabil Hanna, Accredited Certifier, dated 3 March 2022 (Exhibit S12),

(m) Structural concrete plans for [the property] dated 9 February 1982 (Exhibit S13),

(n) Bundle of photographs of window frames taken on 16 February 2023 (Exhibit S14),

(o) NSW Fair Trading, 'Consumer Building Guide' (Exhibit S15),

(p) NSW Fair Trading, 'Role of Registered Certifier, Home Building Act' (Exhibit S16),

(q) NSW Government 'Security of Payments Guide' (Exhibit S17),

(r) Statement of Louie Solevski dated 21 July 2022 (Exhibit S18),

(s) iCare/HBCF Certificate in respect of insurance for residential building work, dated 13/10/2021 (Exhibit S19).

10 The builder called as witnesses Gorgi Mihajlov and Mihail Mihajlov who gave evidence under oath and affirmation respectively. The builder also called its expert John Cunniffe who gave oral evidence under oath. The homeowners called Louie Solevski as a witness who gave oral evidence under oath. They also called their expert, Stan Giaouris, who gave oral evidence under oath. The parties had the opportunity to present their respectively cases, to ask each other questions, and as noted above, to make post hearing submissions to the Tribunal.

Material facts

11 Louie and Zeneta Solevski (the homeowners) are the owners of a residential dwelling located in Rockdale (the property). The dwelling is two levels and is chiefly constructed with brick cavity masonry walls and reinforced concrete

slabs. It was originally constructed during 1981 and 1982 by Louie Solevski's parents. Louie Solevski was involved in the construction work at that time.

12 At the material time for this dispute the homeowners lived at the property with their son, Bonde Solevski, and his wife Natalie Solevski.

13 In or about May 2021 the homeowners were desirous of undertaking a substantial renovation of the property (the building work). A primary objective of this renovation was to create two semi-independent living spaces – one for Louie and Zaneta Solevski on the ground level and one for Bonde and Natalie Solevski on the second level. Although they were not contracting parties for the building works Bonde and Natalie Solevski, and Natalie in particular, had a degree of involvement in building related negotiations and communications for this reason. For the same reason Bonde and Natalie Solevski, as between themselves and Louie and Zanetta Solevski accepted responsibility for costs of the building work that was related to the upper level. The builder was ultimately instructed to itemise this work separately of its invoices.

14 In or about June 2021 the homeowners were introduced to Gorgi Mihajlov and Mihail Mihajlov by Bonde Solevski, who is or was friends with Phillip Mihajlov. another son and brother to Gorgi and Mihail Mihajlov respectively.

15 Gorgi Mihajlov is a civil and structural engineer who conducts a business in that capacity trading as GMP Consultants. GMP Consultants describes itself as 'Civil and Structural Engineers Building Developers & Consultants'. Gorgi Mihajlov is also a director of Genix Building Pty Ltd.

16 Mihail Mihajlov is also a civil and structural engineer. He is the Managing Director of Genix Building Pty Ltd (the builder). Phillip Mihajlov is also a director of Genix Building Pty Ltd.

17 On 16 July 2021 Gorgi and Mihail Mihajlov met the homeowners at the property to discuss their renovation. In his Statement dated 21 July 2022 Mr Solevski states that Gorgi and Mihajlov offered to undertake the renovation on the basis

that they would be a 'one-stop shop'; that is, that they would prepare all building plans, structural engineering plans, undertake the building works, and guide the homeowners through the renovation process by providing consultancy advice when required.

18 In their evidence Gorgi and Mihail Mahajlov do not challenge that reference was made to 'a one-stop shop'. However, Gorgi Mihajlov contends that this was a reference to GMP Consultants guiding the Solevskis though the development consent process and developing architectural and engineering plans for the renovation. He contends that there was no intention in mid-July 2021 that Genix would be engaged to carry out the building works. I note that if that was the case, it is not apparent why Mihail Mahajlov attended the meeting.

19 In any event, it is apparent that the homeowners apprehended that in their dealings with Gorgi and Mihail Mahajov they were dealing with a single entity or at least with two arms of the same entity. In fact, they were not. What occurred in fact is that they engaged GMP Consultants in relation to the development consent process and the development of architectural and engineering plans, and they later engaged Genix Building Pty Ltd in relation to the building work. However, from an objective point of view, Gorgi and Mihail Mahajlov were both involved in the delivery of both contracts. That is denied by Gorgi and Mihail Mahajlov but there are substantial written communications between them and the Solevskis and the Accredited Private Certificate which proves the contrary of that denial. I note that Gorgi Mahajlov trading as GMP Consultants is not a party in these proceedings.

20 On the evidence before me the homeowner's contract with GMP Consultants appears to have been entirely oral. In his Statement dated 7 August 2022 Gorgi Mihajlov states that his obligations under this contract were:

> My obligations were
> i) to prepare the plans and ancillary documents for planning approval.
> ii) to liaise with the Certifier on behalf of the Owners on the requirements the certifier needed to grant approval for renovation and
> iii) to submit the plans and documents through the [Bayside Council] Planning Portal for approval

21 GMP Consultants developed architectural and engineering plans for the renovations in consultation with the Solevskis during August 2021. These plans were finalised on 24 August 2021. The plans included an extension to a ground level veranda to create an alfresco living/dining area. It is not in issue that these plans incorporated the installation of a vapour barrier between the existing veranda slab and the extension slab. In this respect, in his Statement dated 20 June 2022 Gorgi Solevski states:

> 3. The plans and specifications provided for a plastic membrane to be installed between the original slab foundation of the original dwelling and a new slab to be laid for the external front verandah. This membrance was specified in my drawings out of an abundance of caution: it is not mandatory under the National Construction Code (NCC) volume 2 chapter 3.2.2.6 (which is the operative regulation in N.S.W). If the verandah floor slab is not continuous with the internal slab the plastic membrane is not required. Additionally, the external verandah is a non-habitable area thus classifies it as Class 10a. I did not know who would actually build the verandah slab and I was not willing to take any risks with the quality of the workmanship by a builder who was completely unknown to me.

22 Mr Solevski also gave evidence that at their initial meeting with the Mihajlovs, Mihail Mahajlov advised him that he should obtain an Owner Builder's Permit in relation to the work because of the scale of work proposed. He subsequently obtained an Owner Builder Permit on 24 September 2021 after completing an Owner Builder short course of study with an accredited provider. In his evidence Mihail Mahajlov denies that he recommended Mr Solevski become an owner builder. His evidence was to the effect that Mr Solevski informed him of his intention to become and owner builder because he had undertaken such a role in the past and wanted to minimise the costs of the renovation work by engaging trades directly.

23 On my view of the evidence, Mr Solevski always intended to engage several contractors to carry out various pieces of work related to the renovation. He accepted that this was the case under cross-examination. I am satisfied that he communicated that intention to Gorgi and Mihail Mahajlov at their initial meeting; that is, he made it clear that he would not be contracting out the work to a single builder. In that context, it is not surprising that Mihail Mahajlov would have indicated to Mr Solevski that he would require an Owner/Builder permit to

facilitate this. I was repeatedly invited by the homeowners' legal representative to draw an inference adverse to the builder from Mihail Mahajlov giving Mr Solevski this advice. There is no reasonable basis for doing so in the circumstances I have described.

24 On 17 August 2021 the homeowners engaged a Private Accredited Certifier, Nabil Hanna trading as PAC Certifiers in relation to the work. Gorgi Mihajlov gave evidence to the effect that he recommended two potential private certifiers to the homeowners, and they selected one, being PAC Certifiers, which had provided the lowest quote for the work. Mr Solevski gave evidence to the effect that he was presented with a form of appointment of Mr Hanna as Certifier by Gorgi Mihajlov and asked to sign it. He denies ever receiving a quotation from PAC Certifiers before signing the form of appointment.

25 There is a controversy between the parties in relation Mr Hanna's appointment and role as Certifier. The homeowners contend that he is a close associate of Gorgi and Mihail Mahajlov and that he failed to ensure that the building works complied with the plans and specifications for the work and the applicable development consent and building standards.

26 Although PAC Certifiers was formally engaged by the homeowners (they signed his form of appointment), he was paid by GMP Consultants. His costs were billed to the homeowners by GMP Consultants. I accept Mr Solevski's evidence that he had no contact with Mr Hanna before 8 February 2022 when the homeowners were already in dispute with the builder.

27 Gorgi Mihajlov gave evidence to the effect that he inspected the building works with Mr Hanna on 16 October 2021 and on 31 December 2021, but there is no satisfactory evidence that Mr Hanna was present on site at those times. Louie Soleveski said in his evidence that he was present at the building works all day those days and that Mr Hanna did not attend.

28 Gorgi and Mihail Mahajlov both claim in their evidence that it was at the inspection on 16 October 2021 that Mr Hanna agreed that a vapour barrier

between the existing and extension slabs in the alfresco area was not necessary (as to which see following). However, there is no evidence that any opinion of this kind was ever communicated to the homeowners by Mr Hanna at that time.

29 I also accept the homeowners' evidence and submissions that Mr Hanna steadfastly refused to produce any records of his inspections of the site despite repeated demands by the homeowners and their solicitors before 31 March 2022. He also failed to produce documents related to his role in response to a Summons issued to him by the homeowners in these proceedings.

30 The three Mandatory Inspection Reports issued by Mr Hanna in relation to the work are each dated 3 March 2022 but purportedly relate to inspections conducted while the building works were underway, on 16 October 2021, 31 December 2021, and 8 February 2022. The Mandatory Inspection Report that relates to the inspection purportedly conducted on 16 October 2021 states that Mr Hanna attended the site at 5:30am that day and inspected the 'slab' the outcome of which was 'satisfactory (subject to documents being provided)' and that 'no re-inspections required for this inspection'. This Report also states:

> **Additional Inspection Notes:** Structural Compliance Certificate from qualified practicing structural Engineer is required to certify that external front porch footing and slab have been constructed in compliance with Australian Standards and to justify non provision of vapour Barrier under the slab.

31 The builder relies upon a 'structural compliance certificate' issued by GMP Consultants signed by Gorgi Mihajlov to Genix (not the homeowners) dated 19 January 2022 as satisfying the requirement specified by Mr Hanna. However, although the GMP Consultant Certificate is dated 19 January 2022, Mr Hanna did not have it when he issued the Mandatory Inspection Report on 3 March 2022. A copy of the Certificate was not filed with the builder's evidence. Mr Gorgi Mihajlov refers to it in his Statement of 20 June 2022 but does not annex it, stating that it will be provided at the hearing. Why, is not explained.

32 In the circumstances I have described I am satisfied that substantial scepticism should attach to both Mr Hanna's Mandatory Inspection Report and GMP

Consultant's structural compliance certificate. I cannot be satisfied that Mr Hanna inspected the slab on 16 October 2022. There is an inherent unlikelihood that such an inspection would be carried out pre-dawn. That time appears to me to be a concoction to overcome Mr Solevski's evidence that he was present on site that day all day from before ?am until the early evening. I am satisfied that Mr Hanna has acted in concert with the builder, rather than independently of it, including in the context of these proceedings.

33 I note that after his appointment Mr Hanna provided Gorgi Mihajlov and Louie Solevski with advice about how to complete the Bayside Council development consent application form. This included an email to them both dated 17 August 2021 in which he advises them to "write next to "Development description" what you want to build SCA class is 1a". This email is at annexure "E" of the Natalie Solevski's Statement dated 11 July 2022. There is no issue that the homeowners application for development approval to Bayside Council specified that the building class for the work was 1A (being a habitable dwelling) and that Bayside Council granted development approval on that basis on 23 September 2021.

34 The application to Bayside Council for development approval specified that the cost of the work was $44,000.00. Because of that the development was not required to comply with BASIX requirements which are triggered by developments costing $50,000.00 or more. There is now a controversy between the parties because the cost of the building works significantly exceeded $50,000.00 and some of the windows installed do not meet BASIX requirements and must be replaced. The parties blame each other for this circumstance.

35 The homeowners contend that the development approval application to Bayside Council was presented to them for signature by Gorgi Mihajlov with all details already filled in by him. I did not understand that to be in issue. In his Statement dated 20 June 2022 Gorgi Mahajlov states the following in relation to this:

> 2. ... Just prior to (also around August 2021) lodging the Plans for approval I was advised by Mr Solevski that the works he intended to do or pay for third parties to complete would be less than $50,000 and the application was completed in accordance with his instructions. This mean that there would be no need for a BASIX.

36 I note that at that time Gorgi Mihajlov was interacting with the homeowners in his capacity as Principal of GMP Consultants, not on behalf of the builder (at least on a contractual basis). He developed the plans and specifications for the renovation in that capacity which were complete or virtually complete at the time the Bayside Council application for development approval was made. Gorgi Mihajlov is a structural and civil engineer, and he is a director of a building company. He therefore could not possibly have believed that the renovation work for which he had developed plans would cost less than $50,000.00, given the scale of work involved. There is no objective evidence that he ever advised the homeowners in relation to BASIX requirements or that he received any instruction from Mr Solevski as Owner/Builder or otherwise that they would not apply or should be ignored. The only objective evidence in relation to this issue is an email dated 24 August 2021 in which Gorgi Mihajlov advises Natalie Solevski a list of requirements for the submission of the development consent application to Bayside Council. Item 5 in the list referred to BASIX against which he has written "no need".

37 I am satisfied on the basis set out above that the primary failure of the building work to comply with BASIX requirements was Gorgi Mihajlov in his capacity as Principal of GMP Consultants. However, the difficulty for the homeowners is that Gorgi Mihajlov in his capacity as Principal of GMP Consultants is not a respondent to these proceedings. No order can be obtained against him in relation to any damage suffered because of his negligent advice. I consider separately following whether any responsibility for the failure of the building work to comply with BASIX requirements attaches to the builder.

38 On 27 August 2021 Genix Building Pty Ltd provided the homeowners with its first quotation for the renovation work in the amount of $105,620.00. This subsequently underwent two revisions with a final quotation for the work being provided on 15 September 2021 in the amount of $248,300.00 (the building

work). This quotation was signed by Mr Solevski on 2 October 2021 and by Ms Solevski on 8 October 2021.

39 The quotation is dated 10 September 2021 and it is in the form of a 6 page letter addressed to the homeowners signed by Mihail Mihajlov in his capacity as Managing Director of Genix Building Pty Ltd. The letter uses the words 'quotation' and 'tender' interchangeably. The body of the letter sets out the scope of works for the building work. It itemises, relevantly:

> Consultancy Fees
> • Consulting with a qualified structural engineer
>
> Excavation & Concrete
>
> • Install moisture barrier under concrete slab
>
> Windows
> • Supply & Install New semi-commercial Aluminium frames to the following:
> [windows are identified by location and size]
>
> • All proposed windows which are to be altered or changed will be removed and appropriate taken to waste centre.
> • New flashings to be installed according to NCC.
>
> Exclusions
>
> • No allowance has been made for .... waterproofing ... unless mentioned above.
> ... Any other charges & fees that are not noted in this tender are excluded unless specified.

40 The quotation sets out 5 stages of work as follows:

> Stage 1: Deposit (10%)
> Stage 2: Install Steel beams on internal ground floor & concrete slab (50%)
> Stage 3: Install Window and Brick work (25%)
> Stage 4: Install Steel beam on first floor & brickwork (10%)
> Stage 5: Final (5%).

41 Attached to the letter is 1 page on which is set out 5 'Terms & Conditions'. They include the following: '[t]he client authorises Genix Building Pty Ltd to liaise with

necessary consultants and authorities as required to execute the works." Following that page is a signature page styled as a 'Client Signed Acceptance' and 'Builder's Signed Acceptance'. No other documents are attached to the quotation/tender. No other document was created to evidence the agreement for the building works.

42 On 5 October 2022 the builder rendered an invoice on the homeowners (GNX131) which itemised 'deposit' in the amount of $27,313.00 which had a payment due date of 12 October 2021. The homeowners paid that invoice on 8 October 2021.

43 The building work commenced on 11 October 2021.

44 There is a controversy between the parties as to what role, if any, Gorgi Mahajlov had in relation to the building works carried out by Genix as distinct from the pre-building work carried out by GMP Consultants.

45 Both Gorgi and Mihail Mahajlov were present on site on 11 October 2021. In their Statements dated 21 July 2022 and 11 July 2022 Louie and Natalie Solevski state that Gorgi and Mihail Mahajlov usually attended the site together, that Gorgi Mahajlov and was observed to be engaging in various activities consistent with him directing or supervising the work. The homeowners have submitted an abundance of photographic evidence that depicts Gorgi Mahajlov on the building site on different days (as indicated by his different dress) and directly carrying out work.

46 In his Statement dated 20 June 2022 Gorgi Mahajlov states: "I did not formally supervise the building works but I was on-site with Mihail some of the time as a matter of professional interest as I drafted the Plans and to provide inspections". However, in his Statement dated 7 August 2021 Gorgi Mahajlov states in reply to Louie Solevski's Statement:

> ... Genix Building asked me to attend the site to inspect the demolition, other structural aspects and the erection of props. I have been in the construction industry for over 40 years and know many tradesmen who were onsite. I was

advising Genix Building on engineering matters, which also involved me in assisting on the job.
I don't have any agreement or contract with the Solevskis to provide consultancy advice to them. My obligation in the construction process was to provide consultancy advice to Genix Building only.

47 In his Statement in reply to Louie Solevski's Statement dated 7 August 2022 Mihail Mahajlov states the following in relation to Gorgi Mahajlov's role in the building work: "Gorgi Mihajlov is the supervising engineer engaged by Genix Building for Genix Building and not for the Solevskis".

48 I am satisfied based on the above that despite his evidence to the effect that he had only marginal involvement in the building works, Gorgi Mihajlov was substantially involved in the work in supervisory, consultancy and manual capacities. In his consultancy capacity, his engagement was by the builder, not the homeowners. He was not acting for the homeowners at that time. That is the builder's own case and it is a matter of some significance for the builder's s 18(f)(1) defence.

49 On 13 October 2021 an Icare Home Building Compensation Fund Certificate in respect of insurance for residential building work was issued in relation to the building work. A copy of this certificate was forwarded to Mr Solevski and Ms Natalie Solevski by email on 14 October 2021.

50 On or about 16 October 2021 work commenced on the extension of the ground floor veranda to create the alfresco living area. Mr Gorgi Mahajlov says the following about this in his Statement dated 20 June 2022:

> 6. On 16 October 2021 Mr Nabil Hanna of PAC Certifiers and I inspected the external floor slab at Mr Solevski's property. I saw that the verandah slab was not contiguous with the internal habitable floor slab under the original dwelling and therefore was a Class 10a slab for the purposes of the NCC and therefore did not require a plastic membrane between the slabs. I was satisfied that the external verandah floor slab had been built in a good and tradesman like manner and complied with all applicable building codes and the requirements of good building practice.
> 7. On 16 October 2021 I certified the external verandah slab as compliant with applicable codes....

51 On or about 23 October 2021 the builder during demolition works, the builder's labourers demolished the hubs of the glass sliding doors on the lower level (2) and upper level (1). This was done in error. The builder reinstated the hobs but did not waterproof the damaged areas.

52 On 25 October 2021 the builder rendered an invoice (GNX131-2) on the homeowners which itemises "progress payment 2 Downstairs as per Building Contract dated 02.10.2021" and "progress payment 2 Upstairs as per Building Contract dated 02.10.2021" in the amount of $136,565.00. That invoice was paid by the homeowners.

53 On 17 November 2021 the builder rendered an invoice (GNX459-3) on the homeowners which itemises "Variation Works Skip Bin Hire – Mixed 4m3" and "Variation Works Upstairs Window – Changing sliding window to full panel fixed window in the dining room" in the amount of $1,375.00. That invoice was paid by the homeowners.

54 On or about 10 December 2021 the builder and the homeowners fell into dispute in relation to the installation of the windows. The homeowners contend that they noticed that the windows that had been installed were larger than those specified in the quotation/contract. Louie Solevski gave evidence to the effect that Mihail Mahajlov informed him that the windows were larger because they were 'full commercial windows' and that the specified 'semi-commercial widows has not been installed as [the builder] was unable to obtain the appropriate warranty from the manufacturer/supplier. Mr Solevski goes on to give the following evidence in relation to the windows:

> 28. The incorrect installation of the windows caused perimeter gaps which were too large to be rendered. This required gyprock to be installed on the ground floor and first floor.
> 29. The property is a full brick structure with all walls internally having been rendered when it was originally built. There are no structural problems with the render. However, when the new windows and glass sliding doors were incorrectly installed across the cavity walls causing the perimeter gap, it became necessary to have gyprock installed on the ground and first floor at a cost of approximately $18,500.00

55 In his Statement in reply to Louie Solevski's Statement dated 7 August 2022 Mihail Mahajlov denies that he ever discussed the size of the windows with Mr Solevski. He also states:

> I did inform Louie Solevski that I upgraded the window frames to full commercial and advised him that I would not charge a variation to which we both agreed. The windows were installed without objection

There is no written variation to the contract in relation to the change in the type of window, and there is otherwise no objective evidence that supports Mihail Mahajlov's assertion that he notified the homeowners of this change and obtained their agreement to it.

56 In mid-December 2021 there was an escalation in the dispute between the homeowners and the builder in relation to the windows when the homeowners discovered that new flashings had not been installed in all windows as they believed had been provided for by the contract. This resulted in the builder installing a damp course beneath each window to appease the homeowners. However, the homeowners were not satisfied with this work which led to a further escalation in the dispute.

57 Also at that time the homeowners became aware from photographs taken during the work that no vapour barrier had been installed in the laying of the alfresco extension slab. Louie Solevski confronted Gorgi Mahajlov about this at a meeting on site held on 17 January 2022. Gorgi Mahajlov confirmed that no vapour barrier had been installed but asserted that this was not required.

58 On 14 January 2022 the builder rendered an invoice (GNX131-4) on the homeowners which itemised "progress payments 3 and 4' to Louie and Natalie 'as per contract' in the total amount of $95,595.51. The homeowners paid that invoice.

59 On 15 January 2022 Mr Solevski emailed Mihail Mihajlov to complain about the quality of the building work, specifying 11 heads of defective work, including in relation to the alfresco area vapor barrier and window flashings. That email ends with the words "we are happy to work through this and to come up with

solutions". Gorgi and Mihail Mihajlov attended the site on 17 January 2022 and carried out some rectification works. They also met with Mr Solevski and an argument ensued about the vapour barrier and window flashings among other things. An outcome of the discussions was that the builder and homeowners would retain independent experts to inspect and advise them in relation to the work.

60 The homeowners retained Mr Stan Giaouris, who is their expert in these proceedings. He attended the site and issued a critical defects report on or about 4 February 2022, which the homeowners provided to the builder. The builder engaged Dante Dela Cruz to inspect the work. He attended the site on 8 February 2022 in the presence of Mr Solevski and Natalie Solevski. The homeowners attempted to give him a copy of the builder's quotation but were prevented from doing so by Gorgi Mihajlov which resulted in a dispute.

61 On 20 January 2022 the builder rendered an invoice (GNX131-5) on the homeowners which itemised "progress payment 4 Louie" and "progress payment 4 Natalie" in the total amount of $27,313.00. The invoice specified a payment due date of 30 January 2022. The homeowners have not paid that invoice.

62 On 27 January 2022 the builder rendered an invoice (GNX131-6) on the homeowners which itemised "Stage 3 Progress Payment Installation of Windows & Brickwork as per contract" twice in the total amount of $67,682.51. The invoice specified a payment due date of 6 February 2022. The homeowners have not paid that invoice.

63 On 8 March 2022 the builder rendered an invoice (GNX131-7) on the homeowners which itemised "Stage 5 Progress Payment – Final Payment" and two deductions, being in relation to rock boulders ($500.00) and Aluminium Gate ($1,200.00) in the total amount of $11,956.50. The homeowners have not paid that invoice.

64 It is invoices GNX131-5, GNX131-6, and GNX131-7 that are the subject of the builder's application. It claims the total of those invoices plus interest. I note that the quotation signed by the parties does not include any term as to interest on late payment.

65 There is a lack of clarity as to the status of the contract for the building work. The terms and conditions incorporated into the quotation do not include any provision related to termination of contract. There is no evidence that either party has purported to terminate the contract in writing or otherwise. As far as I can ascertain on the state of the evidence the builder last carried out work on site on 17 January 2022. On 16 February 2022 the builder notified the homeowners that it would be removing its perimeter security fencing later that day. Mr Solevski objected to that occurring asserting that the dispute remained unresolved, but the builder did so nevertheless. That might have constituted a repudiation of the contract, but if it did, the homeowners did not elect to terminate the contract.

66 In his evidence Mihail Mahajlov suggests that the work reached practical completion in mid-January 2022. However, it is not in issue that the security door had not been installed and that no keys to the windows had been supplied by that date or since. I therefore do not consider it open to me to find that the contract had been completed, even subject to the builder's residual obligations in relation to defective work.

67 The homeowners' position, as I understand it, is that there never was a contract only a quotation in contemplation of contract. That is because, it is said, the quotation signed by the parties, does not meet the contract requirements of the HB Act, s 7 in particular. However, a distinction is to be drawn between a contract in the general sense and a contract that complies with the requirements of the HB Act. In this case there was certainly a contract subsisting between the parties notwithstanding (as I determine following) that it did not comply with the requirements of the HB Act.

68 I therefore reach the conclusion that the contract between the parties remains on foot.

Contentions of the parties

The builder's claim

69 The builder contends that it has an enforceable contract with the homeowners that it is entitled to sue on. It contends that it has substantially completed the work required by the contract and itemised in its invoices GNX131 5 – 6 and -7 (the disputed invoices) and is therefore entitled to a money order that will require those amounts to be made. It contends it is also entitled to interest on those amounts in accordance with s 100 of the *Civil Procedure Act* 2005 (NSW). In the alternative, the builder contends that it is entitled to an order for the payment of an amount equivalent to its invoices assessed on a quantum meruit.

70 The homeowners contend that quotation for the work is not a contract because it does not comply with the requirements for the form of contract imposed by the HB Act. They contend, including based on s 10 of the HB, that the builder has no cause of action against them available in contract. They also contend that the builder failed to comply with the insurance requirements of the HB Act by commencing work before a contract of insurance was in place and so is prevented from suing on the contract on that additional basis.

71 In relation to the builder's alternative claim on a quantum meruit the homeowners contend that this cause of action has not been properly pleaded or proved. Additionally, they contend that s 94(1)(b) of the HB Act prevents the builder from maintaining this cause of action despite s 11 because the builder failed to comply with the HB Act's insurance requirements before commencing work.

The homeowners' claim

72 The homeowners claim that the building works carried out by the builder are incomplete and defective (defects). They seek damages for breach of contract and the s 188 warranties in relation to those defects. Originally 13 defects were

pleaded and have been the subject of conclave by the parties' experts. However not all are pressed. Those that remain in issue and the damages claimed (excluding builder's margin and GST) are:

(i) the absence of a vapour barrier between the existing and extension slab in the alfresco area ($10,824.00)

(ii) the failure to install window flashings on all windows replaced under the contract ($36,810.00),

(iii) debris left in masonry cavity after window installation ($1,368.00),

(iv) the failure to install sill flashings to glass doors (included in ii. above),

(v) the failure to clean garage brickwork ($420.00),

(vi) damage to entry door ($1,800.00),

(vii) failure to supply rear security door ($1,500.00)

(viii) failure to supply keys to windows that were installed ($900.00)

(ix) failure to comply with BASIX requirements in relation to thermally performing glass ($3,800.00).

to the total of these amounts ($57,422.00) is added a 24% builder's margin ($13,781.28) then to the total of those two amounts ($71,203.28) is added 10% GST ($7,120.32) resulting in a final total claim of $78,323.60.

73 The builder denies that its work is incomplete and defective. It denies any breach of contract or the s 188 warranties in relation to the work. It contends that despite the plans and specifications for the work and what is stated in the

contract it was not obliged to install a vapour barrier between the existing and extension slabs in the alfresco area because it received engineering advice that this was not required. It denies that the contract required it to replace all window flashings and argues that this would have constituted waste as the existing flashings did not require replacement. It denies leaving any waste in the wall cavities and says that the removal of such waste did not fall within the perimeters of the contract. It admits that the rear security door and window keys have not been supplied but says these are in its possession or control and can be supplied. It admits that garage brickwork was left unclean and is willing to return to site to pressure clean the affected area. It denies any responsibility for the failure of the windows to meet BASIX requirements. It submits that no occasion arises for the addition of a builder's margin or GST to any damages awarded because Me Solevski is an Owner/Builder who would not incur such costs.

Jurisdiction

74 There is no issue that the Tribunal has jurisdiction to hear and determine this dispute as a 'building claim' in accordance with the provisions of the *Home Building Act* 1989 (NSW).

Applicable law

75 Part 2 of the HB Act deals with the regulation residential building work and specialist work.

76 Section 6(1)(a) provides, relevantly, that ss 7 – 7E apply to a contract under which the holder of a contractor licence undertakes to do, in person, or by others, any residential building work or any specialist work.

77 Section 7 sets out the requirements for the form of contracts other than for small jobs. It provides:

> 7 Form of contracts (other than small jobs)
> (1A) This section applies to a contract only if the contract price exceeds the prescribed amount or (if the contract price is not

known) the reasonable market cost of the labour and materials involved exceeds the prescribed amount. The **"prescribed amount"** is the amount prescribed by the regulations for the purposes of this section and is inclusive of GST.

(1) A contract must be in writing and be dated and signed by or on behalf of each of the parties to it.

(2) A contract must contain –

(a) the names of the parties. including the name of the holder of the contractor license shown on the contractor licence, and

(b) the number of the contractor license. and

(c) a sufficient description of the work to which the contract relates, and

(d) any plans and specifications for the work, and

(e) the contract price if known, and

(f) any statutory warranties applicable to the work, and

{f1) the cost of cover under Part 6 or 68 (if insurance is required under Part 6), and

(g) in the case of a contract to do residential building work – a conspicuous statement setting out the cooling-off period that applies to the contract because of section ?BA,

(h) in the case of a contract to do residential building work (other than a construction contract to which the *Building and Construction Industry Security of Payment Act 1999 applies)* – any details of any progress payments payable under the contract, and

(i) in the case of a contract to do residential building work – a statement that the contract may be terminated in the circumstances provided by the general law and that this does not prevent the parties agreeing to additional circumstances in which the contract may be terminated, and

U) any other matter prescribed by the regulations for inclusion in the contract.

(3) The contract must comply with any requirements of the regulations.

(4) If the contract price is known, it must be stated in a prominent position on the first page of the contract.

(5) If the contract price is not known or may be various under the contract, the contract must contain a warning to that effect and an explanation of the effect of the provision allowing variation of the prince. The warning and explanation must be placed next to the prince if the price is known.

(6) A contract must not include in the contract the name of any person other than the holder of a contractor licence as, or so it may reasonably be mistaken to be, the holder's name,

(7) This section does not prevent the holder of a contractor license with a business name registered under the *Business Names Registration Act 2011* of the Commonwealth from also referring in such a contract to the business name.

(8) This section does not apply to –

(a) a contract that is made between parties who each hold a contractor license as is for work that each party's contractor license authorises the party to contract to do, or

(b) a contract to do specialist work that is not also residential building work.

78 The 'prescribed amount' for the purposes of s 7(1A) is found in s 5(1)(b) of the *Home Building Regulation* 2014 (NSW) (the Regulation). It is $20,000.00.

79 Section 10 of the Act deals with the enforceability of contracts for residential building work and other rights. It provides:

10 Enforceability of contracts and other rights

(1) A person who contracts to do any residential building work, or any specialist work, and who so contracts –

(a) in contravention of section 4 (unlicensed contracting), or

(b) under a contract to which the requirements of section 7 apply that is not in writing or that does not have a sufficient description of the work to which it relates (not being a contract entered into in the circumstances described in section 6(2)), or

(c) in contravention of any other provision of this Act or the regulations that is prescribed for the purpose of this paragraph,

is not entitled to damages or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, and the contract is unenforceable by the person who contracted to do the work. However, the person is

liable for damages and subject to any other remedy in respect of a breach of the contract committed by the person.

80 However, s 11 of the Act provides:

> **11 Other rights not affected**
>
> This Division does not affect any right or remedy that a person (other than the person who contracts to do the work) may have apart from this Act.

81 Part 2C of the Act contains the statutory warranties that apply in respect of residential building work and specialist work. In this respect, s 188 in that Part provides:

> **188 Warranties as to residential building work**
>
> (1) The following warranties by the holder of a contractor license, or a person required to hold a contractor license before entering into a contract, are implied in every contract to do residential building work –
>
> (a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,
>
> (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
>
> (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
>
> (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
>
> (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
>
> (f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the older of the contractor

license or person required to hold a contractor licence or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgement.

(2) The statutory warranties implied by this section are not limited to a contract to do restdential building work for an owner of land and are also implied in a contract under which a person (the **"principal contractor")** wo has contracted to do residential building work contracts with another person (a **"subcontractor"** to the principal contractor) for the subcontractor to do the work (or any part of the work) for the principal contractor.

82 Secrion 18BA of the HB Act contains the duties of a person having the benefit of a statutory warranty. It provides, relevantly:

18BA Duties of person having benefit of statutory warranty

(1) Breach of a statutory warranty implied in a contract constitutes a breach of contract and accordingly –

(a) a party to the contract who suffers loss arising from the breach has a duty to mitigate their loss, and

(b) the onus of establishing a failure to mitigate loss is on the party alleging the failure.

(3) The following duties apply to a person who has the benefit of a statutory warranty but do not limit any duty the person has to mitigate loss arising from breach of a statutory warranty.

(a) when a breach of the statutory warranty becomes apparent, the person must make reasonable efforts to ensure that a person against whom the warranty can be enforced is given notice in writing of the breach within 6 moths after the breach becomes apparent.

(b) the person must not unreasonably refuse a person who is in breach of the statutory warranty such access to the residential building work concerned as that person may reasonably require for the purpose of or in connection with rectifying the breach (the "**the duty to provide reasonable access").**

(5) If a failure to comply with a duty under this section is established in proceedings before a court or tribunal concerning a breach of a statutory warranty, the failure is a matter that the court or tribunal may take into account. If the failure is a failure to comply with the duty to allow reasonable access, the court or tribunal must take the failure into account.

83 Section 18F contains certain defences that are potentially available to a builder in proceedings concerning an alleged breach of a statutory warranty. It provides, relevantly:

> 18F Defences
>
> (1) In proceedings for a breach of a statutory warranty, it is a defence for the defendant to prove that the deficiencies of which the plaintiff complaints arise from –
>
> (a) instructions given by the person for whom the work was contracted to be done contrary to the advice of the defendant or person who did the work, being advice given in writing before the work was done,
>
> (b) reasonable reliance by the defendant on instructions given by a person who is a relevant professional acting for the person for whom the work was contracted to be done who is independent of the defendant, being instructions given in writing before the work was done or confirmed in writing after the work was done,
>
> (2) A relevant professional is independent of the defendant if the relevant professional was not engaged by the defendant to provide any service or do any work for the defendant in connection with the residential building work concerned.
>
> (4) In this section, "relevant professional" means a person who
>
> (a) represents himself or herself to be an ... engineer ...

84 Part 3A of the HB Act deals with the resolution of building disputes and building claims. Section 48MA in that Part establishes a "preferred outcome" in proceedings involving an allegation of defective residential building work:

> 48MA Rectification of defective work is preferred outcome in proceedings
>
> A court or tribunal determining a building claim involving an allegation of defective residential building work or specialist work by a party to the proceedings (the "responsible party") is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome.

85 Part 6 of the HB Act deals with insurance requirements in relation to residential building work. In this respect s 92 in that Part provides, relevantly:

92 Contract work must be insured

(1) A person must not do residential building work under a contract unless—

(a) a contract of insurance with complies with this Act is in force in relation to that work in the name under which the person contracted to do the work, and

(b) a certificate of insurance evidencing the contract of insurance, in a form approved by the Authority, has been provided to the other party (or one of the other parties) to the contract.

Maximum penalty— 1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

(2) A person must not demand or receive a payment under a contract for residential building work {whether as a deposit or other payment and whether or not work under the contract has commenced) from any other party to the contract unless –

(a) a contact of insurance that complies with this Act is in force in relation to that work in the name under which the contracted to do the work, and

(b) a certificate of insurance evidencing the contract of insurance, in a form approved by the Authority, has been provided to the other party (or one of the other parties) to the contract.

Maximum penalty— 1,000 penalty units in the case of a corporation and 200 penalty units in any other case

(3) This section does not apply if the contract price does not exceed the amount prescribed by the regulations for the purposes of this section or (if the contract price is not known) the reasonable market cost of the labour and materials involved does not exceed that amount.

(4) If the same parties enter into two or more contracts to carry out work in stages the contract price for the purposes of subsection (3) is taken to be the sum of the contract prices under each of the contracts.

86 The amount prescribed by the HB Regulation for the purposes of s 92(3) is $20,000.00 inclusive of GST: s 53.

87 Section 94 of the HB Act prescribes the effect of the failure to insure residential building work in accordance with the requirements of that Act. It provides:

94 Effect of failure to insure residential building work

(1) If a contract of insurance required by section 92 is not in force, in the name of the person who contracted to do the work, in relation to any residential building work done under a contact (the **"uninsured work),** the contractor who did the work –

(a) is not entitled to damages, or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, in relation to that work, and

(b) is not entitled to recover money in respect of that work under any other right of action (including a quantum meruit)

(1A) Despite section 92(2) and subsection (1), if a court or tribunal considers it just and equitable, the contractor, despite the absence of the required contract of insurance, is entitled to recover money in respect of that work on a quantum meruit basis.

(1C) Without limiting the factors that a court or tribunal may consider in deciding what is just and equitable under subsection (1A) –

(a) in relation to any contract – the court or tribunal may have regard to the impact on the resale price of the property if no contract of insurance is provided, and

(2) However, the contractor remains liable for damages and subject to any other remedy in respect of any breach of the contract committed by the contractor.

(3) Residential building work that is uninsured work at the time the work is done ceases to be uninsured work for the purposes of this section if the required contract of insurance for the work is subsequently obtained.

Consideration

The builder's application

88 To determine the outcome of this application the Tribunal must pose and answer the following questions:

(a) Does the builder have a maintainable claim in contract against the homeowners?

(b) If the answer to (a) is "no" does the builder have a maintainable claim against the homeowners on a quantum meruit?

(c) If the answer to (b) is "yes" has any entitlement to payment on a quantum meruit assessment been established.

89 Both parties approach the question of whether the builder has a maintainable claim in contract on a substantially misconceived basis. In effect, they characterise the issue for determination as whether a contract between the parties existed. In this respect the homeowners contend that the quotation is only that and was given in contemplation of contract. The builder contends that the quotation became a contract binding upon the homeowners upon it being signed by them. It also points to its performance of the work set out in the contract and the payments made to it by the homeowners in relation to that work as evidence of a contract existing. That being the case, it asserts an entitlement to sue on that contract.

90 There can be no issue that a contract existed between the parties on a common law basis on and from 2 October 2021 when the quotation was signed on the ('accepted') by Mr Solevski. There can be no issue on the evidence that on that date there had been an offer and acceptance for valuable consideration in circumstances where it was the clear intention of the parties to enter binding legal relations.

91 However, the existence of a common law contract between the parties does not give rise, so far as the builder is concerned, to a maintainable cause of action against the homeowners in contract because of the consumer protection regime that is embedded in Part 2 of the HB Act. By operation of s 1O in that Part the builder will only have a maintainable cause of action in contract if, relevantly, it has complied with the requirements of s 1O(1)(b).

92 In this case the builder did not comply with those requirements. In this respect there is no issue that this is a contract to which s 7 of the Act applies because the value of the work exceeds the relevant threshold for the operation of that section ($20,000.00).

93 Section 7(1) provides that, relevantly, that a contract for residential building work "must" be in writing. Section 7(2) sets out what a contract for residential building work "must contain". That is, read with s 7(1), that must be in writing and part of the contract. The contract is in writing in this case but it does not contain any statement about the statutory warranties that are applicable to the work (s 7(2)(f)), the cost of home building compensation fund insurance (s 7(2)(f1)), any statement about the mandatory cooling off period (s 7(2)(g)), or the required statement as to how the contract may be terminated (s 7(2)(i)). These mandatory elements of a contract for residential building work are therefore not in writing as required by s 7(1). Section 10(1)(b) is therefore engaged. The builder cannot sue on the contract because it is not in the mandatory written form of a contract for residential building work.

94 It was also put to me by the homeowner's representative that the contract did not contain a sufficient description of the work to which the contract relates (s 7(2)(c), and any plans and specifications for the work (s 7(2)(d). I am not satisfied that the contract fails to include a sufficient description of the work. Fairly read each component of work is described in detail. The contract does not incorporate the architectural and engineering plans for the renovation developed by GMP Consultants. However, it does refer four times to aspects of work being done in accordance with the "structural plans" developed by GMP Consultants dated August 2021. I consider it arguable that the contract "contains" these plans by referring to them in writing in this way. I am therefore not satisfied that the contract fails to contain what is required by s 7{2){c) and (d). Section 10(1)(b) is therefore not engaged on this additional basis. However, this leads to no difference in outcome because s 10(1)(b) is engaged on the separate basis that mandatory components of a contract for residential building work are not in writing.

95 The builder sought to obtain a benefit from a recent decision of an NCAT Appeal Panel in *Dyjecinska v Step-Up Renovations (NSW) Pty Ltd* [2023] ZNSWCATAP 36 (Dyjecinka). That case concerned an attempt by a builder to sue on a contract that was in standard form (Master Builders Association of NSW Residential Building BC4 Contract which the homeowner had not signed.

There was no issue that the form of contract complied with the requirements of section 7, the only issue was whether s 10(1) was engaged by the homeowner's failure to sign it. The Tribunal at first instance held that s 10(1) was not engaged because that section did not prescribe the requirement for signature as a trigger for its operation. That decision was upheld on Appeal, in the unusual circumstance where the two member panel were split and the outcome was determined by the presiding member's vote.

96 *Dyjecinska* is clearly distinguishable from the present case. The issue in this case is not whether a builder can sue on a fully conforming contract for residential building work that has not been signed. Rather, it is whether a builder can sue on a contract that does not contain in writing several of the mandatory provisions of a contract for residential building work. Section 10(1) does not prescribe a signature as a trigger for the operation of the section, but it does plainly prescribe the requirement for writing.

97 The matters prescribed by s 7(2) as mandatory components of a contract for residential building work form part of a consumer protection regime determined by Parliament to operate in the home building industry: *Vujica v TNM Roofing Pty Ltd* [2022] NSWCATAP 305 at [71]. As s 10 makes clear, Parliament clearly intended that there would be potentially a harsh consequence in specified circumstances for a builder that failed to comply with the contracting requirements of that system of consumer protection. For the reasons stated above that harsh consequence crystalises in this case. By operation of s 10(1)(b) the builder cannot sue on the contract.

98 Section 11 of the HB Act preserves the right of a builder deprived of an ability to sue on the contract by s 10 to maintain a claim against a homeowner on a quantum meruit.

99 At this juncture, on the homeowner's case, a further issue arises. It is contended that the builder is disentitled by operation of s 94(1Xb) of the HB Act from maintaining a cause of action against the homeowners on a quantum meruit because it failed to comply with the mandatory home compensation fund

insurance requirements specified by s 92 of the Act. That is, the builder received a deposit from the homeowners, and commenced work, before a certificate of insurance was in place and a copy of it provided to the homeowners.

100 This submission cannot be accepted because of the operation of s 94(3) of the HB Act. Section 94(1)(b) only operates in relation to "uninsured work". By operation of s 94(3) residential building work that is uninsured work at the time the work is done ceases to be uninsured work for the purposes of s 94 if the required contract of insurance is subsequently obtained. It is not in issue that a certificate of insurance was issued in relation to the work on 13 October 2021 and provided to the homeowners on 14 October 2021. The work was not "uninsured work" from that date. Consequently, the builder is not prevented by s 94(1) from pursuing a claim in quantum meruit.

101 The homeowners complain that the builder's case in quantum meruit is irregular. It was not pleaded as part of the builder's application. Rather it is raised as a 'defence' to the homeowners' application. Consequently, the homeowners have not had a straightforward opportunity to reply to it. At the outset of the hearing on day 1, counsel for the builder advised the Tribunal that he relied on the contract and did not intend to pursue a case in quantum meruit. However, later in the hearing he advised that he was instructed to pursue a claim on a quantum meruit in the alternative. Notwithstanding that, a claim in quantum meruit is not referred to in the builder's final submissions. Those submissions are limited to the builder's case in contract.

102 It may be accepted that the presentation of the builder's quantum meruit case was unsatisfactory. Given the absence of any final submission about it, I cannot be certain if it is even still before me. However, it will consider it on its merits. NCAT is not a Court of pleadings. Its' procedure is intended to be informal subject to observance of the rules of natural justice. I am satisfied that by the time submissions closed, the homeowners have had sufficient opportunity to respond to the builder's case in quantum meruit.

103 The real difficulty for the builder on a quantum meruit is evidentiary.

104 This is not a case whether the builder has not been paid at all in relation to the work performed. The invoices in dispute are GNX131 -5 -6 and -7. In relation to those invoices the onus is on the builder to establish the reasonable (or fair) value of the work itemised. It is not enough for the builder to merely assert that the work has been done and that a claim for payment has been made. It must prove the value of that work claimed with evidence.

105 In this respect the invoices themselves offer little assistance to the builder. They provide no real detail of the work on which they are purportedly based. With respect to Invoice GNX131-5 it itemises 'progress payment 4', but progress payment 4 is also itemised in Invoice GNX131-4, which was paid by the homeowners. GNX131-6 itemises 'progress payment 3' but that is also itemised in Invoice GNX131-4, which was paid by the homeowners. It is thus not possible to know what falls within the scope of those two unpaid invoices, even by reference to the contract. GNX131-7 is itemised as a final payment in accordance with the Schedule of progress payments set out in the contract. It is therefore not referable to any particular work.

106 No invoices or receipts for materials purchased or equipment hire, or evidence of labour costs in the form of rosters, timesheets, payroll, or the like have been submitted in support of the builder's quantum meruit case. The homeowners' legal representative submits that his office repeatedly requested the builder's solicitors to produce such evidence to him in the prehearing period, but they failed to do so. That allegation was not refuted in argument.

107 The builder's quantum meruit claim was not the subject of any evidence by its witnesses, with the exception of its expert Dr Cuniffe who expresses an opinion about the value of the total work at paragraph 7.53 of his Report. Dr Cunniffe did not give oral evidence in relation to that opinion.

108 These are proceedings to which NCAT's Procedural Direction 3: Expert Evidence applies (being proceedings in the Consumer and Commercial

Division under the *Home Building Act* 1989 (NSW)) where the claims are greater than $30,000.00). Dr Cuniffe is relied upon as an expert by the builder. It is therefore necessary that his evidence satisfies the requirements for the evidence of an expert established in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [64]. He must make plain the facts, or assumptions as to fact, upon which his opinion is based. He does not do so. He merely asserts a sum of money in relation to a category of work. He does not explain how he has arrived at the sum of money stated. This is evident in the following extract from paragraph 7.53 of his Report:

> 7.53 I am of the opinion that the works carried out by GENIX to be of a competent building contractor, and have calculated the value of the works as follows:
> Demolitions – using temporary supports and skip bins, manually removing bricks, tiles, rocks, cutting openings, and disposing of aluminium windows to waste centre ... $49,400
>
> Steel beans and posts (includes crane hire) ... $5,000
>
> [all other costs itemised are in one of these two forms).

109 Strictly speaking, Dr Cuniffe's evidence as to quantum meruit is inadmissible on this basis. However, it was admitted. Nevertheless, the underlying reason for its potential inadmissibility means that it is of no real probative value to the builder's quantum meruit case. It is merely an unsubstantiated assertion as to the value of the work performed. I also note that the opinion relates to the total asserted value of the work carried out by the builder. It does not directly address the work that is the subject of the disputed invoices. It is not helpful to the builder's quantum meruit case on this additional basis.

110 For the foregoing reasons, the builder has no maintainable cause of action against the homeowners in contract, and it has failed to establish an evidentiary basis for an entitlement to payment on a quantum meruit assessment. The builder's application must therefore be dismissed.

The homeowners' application

The vapour barrier

111 It is not in issue that the plans and specifications for the building works developed by GMP Consultants on retainer by the homeowners specified the installation of a vapour barrier between the existing and extension concrete slabs in the alfresco area. Nor is it in issue that the contract for the building works expressly specified the installation of that vapour barrier, in addition to referring to the structural plans developed by GMP Consultants and stating that the work would be carried out in accordance with those structural plans. Nor is it in issue that the application to development approval of the building works to Bayside Council was made and granted by Council on the basis that it concerned a Class 1A structure within the meaning of the National Construction Code.

112 The builder's defence to this element of the homeowners' claim is that when the relevant demolition works had been completed and it was time to pour the concrete for the extension slab GMP Consultants (being Gorgi Mihajlov) advised that this was not necessary as the existing slab of the veranda was a Class 10A structure so far as the National Construction Code was concerned. That is, in short summary, that it was a non-habitable structure that was detached from the interior of the dwelling, equivalent to a detached garage or pathway and therefore did not require protection from water transfer as it would if it were a Class 1A structure. It is submitted that, as a matter of contract, the homeowners are bound by Gorgi Mihajlov's advice to the builder because the contract specified 'consulting with a qualified structural engineer' including in relation to a 'structural certificate for concrete slab ... ' and:

> 40. This clearly means that decisions concerning the acceptability or non• acceptability of these nominated sections of the work will be determined by the engineer. ... The corollary is that the structural engineer's decision is binding upon the parties whether they agree with it or not.

113 It is not contended by the builder that Gorgi Mahajlov was acting for the homeowners in providing his advice to the builder concerning the vapour barrier. It is contended that he did so in the role of a consultant to the builder.

That is of some significance to the builder's defence on its own case. Gorgi Mahajlov is a "relevant professional" for the purposes of s 18F, but he was not independent of the builder. He was working for the builder as a consultant at the material time, and in any event, was a director of the builder's company. The builder is therefore not entitled to the defence contained in s 18F(1)(b).

114 The builder's decision not to install the vapour barrier was not communicated to the homeowners by the builder before the extension slab was poured or afterwards. It was discovered by the homeowners afterwards when they were looking at photographs of the formwork before the concrete was poured. It follows from this that there was no variation to the contract, written or otherwise, agreed to by the parties to remove the installation of the vapour barrier. Nor was any advice given that Bayside Council's development consent required amendment to reflect the asserted fact that the alfresco area was a Class 10A structure. I therefore reject the submission that the contract evinces an intention by the parties to be bound by the advice of the engineer irrespective of its consequences for the performance of the builder's contractual obligations or the terms of Bayside Councils development approval.

115 In any event, I am satisfied on the evidence that Gorgi Mahajlov was wrong in concluding that the existing veranda slab was a Class 10A structure. There are two issues.

116 First, whether the alfresco area is a "habitable room" within the meaning of the National Construction Code. In this respect a "habitable room" 'means a room used for normal domestic activities, but excludes other spaces occupied neither frequently nor for extended periods'. The builder submits that because the alfresco area is external to the dwelling it is not a habitable room. I am not persuaded that this is the case. I am satisfied on the evidence that the alfresco area was designed to be an 'indoor/outdoor living area'; in other words, that it was and is intended to be used as a habitable room for leisure and entertainment on a frequent basis and for extended periods of time. A Class 10A structure is defined in the National Construction Code as a 'non-habitable

building including a private garage, carport, shed or the like'. The alfresco area is not of this character.

117 Second, whether the existing concrete slab of veranda is continuous with the concrete slab in the interior of the dwelling. In this respect the structural concrete plans for the construction of the dwelling in 1982 are found in Exhibit 813. Those plans show that the existing concrete slab is continuous from the interior of the dwelling to the veranda. Louie Solevski gave oral evidence under oath that he was present on site when the concrete slab was poured in 1982 and that it was poured as a single slab including the veranda. The builder speculates that the slab was not poured in accordance with the structural concrete plans or has been modified since, but there is no objective evidence that supports that speculation.

118 The builder's case (based on the evidence of Gorgi and Mihail Mahajlov) is that there is a cavity between the veranda slab and the slab of the interior of the building. It is contended that this was discovered during site investigations. But the existence of this cavity has not been proved on the evidence. There is no satisfactory objective evidence of it that corroborates Gorgi and Mihajlov's opinions.

119 In this respect the builder derives no real benefit from the opinion of Dr Cunniffe because he was not present on site before the extension slab was poured to witness any cavity between the interior and veranda slabs. His opinion is based on what has been said to him by Gorgi and Mihail Mahajlov. I am also troubled by Dr Cuniffe's evidence as to the structure Class for the alfresco area. In the context of the Joint Memorandum of Conclave he agreed with Mr Giaouris that it was a Class 1A structure. After the conclave he recanted on that issuing a dissenting report (Exhibit G6) claiming that it is a Class 10A structure and that he overlooked that fact during the conclave because he was distracted by a toilet blockage at home. I consider that ludicrous. I am concerned that Dr Cunniffe was persuaded to change his opinion. It is thus of no value to me as the opinion of an expert.

120 Nor does the builder derive any benefit from the Private Accredited Certifier's certificate in relation to the work. For the reasons set out above, I do not believe Mr Hanna attended the site on 16 October 2021 to inspect the work. Even if he did there is no evidence that he formed the opinion that the slabs were discontinuous himself. His certificate specifies that this is to be established by the certificate of an engineer.

121 Ultimately, it was put to me by Counsel for the builder on day two of the hearing that the issue could only be proved one way or the other by an invasive investigation. I note that in final submissions it is said for the builder that the homeowners 'refused to allow minimal destructive investigations to confirm actual construction of [the existing slab]'. I take it that this refers to the homeowners' legal representative's objection to Counsel for the builder's suggestion that there be some form of 'view' of the slab involving an invasive investigation in an extension of the hearing. I am not aware of any other way in which the homeowner prevented the builder from obtaining such evidence. It is put to me by reference to *Jones v Dunkel* (1959) 101 CLR 298 that I should draw an inference that this evidence would not have assisted the homeowners if it had been obtained by the builder. I reject this submission. The builder had a reasonable opportunity to present its evidence. The time for that had come and gone when its' Counsel made this suggestion.

122 Mr Giaouris' evidence establishes to my satisfaction that the alfresco area is property considered a Class 1A structure. His opinion is anchored firmly in the terms of the National Construction Code and he remained resolute about it under cross-examination. His opinion also supports the conclusion that the existing slab is continuous from the interior of the dwelling to the veranda. In this respect he contends that the roof line over the dwelling is consistent with the veranda being part of a single structure rather than an 'add-on' as contended by the builder. I accept Mr Giaouris' evidence in these respects.

123 Additionally, Mr Giaouris gave evidence that even if the alfresco area slab was considered a Class 10A structure the extension slab would still require the installation of a vapour because it was connected to or continuous with a Class

1 A structure rather than being set apart from it. Again, this opinion was firmly anchored in the provisions of the National Construction Code, and he remained resolute about it under cross-examination. I accept his evidence.

124 Having regard to the above I am satisfied that in failing to install a vapour barrier between the existing and extension slabs the builder breached the statutory warranties that apply in relation to residential building work contained in s 188(1)(a) and (c). There is no issue that this was contrary to the plans and specifications for the work and to the terms of the contract. I am also satisfied that it constituted a failure of due care and skill by the builder in failing to recognise that a vapour barrier was required by the National Construction Code. The National Construction Code is a 'law' for the purposes of s 188(1)(c) and the work was not carried out in accordance with that law.

125 The builder contends that in any event the homeowners have suffered no loss as a result of its failure to install a vapour barrier, or if there was such a loss, it is nominal only, being the estimated cost of the plastic membrane ($71.00). Additionally, or alternatively it is submitted that any such loss is too remote to be recoverable from the builder. I reject those submissions.

126 The damage suffered by the homeowners is a defectively installed slab. Mr Giaouris gave evidence that there is a likelihood that water will wick up between the slabs creating efflorescence and damp on the surface of the concrete in the afresco area. This is likely to lead to mould and the delamination of the tiled surface of the slab. He was tested repeatedly and in various ways in relation to that evidence under cross examination but did not waver from it. I accept his evidence. The contract between the parties did not incorporate the installation of a tiled surface to the slab in the alfresco area. Apparently, that was to be installed by another contractor. However, I cannot see any way in which this makes the damage suffered by the homeowners remote from the breaches of statutory warranties they have established. The damage flows directly from these breaches.

127 It is also submitted on behalf of the builder that the homeowners have no genuine intention of replacing the extension slab and that because of this they have not and will not suffer any compensable loss. I do not accept this argument. The loss suffered by the homeowners is the money they have spent on the installation of an extension slab that does not comply with the requirements of the National Construction Code. An acceptable measure of their loss is the cost they will incur in rectifying that deficiency. Whether they do so or not does not have any bearing on whether that loss has crystalised.

128 The homeowners are entitled to be put in the position they would have been in had there been no breach of the statutory warranties in relation to the vapour barrier: *Bellgrove v Eldridge* (1954) 90 CLR 613. Mr Giaouris' evidence is to the effect that the alfresco area slab should be rectified by demolishing the extension slab and reinstalling it with a vapour barrier. He estimates the cost of this work to be $10,824.00 before builder's margin and GST. His methodology sets out in detail how he has arrived at this figure. Dr Cunniffe provides an alternative and cheaper remediation method which Mr Giaouris accepts would be satisfactory. The cost of this method before builder's margin and GST is estimated at $6,950.00. However, Dr Cunniffe's methodology is only viable if an engineer can 'provide alternate solution documents for PCA signoff as not compliant with DTS'. The builder has not put any evidence before me from an engineer willing to provide that documentation. Accordingly, I cannot be satisfied that Dr Cunniffe's remediation method is viable. I will allow the homeowners the cost of the remedial methodology recommended by Mr Giaouris.

The window flashings

129 At the centre of this dispute is what the following words of the contract mean: "[n]ew flashings to be installed according to NCC". The builder contends, in effect, that these words are to be read down to mean "only where necessary". The homeowners contend that these words mean that the builder was required to install new flashings on all windows specified for replacement in the contract.

130 Citing as its authority for the proposition, *BCC Trade Credit Pty Ltd v Thera Agri Capital No 2 Pty Ltd* [2023] NSWCA 20, the builder contends that the contract is a commercial contract which should be given a businesslike interpretation. paying attention to the language used by the parties, the commercial circumstances surrounding it, and the objects it was intended to secure. It contends that the Tribunal should approach the task of construction on the basis that the parties intended to produce a commercial result, construing the contract so as to avoid making commercial nonsense or working commercial inconvenience.

131 The builder submits that it would be a commercial nonsense for the contract to be interpreted as requiring the builder to replace the flashings on all the windows that were to be altered or changed because there is no evidence, and it is not asserted, that any of these flashings were deficient or defective and because of the scale of work involved which includes the removal of one or two brick courses. Particular reliance is placed on the absence of the word "all' in the in the sentence referring to the flashings, and the presence of that word in other sentences.

132 I have studied the construction of the contract contended for by the builder and cannot accept it. It is clear to me that from an objective point of view the words must mean the installation of new flashings on all the windows specified in the contract. That follows from what is stated immediately above these words. There is a sub-heading "windows". The windows that are the subject of the builder's contractual obligations are then specified by location and size. The words "all proposed windows which are to be altered and changed ..." then appear. That is plainly a reference to the windows specified by location and size. Then the words 'new flashings to be installed according to NCC". In my view that can only reasonably be read as a reference to all proposed windows which are to be altered and changed. The contract includes a list of express "exclusions". No words of limitation or exclusion appear in that list in relation to window flashings.

133 The evidence does not establish that it would be a commercial nonsense to interpret the contract in this way. I do not understand there to be any contest that the existing flashings date to the construction of the dwelling in 1982. They were therefore just under 40 years when the contract was made and performed. Mr Giaouris' expert evidence is that flashings deteriorate over time and have an expected useful life of between 30 and 50 years after which they require replacement. It would therefore make commercial sense for them to be replaced at the 40 year mark, particularly when other major work was being done to the windows. Otherwise, the homeowners would have new windows sitting on flashings that may fail at any time due to their age. Mr Giaouris also gave evidence that it was industry practice to install new flashings when windows are replaced because there is a likelihood of them being damaged by the removal of the existing windows. Dr Cunniffe performed moisture testing around some windows during his inspection of the property and detected high moisture levels. That is consistent with this risk having crystalised.

134 For the foregoing reasons I am satisfied that the builder did have a contractual obligation to replace the flashings of all windows that were to be altered or changed. There is no issue that it did not do so. That constitutes a breach of the statutory warranty contained in s 18B(1A)(a) of the HB Act.

135 The builder submits that the homeowners have not and do not intend to suffer any loss in relation to the flashings because they have no genuine intention of replacing them. It is submitted that this is to be deduced from the fact that Gyrock has been installed and finished around the windows on the interior of the dwelling and the exterior walls have been rendered. I do not accept this submission. The damage and loss the homeowners have suffered in relation to the flashings is the money they have paid the builder for this work for which they have received no benefit. That loss has crystalised.

136 The homeowners are entitled to be put in the position they would have been in had the builder's contractual obligations with respect to the flashing been performed. In the alternative they are entitled to compensation for the reduction in the value of the work that results from the non-performance.

137 Mr Giaouris has provided both in the context of his expert report and in the Joint Memorandum of Conclave a methodology for the replacement of the flashings and costings. Dr Cunniffe does not propose any alternative. I will allow the homeowners compensation in relation to this head of damage in accordance with Mr Giaouris calculations. This will put the homeowners in the position they would have been in had the builder performed this contractual obligation. In the alternative, it is a reasonable assessment of the reduction in the value of the building work the homeowners suffered due to the non-performation.

Debris in masonry cavity

138 Although this item was pressed by the homeowners, little attention was given to it in the hearing. It is not referred to in Mr Solevski's Statement or in his oral evidence. There is no reference to this issue in the list of complaints about the building work Mr Solevski emailed to Mr Mihail Mihajlov on 15 December 2022.

139 I understand the allegation to be that the builder caused debris to enter the masonry cavities when it was altering and replacing the windows and failed to clear this debris. The presence of debris in masonry cavities constitutes a failure to comply with AS 4773.2 – 2010 Masonry in small buildings Part 2: Construction 10.2 Cavity.

140 The builder denies that it caused debris to enter the masonry cavities. It contends that its tradesmen flushed the masonry cavities it worked on with water, and that the debris the homeowners complain about was pre-existing. The builder also relies upon the contract which does not include any express obligation in relation to the removal of debris from the masonry walls.

141 The homeowners' closing submissions do not take me to any evidence that establishes that the builder caused debris to enter the masonry cavities when it altered and replaced the windows. I cannot recall any oral evidence being given about this issue and cannot find reference to it in the transcript. Mr Giaouris gives evidence in his expert report as to the existence of debris in the masonry wall cavity, but this falls short of establishing how it got there.

142 If it had been proved that the builder left debris in the masonry wall cavities when it altered and replaced the windows or other, I would have held that the builder had an obligation, as a matter of its' due care and skill, to remove it. But on the state of the evidence, this element of the claim must be dismissed.

Sill flashings

143 This item relates to the waterproofing of the glass doors installed by the builder. These doors are specified in the contract under the heading "windows". Accordingly, I determine that the builder had the same performance obligations in relation to these glass doors as it did in relation to the windows. This therefore included the installation of flashings in accordance with the National Construction Code. I am satisfied on Mr Giaouris' expert evidence that this required the installation of new sill flashings. In their Joint Memorandum of Conclave Mr Giaouris and Dr Cunniffe agree that the flashings installed by the builder to not comply with AS 4773.2 because they do not extend to the outside of the frames or 150mm beyond either side of the frame, nor are they turned up at the rear to direct moisture to the external face of the wall.

144 I am satisfied on these bases that the door flashings are defective work in breach of the statutory warranties contained in s 18B(1Xa) (due care and skill and in accordance with the contract) and (c) (failure to comply with the National Construction Code).

145 There is a second issue. The builder's tradesmen demolished the hobs of the sliding doors in error when the existing doors were removed. This required the builder to reconstruct the hobs. There is no issue that waterproofing was not reinstated by the builder when the hobs were reconstructed. In their Joint Memorandum of Conclave Mr Giaouris and Dr Cunniffe agree that waterproofing and a waterstop angle should have been installed prior to the sliding door installation but was not.

146 The builder contends that waterproofing was excluded from the contract. It also says that it notified Mr Solevski as Owner/Builder that it was required prior to

the installation of the doors, but he failed to ensure that this work was completed before the doors were ready for installation.

147 I accept that waterproofing was excluded from the contract. However, I am also satisfied that the builder had a duty pursuant to the s 188(1)(a) warranty to rectify its defective work with due care and skill. Its' tradespersons demolished the hobs, and it therefore was obliged to re-instate or instate waterproofing in the area of damage in accordance with the applicable contemporary building standards. It seems to me this issue ends there.

148 However, as the point was argued at some length, additionally, despite the issue being raised at various points in both Mr Mihail Mahajlov's and Mr Solevski's oral evidence no objective evidence was produced to prove that the builder notified Mr Solevski as Owner/Builder of the date that it would be installing the doors and that waterproofing had to be installed before then.

149 There can be no contest on the evidence that the builder installed the doors in circumstances where it knew that waterproofing was required by the applicable building standards but was not installed. It is not contended that it was instructed to do so by Mr Solevski as Owner/Builder contrary to its written advice. In these circumstances the s 18F(1Xa) defence is not available to the builder.

150 For the foregoing reasons I am satisfied that the builder breached the statutory warranties contained in s 188(1)(a) and (c) with respect to this item.

151 The damage and loss claimed by the homeowners is incorporated into their flashings head of damage, which I have allowed in full. My discussion of the damage and loss suffered by the homeowners is equally applicable to this item.

Garage brickwork

152 The contract required the builder to carry out demolition in the interior of the garage and to re-brick it using the existing face brick. The interior face of the

bricks was to be scratched to receive cement render. The cement rendering was not part of the contract.

153 It is not in issue that during the work performed by the builder a significant amount of mortar was left on the brickwork above the garage doors and was not cleaned away by the builder. I understand that thfs is mortar spray from a saw which adhered and hardened. The builder says it had no obligation to do clean this away because brick cleaning was not part of the contract, and the cement rendering was to be done by another contractor.

154 While the contract did not include brick cleaning per se, the builder was required to carry out the brick work contracted for in the garage area with due care and skill. I accept Mr Giouris' evidence that allowing mortar to spray onto the brick work during demolition work without cleaning it away constitutes a want of due care and skill. It is a breach of the statutory warranty contained in s 188(1)(a) on that basis.

155 In their Joint Memorandum of Conclave Mr Giaouris and Dr Cunniffe agree to a cost of remediation of $420.00 (before builder's margin and GST). I will allow the homeowners that amount in compensation for the loss they will having the brick work cleaned.

Entry door

156 This issue relates to the front entry door which the homeowners contend was fatally damaged by the builder's tradesmen during the building work. That is denied by the builder. There is a dispute between the parties as to what the homeowners' intentions were with respect to the door. In his Statement of 21 July 2022 Mr Solevski says that it was the homeowners' intention to retain and reuse the door. In oral evidence, he said it was his intention to sell it. The builder's position, as I understand it, is that it was informed that the door was to be replaced as part of the broader building works and was site waste.

157 There are three difficulties for the homeowners with respect to this item. First, the evidence is not sufficient to establish that the builder had any particular

obligation to the homeowners with respect to the door. There are two opposing accounts and no objective or surrounding evidence that supports one account over the other. Second, apart from what is said in Mr Solevski's statement, I can find little evidence of the damage to the door complained of.

158 Third, even if it had been proved that the builder had an obligation to the homeowners with respect to the door, which it failed to perform with due care and skill resulting in damage to the door, the loss contended for is not maintainable. In this respect, the homeowners seek to be compensated $1,800.00 being the cost of a new replacement door. That is not the measure of their loss. Their loss is the residual value of the door, prior to its damage. There is no evidence of the pre-damaged condition of the door, its age, or 'second-hand' value. If the door was original to the dwelling and therefore 40 years of old, it may not have had any residential value. For these reasons this element of the claim must be dismissed.

Rear security door and keys to altered and replaced windows

159 There is no issue between the parties that the builder was contracted to supply a rear security door and that it was also obliged to supply keys to the windows and doors that it altered or replaced. There is no issue that the builder had not done so up to the date the Special Fixture Hearing commenced. However, Counsel for the builder submitted that the builder had both the door and the keys available to it to supply to the homeowners. I am uncertain if that has occurred to date. For that reason, I will make a specific performance order that will require the builder to provide these items to the homeowners within 7 days if it has not done so already. I will grant the homeowners a right of renewal in relation to these two items should the builder fail to comply with order. The homeowners claim for compensation in relation to these items can then be considered as an alternative remedy.

BASIX requirements

160 The basic facts in relation to this item are not in dispute and are outlined in greater detail above. The building works were of a value that triggered BASIX

requirements in relation to the windows, because the contract price exceeded $50,000.00. However, the estimate of the value of the works included in the homeowners' application to Bayside Council for development approval was $44,000.00 which meant that these obligations were not engaged. No BASIX Certificate was therefore obtained at that time. I have found that this occurred due to Gorgi Solevski's negligence in his capacity as Principal of GMP Consultants.

161 On 7 July 2022 the homeowners obtained a BASIX Certificate from a business trading as Efficiency Assessments Pty Ltd. That Certificate determined that the glass in several windows installed by the builder does not meet BASIX requirements and will have to be replaced. Mr Giaouris and Dr Cunniffee estimate the cost of replacement at $3,800.00 before builder's margin and GST.

162 The issue to be determined is whether this damage and loss that is recoverable from the builder. I am satisfied that it is.

163 The builder had no obligation under the contract to obtain a BASIX Certificate for the work. However, it knew the value of the building work, and it knew, or ought to have known (on the basis that it is a licensed builder with that specialised expertise), that a BASIX Certificate was required in relation to the work. In this respect, a major component of the work was the supply and installation of windows and glass doors. It could not determine the full specifications for this component of the work without a BASIX Certificate that set out the performance requirements for the glass to be installed in the windows. Nevertheless, the builder supplied and installed the windows. It did not notify Mr Solevski as Owner/Builder that it should or could not do so because it did not have a BASIX Certificate. It was not instructed by Mr Solevski to install the windows contrary to any advice it gave him in relation to BASIX requirements. In this respect, no s 18F defence is available to the builder.

164 I am satisfied on this basis that the supply and installation of the windows and glass doors without a BASIX Certificate specifying their performance requirements constituted a breach by the builder of the statutory warranties

contained in s 18B(1)(a) (due care and skill) and (c) (compliance with other law). In this latter respect, BASIX requirements derive from the *Environmental Planning and Assessment Act* 1979 (NSW).

Builder's margin and GST

165 The builder contends that the homeowners are not entitled to any builder's margin or GST on top of the base costs they contend for because Mr Solevski is an Owner/Builder who will not incur these costs. I do not accept that submission. As an Owner/Builder Mr Solevski contracts with tradespersons to carry out work. He does not perform the work himself. Those tradespersons will typically include a builder's margin or equivalent on their base costs and they will typically include GST in their contract price. The homeowners will therefore incur the costs of a builder's margin and GST in rectifying the builder's defective work and are entitled to be compensated for it.

The preferred outcome

166 I am required by s 48MA of the HB Act to approach the identification of the appropriate remedy for the builder's breaches of statutory warranty, which I have found established, on the basis that rectification of the defective work by the builder is the preferred outcome. Section 48MA is a statutory preference, not a command. The preference may be displaced in the circumstances of a particular case.

167 The builder submitted that it is in a position to supply the homeowners with the missing security door and window keys. I have applied the s 48MA preference with respect to these items of the claim by issuing specific performance orders requiring the builder to supply them to the homeowners.

168 Other than in relation to these items, neither party contended at hearing or in their closing submissions that the preference should be applied in this case. While that is not the end of the matter, I give some weight to the fact that the builder does not assert and entitlement or willingness to rectify any breach of statutory warranty found. A further decisive consideration is the state of the relationship between the parties. It was obvious over the two-days of hearing

that this relationship had entirely broken down and might fairly be described as poisonous. It is unreasonable to expect that the parties could overcome this breakdown in their relationship so as to allow the builder to carry out remedial works at the property, bearing in mind that the homeowners occupy the property. Other than as I have stated, the preferred outcome should therefore be departed from in this case. The appropriate remedy is damages.

A note on Mr Solevski's status and role as Owner/Builder

169 It was contended by the builder during argument and submissions that Mr Solevski was ultimately responsible for any defective building work because, as Owner/Builder he was responsible for supervising the work. That submission cannot be accepted. The statutory warranties that are at issue in these proceedings are imposed on the builder as the holder of a contractor licence. The builder has not made out any defence under s 18F or established any failure by the homeowners under s 18BA that could operate to make Mr Solevski liable for its defective work.

170 For the foregoing reasons the homeowners have established an entitlement to damages in the sum of $70,720.93 in relation to 4 items calculated as follows: $51,824.00 in base costs, plus 24% builders margin ($12,437.76), plus GST on the total of those two amounts ($6,429.17).

Costs

171 This is a case where the amount in dispute exceeds $30,000.00. The costs regime that is found in Rule 38(2)(b) of the *Civil and Administrative Tribunal Rules* 2014 (NSW) therefore applies. It provides that despite s 60 of the *Civil and Administrative Tribunal Act* 2013 (NSW) the Tribunal may award costs in proceedings where the amount in dispute exceeds $30,000.00 even in the absence of special circumstances.

172 While Rule 38(2)(b) confers a discretion to award costs that discretion must be exercised judicially having regard to established principle. Where a discretion to award costs is unfettered, it should be exercised in favour of a wholly successful party in the absence of any disentitling conduct by that party:

Latoudis v Casey (1990) 170 CLR 534; *Oshlack v Richmond River Council* (1998) 193 CLR 72.

173 The homeowners have not engaged in any disentitling conduct in these proceedings. It follows that they are entitled to an order that will require the builder to pay them their costs of the proceedings on the ordinary basis as agreed or assessed.

Orders

174 For the foregoing reasons I make the following orders:

In application no. HB 22/19265:

(1) The application is dismissed.

In application no. HB 22/26345:

(2) Louie Solevski and Zaneta Solevski do not owe Genix Building Pty Ltd $121,895.68 (or any other amount) in relation to the building work.

(3) Genix Building Pty Ltd must supply Louie Solevski and Zaneta Solevski with keys to all windows and doors supplied under the contract and with the rear security door on or before 27 October 2023.

(4) Genix Building Pty Ltd must pay Louie Solevski and Zaneta Solevski $70,720.93 immediately.

(5) The application is otherwise dismissed.

In both applications:

(6) Genix Building Pty Ltd must pay Louie Solevski and Zaneta Solevski their costs of the proceedings as agreed or assessed.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

Stan Giaouris identified defective workmanship by the Builder for a Class 1 Property.
Almost all items raised by Mr Giaouris were found to be defective.

See yellow highlights from page 22 onwards and Page 90 – "I Prefer the evidence of Mr. Giaouris"

Civil and Administrative Tribunal
New South Wales

Case Name:	CRAIG ABBOTT & Erin Abbott ats PATTERSON BUILT PTY LTD
Medium Neutral Citation:	[2022] NSWCATCD
Hearing Date(s):	22 and 23 November 2021
Date of Orders:	7 March 2022
Date of Decision:	7 March 2022
Jurisdiction:	Consumer and Commercial Division
Before:	R C Titterton OAM, Senior Member
Decision:	1. In matter HB 20/45109: (a) by consent, on or before 7 July 2022 the respondent is to rectify following items (using the numbering in the Statement of Agreed Facts and Contentions found at pages 1311 to 1316 of the Joint Tender Bundle): P6, P12, 9.4, 9.6, P95-P98, P106, P112, P113-P115, P126, 9.8, P35, P 20, 070-P71, 9.11, P102, P116-P120, P123, P52, P38, P128, P9.10, P99-P101; (b) on or before 7 July 2022 the respondent is to rectify following items (using the numbering in the Statement of Agreed Facts and Contentions found at pp 1311 to 1316 of the Joint Tender Bundle): 9.2, 9.3, 9.7, 9.8, P124, 9.12, 9.13 and P24; (c) on or before 4 April 2022 the respondent is to pay the applicant $2,600.00. 2. Both parties have leave to relist the matter in the event orders 1(a) or (b) are not complied or cannot be complied with. 3. The Tribunal proposes to order the respondent to pay the applicant' costs as agreed or as assessed; 4. If either party wishes to seek any other order, they

should file and serve submissions on or before 21 March 2022, and the other party may respond on or before 4 April 2022.

5. In matter HB 21/04839, the application is dismissed.

6. The Tribunal proposes to order the applicant to pay the respondents' costs as agreed or as assessed.

7. If either party wishes to seek any other order, they should file and serve submissions on or before 21 March 2022, and the other party may respond on or before 4 April 2022.

Catchwords:	BUILDING AND CONSTRUCTION – breach of the statutory warranty in s 18B(1) of the Home Building Act 1989 (NSW) – claimed variations – alternative claims in quantum meruit
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) – s 60 Civil and Administrative Tribunal Rules 2014 – r 38 Home Building Act 1989 (NSW) – ss 18(1)(b), 48MA Environmental Planning and Assessment Act 1979 (NSW)
Cases Cited:	Brenner v First Artists' Management Pty Ltd [1993] VicRp 71 Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd [2004] NSWSC 272 Ingate v Andrews [2018] NSWCATAP 99 Nayak v Rockwall Constructions Pty Ltd [2017] NSWCATAP 18 Pavey & Matthews Pty Ltd v Paul [1987] HCA 5 Urban Constructions (NSW) Pty Ltd v Shearer [2015] NSWCATCD 9
Texts Cited:	
Category:	Principal Judgment
Parties:	First Applicant: Craig Abbott Second Applicant: Erin Abbott Respondent: Patterson Built Pty Ltd
Representation:	Counsel: Applicants: T Valentelli

	Respondent: C Sadler
	Solicitors:
	Applicants: PDC Lawyers and Town Planners Respondent: Phillip Silver and Associates Lawyers
File Number(s):	HB 20/45109
Parties:	Applicant: Patterson Built Pty Ltd First Respondent: Craig Abbott Second Respondent: Erin Abbott
Representation:	Counsel:
	Applicant: C Sadler Respondents: T Valentelli
	Solicitors:
	Applicant: Phillip Silver and Associates Lawyers Respondents: PDC Lawyers and Town Planners
File Number:	HB 21/04839
Publication Restriction:	NIL

REASONS FOR DECISION

Introduction

1 There were two matters before the Tribunal.

The Homeowner's Claim

2 The first is application HB 20/45109 (**Homeowners' Claim**) which is the application of Mr and Mrs Abbott (the **Homeowners** or the **Abbotts**) against Patterson Built Pty Ltd (**Builder**). The Abbotts own a property at Freshwater (**Property**). They seek relief under the *Home Building Act 1989* (NSW) (**HB Act**) in respect of allegedly incomplete and defective building work carried out by the Builder. In the alternative, they seek relief under the Australian Consumer Law (**ACL**) for alleged leading in deceptive conduct of the Builder in relation to specific items of work.

3 Prior to the hearing the parties had agreed that many of the defects claimed by the Abbotts would be rectified by the Builder. Various other defects were left to the Tribunal to determine but the parties agreed that the appropriate remedy was rectification of the defects by the Builder in accordance with s 48MA of the HB Act.

The Builder's Claim

4 The second is application HB 21/04839 (**Builder's Claim**) which is the Builders' claim against the Abbotts. The Builder claims that in addition to the building works the subject of the contract, it had at numerous times in 2018 and 2019, at the specific request of the Homeowners, carried out numerous additional works at the Property and incurred additional costs being:

(1) removal of additional large quantities of soil, $19,562.40

(2) additional piering, related to the raft slab, $1,274.37;

(3) additional reinforcing and thickness in the raft slab, $3,870.44;

(4) variation to the windows, as selected by the Homeowners, $2,475.53;

(5) additional installation costs due to revised windows, $1,558.01;

(6) additional installation cost of recessed fireplace, $799.00;

(7) additional structural steel in framing, due to specification change, $8,712.00;

(8) concrete floor repeated cut and polish, $16,029.99;

(9) supply and installation of a side gate, $1,874.40;

(10) provision of additional side retaining walls, $4,658.20.

5 The Builder seeks payment of $60,814.34 either as variations under the contract or alternatively on the quantum meruit basis.

6 All these claims are rejected by the Homeowners who submit that the Builder's Claim should dismissed in its entirety.

Agreed Facts and Contentions and Work Orders

7 Prior to the hearing the parties agreed to a Statement of Agreed Facts and Contentions (**SAFC**). These appear at pp 1311 to 1316 of the Joint Tender Bundle (**JTB**) filed in the Homeowners' Claim,[1] and the Builder concedes that it is liable to complete or effect repairs to the works as set out in the column headed Agreed Work Order.

8 In summary, the parties agreed that the following items (using the numbering in the SAFC) would be rectified by the Builder: P6, P12, 9.4, 9.6, P95-P98, P106, P112, P113-P115, P126, 9.8, P35, P 20, 070-P71, 9.11, P102, P116-P118120, P123, P52, P38, P128, P9.10, P99-P101.

[1] I note that there were two Joint Tender Bundles: see [13].

9 The content of each work order is also set out in the SAFC.

10 Then, commencing at p 1317, are the items where the parties could not agree, either in whole or in part as to rectification or the cost of rectification. Helpfully, the parties agreed on certain facts, and pp 1317 set out each parties' contentions in relation to each item, although some of those contentions have been superseded by the evidence at the hearing, including certain concessions made at the hearing and then confirmed in the parties' written submissions.

11 The following items in the Homeowners' Claim were left in contention at the hearing:

- 9.2 (air conditioning);
- 9.3 (landscaping and external door threshold);
- 9.7 (roof drainage system);
- 9.8 (waterproofing of internal wet area);
- P124 (main roof parapet);
- 9.12 (roof flashing)
- 9.13 (concrete topping); and
- P24 (sewer pipework).

12 In addition to those matters, there are also the Homeowners' claim in respect of an alarm camera system and a claim of liquidated damages of $2,600.

Evidence

13 The evidence relied on by the parties was conveniently set out in two JTBs, one containing the evidence of both parties in the Homeowners' Claim, the other containing the evidence of both parties in the Builders' Claim.

14 The critical evidence in the Homeowners' Claim was three statements of Mr Craig Abbott. The first statement appears at pp 0019 to 0033 of the JTB and is undated. The other two statements are respectively dated 16 April 2021 and 7 May 2021. Mr Abbott was not required for cross-examination and I see no reason why his evidence should not be accepted.

15 The other evidence included two expert reports of the Homeowners' expert Mr Stan Giaouris respectively dated 23 October 2020 and 29 January 2021; a statement of the Builder's director Mr Grant Patterson dated 1 March 2021 and an expert report of the Builder's expert Mr Michael O'Donnell of MKO Consulting Pty Ltd (**MKO**) dated 22 April 2021.

16 The critical evidence in the Builder's Claim was a statement of Mr Patterson dated 18 August 2021 and an expert report of Mr O'Donnell dated 24 February 2021 and a statement of Mr Patterson sworn 7 September 2021.

17 As noted, Mr Abbott was not required for cross-examination. Mr Patterson and the two experts were required for cross-examination. Where relevant I will refer to their oral evidence.

Relevant Findings

18 It is appropriate to set out some brief findings about the contract between the parties.

19 On 30 January 2018, the parties entered into a Master Builders Association Residential Building (BC4) contract (**Contract**).

20 The Contract price was stated as $977,220 including GST.

21 At p [82] of the Contract is a description of the work to be completed by the Builder. The work is described as follows:

> As per the tender and plans attached.

22 At p 62 of the JTB is a copy of the tender dated 24 January 2018 signed by the Homeowners. The Homeowners submit and the Tribunal accepts and finds that this is the tender referred to in the Contract (**Tender**).

23 At pp 324 to 363 of the JTB are a series of plans. The Homeowners submit and the Tribunal accepts and finds that these documents constitute the plans and specifications set out in the Contract for the purposes of determining a breach of the statutory warranties in s 18B(1)(a) of the HB Act.

24 I will deal with the issue of claimed variations to the Contract below in my consideration of the Builder's Claim.

25 A Final Occupation Certificate was issued under the *Environmental Planning and Assessment Act 1979* (NSW) on 22 March 2018 (Certificate Number 17/3338-2).

Consideration – Homeowners' Claims

Introduction

26 I was assisted in my task by the provision of very detailed cross-referenced submissions from the Homeowners. This can be contrasted with the submissions of the Builder, which were generalised, high level and not cross-referenced to the evidence. Indeed, in relation to the contested items, the Builder submits that it relies on the evidence of Mr Patterson and Mr O'Donnell, but that their evidence is not "regurgitated save for the following brief points", which are five sentences relating to the air conditioning. There is substance in the Homeowners' submission in reply that the only contention that was responded to by the Builder was the claim in respect of the air-conditioning, and that otherwise the Builder made no meaningful response to their claims.

27 In circumstances where the JTB in the Homeowners' Claim totalled 1,334 pages, and the JTB in the Builder's Claim totalled 326 pages, greater assistance could have been provided to the Tribunal through the Builders' submissions.

28 Nor did the Builder's submissions do justice to the oral evidence that Mr O'Donnell gave to the Tribunal.

9.2 – Air-conditioning

JSS

29 In the JSS, the Homeowners' expert Mr Giaouris stated:

> Reasons claimed variation altering the Air conditioning, MKO Report doc 3.12 An Email from owners to builder accepting change to AC the variation claim is not in writing. The response has been identified as a PC in the email cited by the SG. Builder has incorrectly treated the item as a PC. SG - There is no AC to Living area. Revised Spec calls for Cassette unit in the living area. Not provided, and multi head split system to upstairs, again not provided.
>
> SG has allowed to remove VRV's and provide ducted Ac as per plans including Guest Bedroom. email evidence by MKO identifies multi split upstairs not provided - therefore no AC to BEDS 2 3, 4 and guest, and nil to GF.
>
> SG and MKO agreed at the conclave that air conditioning to GF should have been installed. This seems to now have been omitted by MKO.
>
> The multi head split system suggested in the email to upstairs has not been installed, neither has the GF unit, as such the alternate scope has also not been met. Rendering the house without air conditioning besides two rooms (upstairs living and master bed).

30 On the other hand, the Builder's expert Mr O'Donnell stated that:

> No defect exists. Ducted AC was deleted through a variation to the Contract. Refer Doc 3.12. MKO agrees there is no AC in the living area and this should be provided by the Builder in accordance with his email of 30 Oct 2018 but because the roof structure is flat it is not possible to install a ducted system without the duct work being visible in the upstairs rooms

31 The Tribunal member conducting the conclave commented:

> The difference between the experts relates to the provision or otherwise of Provision or PC Items. The experts agree that no AC to ground floor has been

provided contrary to the specification. It is possible to install ducted AC to the living area via upstairs bedrooms to bring Ac into living area Kitchen. Tender is appended to the contract MKO 3.02 SG ref p7 of tender at P79 of MKO Report. The alternative proposal by the builder has not been installed rather than 3.5 and 8.2 the builder and a 5.2 in living area has installed 2x 3.2 units above but no unit in Living Area

Homeowners' submissions

32 In summary, the Homeowners submit that:

(1) ducted air conditioning is included in the Contact and described as:

> 11.1 Ducted Air Conditioning
>
> – Ducted air conditioning system to be supplied and installed
>
> – Clients choice of standard square or round outlets
>
> Ducted air conditioners consist of an indoor and outdoor unit and flexible ducting. The indoor unit is concealed out of sight, in your ceiling under the floor, with flexible ducting distributing can dish and air through vents located throughout your home. An outdoor unit is positioned in a discrete location outside your home.

(2) on 22 June 2018, the Homeowners made an enquiry with the Builder by way of email about the size, type, and allowance for the ducted air conditioning. That same day the Builder replied:

> My contractor is going to show you and I a multi-head, bulkhead system due to the difficult tight spacing to your project. We generally allow for 19-24Kw systems, but all jobs/applications are different and until framing stage we only propose our allowance.

(3) the Homeowners gave evidence that the Builder represented to them ducted air conditioning could not be installed in the Property due to the "nature of the build"; and that evidence is uncontested;

(4) the Homeowner gave evidence that he advised the Builder that a suitable ducted air conditioner system could be located, and gave the Builder two options;

(5) on 31 October 2018, the Builder confirmed the option to be installed for air conditioning and applied a credit of $5,123.37 for air conditioning;

(6) by email dated 5 November 2018, the Homeowners agreed to the variation as follows:

> We approve the supply and installation of the Fujitsu Multi Split Unit system (8w) upstairs, 1x 5.2w ceiling and 1 x 3.5 kw ceiling cassette in the master bedroom.

(7) Mr Giaouris gave evidence that:

(a) the Builder can install ducted air conditioning, and that installing ducted air conditioning into a timber floor home requires coordination of the timber floor framework to coordinate floor joist directions to ensure compatibility with the air conditioning installation;

(b) the Builder failed to carry out the works with due care and skill and installed ducted air-conditioning by not coordinating the timber joint framework with the air conditioning installation in breach of s 18B of the HB Act;

(8) in cross-examination, Mr Giaouris set out how it was still possible to install ducted air conditioning to the home in accordance with the Contract and as set out by him in the JSS;

(9) O'Donnell said that the ducted air conditioning could not be installed without installation of obvious and expensive ducting that may now look unsightly and in cross-examination conceded that:

(a) the Builder could have installed the ducted air conditioning; and

(b) it would have required additional work for the Builder if he did;

(10) they were induced into entering into the purported variation in reliance upon the representation from the Builder that ducted air conditioning could not be supplied and the representation was misleading and deceptive;

(11) they would not have agreed to the variation other than in reliance upon the representation of the Builder;

(12) in cross-examination, Mr O'Donnell attempted to backtrack on his comments in the JSS and suggested that the variation of been misinterpreted;

(13) the Tribunal should prefer the opinion of the member conducting the conclave and Mr Giaouris set out at item 9.2 of the JSS.

The Builder's submissions

33 The Builder submits that:

(1) Mr Giaouris was clear that ducted air-conditioning could be installed only by reducing the height of ceilings in the wet areas and in built-in cupboards, with significant changes in formwork, at the very least;

(2) Mr O'Donnell's evidence is that the installation of ducted air-conditioning would have required exposed or boxed in ducting, or multi-level ceilings, which may have been unsightly;

(3) Mr Patterson's evidence was clear that the Homeowners wanted no visible ducting, no reduction in ceiling heights, and no multi-level ceilings. The variation accordingly arose and the Homeowners should not be entitled to benefit based on changes made to accommodate their wishes;

(4) no misleading representations were made. The Homeowners were fully aware of the change and the reasons for it.

Conclusion

34 In the SAFC, the parties agreed that:

(1) the Contract provided for a ducted air conditioning system to be supplied and installed;

(2) ducted air-conditioning has not been installed by the Builder;

(3) on 22 June 2018, Builder advised that allowance for ducted air-conditioning is $17,000;

(4) air-conditioning is not a Prime Cost item in the Contract;

(5) at a site meeting on 14 September 2018, the Builder advised the Homeowner that ducted air-conditioning could not be installed;

(6) on 2 October 2018, the Builder provided two options for the air-conditioning system;

(7) on 31 October 2021, the Builder proposed a variation to the Contract to supply and install of 1 x 8kw Fujitsu Multi Split unit upstairs; 1 x 5.2kw ceiling cassette in living area and 1 x 3.5 kw ceiling cassette in master bedroom. The contract price is to be varied by $5,123.37 to offset the cost to the air conditioning;

(8) on 5 November 2018, the Homeowners emailed the Builder about the variation.

35 Mr O'Donnell accepted in cross-examination that his position had changed, said that there had been a "misinterpretation" of his views at the conclave, and that he had misread certain documents, in particular the email of the Builder of 31 October 2018 agreeing to supply and install various air-conditioning units upstairs in the living area and in the master bedroom. units upstairs.

36 I find that position unsatisfactory and unpersuasive. What I did find persuasive was Mr Giaouris' explanation of how ducted conditioning could be installed.

37 However, I find that the parties agreed to vary the Contract in terms of proposal of the Builder of 31 October 2018 and accepted by the Homeowners on 5 November 2018. I find that this work has not been completed in that the 8kw Fujitsu Multi Split unit upstairs has not been installed and the 5.2kw ceiling cassette in living area has not been installed. Nor is there any air conditioning to bedrooms 2, 3, 4, the guestroom or the ground floor.

38 I find that in failing to install the air conditioning in accordance with the agreed variation the Builder has breached the statutory warranty contained in s 18B(1)(a) of the HB Act.

39 I will make a work order requiring the work to be completed within four months of these reasons.

40 It is not necessary to consider the Homeowners' alternative claim or misleading and deceptive conduct.

9.3 - Landscaping

JSS

41 In the JSS, the Homeowners' expert Mr Giaouris stated:

> stepping concrete. No longer pressed by SG because landscape has now been completed by the owner limiting the difference between the concrete slabs. As identified in the members comments, square set is in fact cheaper than cornice, as such there is no justifiable extra cost, and the document provided are not variations but emails, further the landscaping is not a PC cost but seems to have been treated as such. The email regarding the cornices does not relieve the contractual required for hard and soft landscaping, gates, entry wall, planting, etc

42 On the other hand, the Builder's expert Mr O'Donnell stated that:

> No defect exists. Landscaping scope was reduced, stepping stones were requested. Refer my 8.02.

43 In par [8.02] Mr O'Donnell stated:

8.02.01 At 9.3.1 Mr Giaouris refers to incomplete general landscaping. Landscaping works were included in the Contract sum as an Allowance of $22,000.00 (refer Document 3.02, Builders tender page 13).

8.02.02 The allowance and the extent of the landscaping works was reduced at the Owners request to partly offset the cost of a Variation to the works for "square set (sic: plasterboard joints) throughout" then the balance of the allowance was almost fully used for the construction of the Driveway and footpath crossover (refer document 3.09. Second page email dated 15 August 2019)

8.02.03 The Owner requested the Builder delete the remainder of landscaping works and construction of Front Fence (and gate) in email correspondence dated 17 January 2019 (refer document 3.10 in particular top of page 3).

8.02.04 At Mr Giaouris 9.3.3, P14, this work was deleted from the contract (refer document 3.10) and P1, Concrete block stepping stones were requested by the Owner in e mail correspondence dated 21 January 2019 (refer document 3.11) and the Owner expressed their satisfaction with this work in an email dated 24 January 2019 (refer document 3.10). In P4 and P10 this work was not carried out by the Builder as landscaping works were deleted from the Contract.

8.02.05 At 9.3.12 Mr Giaouris states the front concrete stepping stones are not fit for purpose due to level changes and spacing without particularising this alleged defect. In my opinion the stepping stones to the front garden are fit for purpose and usable and appear to have been being used since completion of the works (refer MKO P01).

8.02.06 At 9.3.13, 9.3.14 and 9.13.15 Mr Giaouris alleges, it seems, the stormwater pits as installed are defective.

8.02.07 I do not agree with his allegations as part of the purpose of the stormwater pits is to trap any silt that may be entering the stormwater system through the pit. It is the proper function of the pit to have its inlet and outlet above of the bottom of the pit so silt can amass in the bottom of the pit and subsequently be cleaned out and not be carried down the stormwater outlet pipe potentially causing a blockage in the pipe.

8.02.08 My observation was that the pits contained some water but, in my opinion, this is part of the normal function of the pits especially after the Property had received 38.5mm of rain in the 5 days preceding the date of my inspection (refer Document 3.19, BOM rain records for the area)

8.02.09 The stormwater system was inspected and certified by Northern Beaches Consulting Engineers Pty Ltd, the Owners Engineer, and found the work had been carried in accordance with their plans (refer document 3.24)

44 The Tribunal member conducting the conclave commented:

SG has no landscaping qualifications. Provisional allowance by builder in quotation $22,000.00, itemised quote. Builder is treating the allowance as PC. SG has identified square set cornices as cheaper than cornice ref

> Rawlinson's p434 2019 edition. MKO has no landscape qualifications Issue between the experts is the scope of works altered in email exchange 15 August 2018 MKO doc 3.09 bottom page 2. email owner to builder owners proposed off-set. MKO refers to emails 16 Jan 2019.

The Homeowner's submissions

45 In summary, the Homeowners submit:

(1) soft landscaping is included in the Contact and included external glass balustrades and driveway;

(2) a landscape plan that formed part of the contracted works;

(3) the site plan that includes the concrete driveway that formed part of the contracted works;

(4) in cross-examination, Mr O'Donnell conceded that there was no provisional sum in the contract for landscaping;

(5) the Tribunal should find that landscaping was not a provisional sum in the Contract;

(6) the landscaping were works included in the Contract and these works have not been completed by the Builder;

(7) the Builder contends that the Contract was varied to reduce the landscaping works to be carried out to partly offset the cost of a variation to supply and install "square set" plasterboard joints throughout. The evidence relied on for the variation was an email 16 January 2019 which relevantly states:

> External Allowance, soft Landscape, External Glass balustrade – Driveway = $22,000 Inc GST
>
> Square set variations as per signed email below = $10,956.56
>
> Leaving = $11,043.44.

(8) what occurred was that the Builder charged the Homeowners the following works as purported variations:

(a) driveway works totalling $11,572 including GST; and

(b) external balustrade totalling $8,092.26 including GST;

(9) what was left was a balance of $2,335.74 to carry out all the soft landscaping;

(10) the photographic evidence shows some landscaping has been done by the Builder, but it is incomplete;

(11) the Tribunal should not accept that the Homeowner agreed to forgo $31,905 in landscaping works for $2,335.74;

(12) the basis upon which the Builder has asserted a provisional sum of $22,000 was applicable to landscaping was misleading and deceiving and induced the Homeowners to enter the Contract on the representation from the Builder that he could carry out the works for the contracted price;

(13) the Tribunal should find that the email dated 16 January 2019 is not a valid variation to the Contract because:

(a) the Builder erred in treating the amount of $22,000 as a provisional sum for landscaping and landscaping was in the contract sum;

(b) the Builder had no reasonable basis for making the representation that the landscaping works could be carried out for $22,000; and

(c) the Homeowners were misled and deceived by the Builder in relation to the landscaping allowance; and

(d) the Homeowners relied upon the Builder's representation and suffered damage; and otherwise; and

(e) the Tribunal should otherwise find the purported variation to the building contract to exclude the landscaping is not in the form required by cl 14 (d) of the Contract and does not amount to an agreed variation to exclude landscaping from the Contract or amend the landscaping plan.

The Builder's submissions

46 No written submissions of any substance were received. The Builder states that this item was adequately addressed in the evidence of Mr Patterson and Mr O'Donnell, that the Homeowners were not misled and were an active participant in arriving at the decisions on items to be charged, and that in the event that the Tribunal finds that this item requires attention, then a work order for remedial works is the preferred outcome.

Conclusion

47 In the SAFC, the parties agreed that:

(1) the Contract provided for landscaping as per the landscape concept plan of Grant Seghers dated 29 December 2017;

(2) the landscaping has not been carried out by the Builder as per the approved plan;

(3) landscaping was set out in itemised quote attached to the Tender for $22,000 and lists as included soft landscape, external glass balustrade and the driveway;

(4) landscaping is not a Prime Cost item in the Contract;

(5) on 15 August 2018, the Homeowners emailed the Builder about the square set for doors, windows and ceilings and allocation for the soft landscape and driveway;

(6) on 16 January 2019, the Builder emailed the Homeowner setting off a variation for square set against the landscaping allowance;

(7) on 24 January 2019, the Builder emailed the Homeowners setting out the following costs for landscaping works which were carried out by the Builder:

(a) pool balustrade, $8,092.26;

(b) driveway, $7,722.00;

(c) crossover, $3,850,

48 In the circumstances I am satisfied that the landscaping works the subject of the Contract were not completed by the Builder and that the Builder has breached the statutory warranty contained in s 18B(1)(a) of the HB Act.

49 I will make a work order requiring the work to be completed within four months of these reasons.

50 It is not necessary to consider the Homeowners' alternative claim of misleading and deceptive conduct.

9.7 – External door threshold

JSS

51 In the JSS, the Homeowners' expert Mr Giaouris stated:

> Front entry door - change to scope of works to cut in brass strip in front of door sill after sealing the gap below the seal with epoxy Agreed cost $400.00.9.5.10 of SG Report identifies aluminium in contact with concrete. Resulting degradation of the sill by alkali action. Maintains cost of rectification at $20,636.00 incl modification of front door rectification. The MKO report has

not responded to this item.SG has not been provided with any documentation of the alleged drain to the subsill under the concrete.

52 On the other hand, the Builder's expert Mr O'Donnell stated that:

> MKO agrees to sealing below timber front door tread and the installation of a brass strip to protect the sealant at the front door. Cost agreed of $400.00. MKO holds on remaining items as there is no visible evidence of direct contact between the aluminium windows and concrete.

53 The Tribunal member conducting the conclave commented:

> Agree scope and cost. MKO agrees front door rectification but maintains nil for remainder of this item. MKO report 8.04 pages 10, 11,12. Builder has instructed MKO that there is a sub-sill below the doors/windows SG Maintains position.

The Homeowners' submissions

54 In summary the Homeowners submit:

(1) Mr Giaouris was cross-examined on this item and provided the Tribunal with clear and reasoned evidence explaining the cause of the issue at the door thresholds, including:

(a) water egress into the property; and

(b) further corrosion with the aluminium frame of the window in contact with the concrete floor;

(2) in cross-examination, Mr O'Donnell conceded that if there was evidence of water egress, he agreed that the relevant Australian Standard and performance requirements of the BCA was not met;

(3) Mr Abbott gave uncontested evidence of water egress at the door thresholds.

The Builder's submissions

55 I repeat my comments at [26].

Conclusion

56 This item was effectively conceded by the Builder's expert during cross-examination. I am satisfied that in this respect the Builder breached the statutory warranty in s 18B(a) of the HB Act that the building work the subject of the Contract be done with due care and skill and in accordance with the plans and specifications.

57 I am satisfied that a work order should be made.

9.7 - Roof drainage system

JSS

58 In the JSS, the Homeowners' expert Mr Giaouris stated:

> Defects in part agreed by roofing expert, remaining defects have not been responded to.

59 On the other hand, the Builder's expert Mr O'Donnell stated that:

> Part agree defects exist. Refer MKO 8.06. MKO and Andrew Steward are of the opinion the roofing installed requires a fall of 1 degree. The roofing has a fall of more than 1 degree.

60 The Tribunal member conducting the conclave commented:

> Roofing expert Andrew Steward joined the conclave. 12.25 PM. Engaged by roofer. This issue has not been addressed by the MKO

The Homeowner's submissions

61 In summary the Homeowners submitted:

(1) the Homeowners gave uncontested about water damage and water egress to the Property;

(2) Mr Giaouris gave his opinion on defects to the roof drainage system as the cause of water egress together with issues of corrosion and ponding;

(3) this item specifically relates to the main roof fall and several items in relation to the roof were agreed as defective. Mr O'Donnell conceded that the main roof had not been constructed as per the agreed plans (see too the SAFC in relation to the main roof);

(4) the Builder has not installed the roof as per the plans and it follows that the Builder is in breach of the statutory warranties;

(5) Mr Giaouris explained that the roof is a trapezoidal roof and in accordance with the relevant Australian standard a 3 degree fall is required to ensure water is not ponding on the roof;

(6) Mr O'Donnell conceded in cross-examination that the fall was less 1.6 degrees;

(7) Mr Giaouris provided the Tribunal with a clear and concise explanation in cross-examination as to why the roof drainage was not working effectively. Mr Giaouris' opinion was that the roof should be rectified in accordance with the approved plans;

(8) Mr O'Donnell conceded in cross-examination that he did not inspect the roof at roof at all and it appears that he has solely relied upon the opinion of the roofing contractor to whom the Builder subcontracted the work;

(9) the opinion of Builder that the roof as constructed is a better solution than the approved plans are unsupported by any evidence and should be disregarded by the Tribunal;

(10) the agreed defects to the roof include evidence of corrosion after only two years of construction. Given the overwhelming and uncontested evidence of ponding of the roof and water egress into the property, the Tribunal should be satisfied that the construction of the roof has not

been carried out with due care and skill and find in favour of the Homeowner.

The Builder's submissions

62 I repeat my comments at [26].

Conclusion

63 This item was barely opposed by the Builder. In the SAFC, the parties agreed to some but not all the works related to the roof drainage system including:

(1) roof alfresco gutter defective;

(2) roof alfresco overflow required;

(3) service penetrations on the roof not sealed;

(4) corrosion on the main roof; and

(5) main roof not constructed as per the approved plan.

64 In the circumstances, I find that the Builder has breached the statutory warranty contained in s 18B(1)(a) of the HB Act that the building work the subject of the Contract be done with due care and skill and in accordance with the plans and specifications.

65 I will make a work order requiring the work to be completed within four months of these reasons.

9.9 - Waterproofing to internal wet areas

JSS

66 In the JSS, the Homeowners' expert Mr Giaouris stated:

> SG & MKO inspected all 4 wet areas. Water test undertaken to ensuite and the water was identified to pond. No compliance with AS3740 has been

achieved with waterstop to other 3 bathrooms. This was confirmed at inspection with member and MKO.

67 On the other hand, the Builder's expert Mr O'Donnell stated that:

nil defect exists

68 The Tribunal member conducting the conclave commented:

AS 3740 entry door to each wet area. MKO P25 at p75-p78. Issue is compliance. MKO says complies with performance requirements of the NCC. In particular P2.4.1 Wet areas. MKO maintains position.

The Homeowner's submissions

69 In summary, the Homeowners submit:

(1) the issues with the bathrooms are twofold, namely:

(a) water is ponding in the ensuite; and

(b) there is no visible water stop to all bathrooms;

(2) both Mr Abbott and Mr Giaouris gave evidence of these matters, and in the JSS, Mr Giaouris sets out the water testing done on all four wet areas: water was found to pond in the ensuite and Mr Giaouris further says that the noncompliance has been achieved with the water stop to the other bathrooms as confirmed by Mr O'Donnell and the member conducting the conclave;

(3) Mr Giaouris was cross-examined on his finding and gave clear and concise evidence on the issue including potential damage to the property over time if the defect was not rectified;

(4) Mr O 'Donnell conceded there was ponding in the ensuite bathroom and if the Tribunal found that water was ponding, the relevant Australian standard and BCA had not been complied with resulting in the works being defective.

(5) in cross-examination Mr O'Donnell attempted to renege on his comments in the JSS in relation the water stops in the other bathrooms and was now changing his opinion.

(6) the Tribunal should accept the evidence of Mr Giaouris in relation to the water stops which was consistent with the comments set out in the JSS;

(7) given the overwhelming and uncontested evidence of ponding to the ensuite floor and comments in the JSS the Tribunal should be satisfied that the work on the bathrooms has not been carried with due care and skill find in favour of the Homeowners.

The Builder's submissions

70 I repeat my comments at [26].

Conclusion

71 This item was barely opposed by the Builder and effectively conceded by the Builder's expert Mr O'Donnell. In addition, the SAFC states:

> The experts agree:
>
> a. Water ponding in the ensuite due to insufficient fall.
>
> b. No compliance with AS3740 achieved with water stop in other 3 bathrooms.

72 I am satisfied that in this respect the Builder breached the statutory warranty in s 18B(a) of the HB Act that the building work the subject of the Contract be done with due care and skill and in accordance with the plans and specifications.

73 In the circumstances, I am satisfied that a work order should be made.

P124 - Main roof parapet

JSS

74 In the JSS, Mr Giaouris stated:

> SG maintains defect. MKO remains silent on this position.

75 On the other hand, the Builder's expert Mr O'Donnell stated that:

> nil defect exists

76 The Tribunal member did not record any comment for this item.

The Homeowner's submissions

77 Here the Homeowners rely on the evidence of Mr Giaouris at p 238 of the TB where he states:

> *Defect Description:*
>
> Clear sealant filling
>
> crack - blue
>
> Fixings punched through render - red
>
> Sealant installed - green
>
> *Remediation*
>
> Remove and replaced cracked sealant.
>
> Remove and replace fixings. Painter to fill and recoat.
>
> Painter x 6 hours to repair both defects.
>
> $100 materials.

78 Page 238 also provides a cross to section 9.10 of his report "Poor Paint and Render".

The Builder's submissions

79 I repeat my comments at [26].

Conclusion

80 This item was barely opposed by the Builder.

81 I am satisfied that in this respect the Builder breached the statutory warranty in s 18B(a) of the HB Act that the building work the subject of the Contract be done with due care and skill and in accordance with the plans and specifications.

82 In the circumstances, I am satisfied that a work order should be made.

9.12 - Roof flashing

JSS

83 In the JSS, Mr Giaouris stated:

> Included in 9.70 above. BCA specifies 3 degrees pitch required.

84 "9.70 above" is section 9.7 of Mr Giarouris' report "Roof Drainage System" which states:

> *Defect (recurring)*
>
> 9.7.1 Below are the items that were found defective in relation to defective workmanship to the roof:
>
> 9.7.1.1 Insufficient fall to gutter;
>
> 9.7.1.2 Non-complaint roof slope;
>
> 9.7.1.3 Insufficient downpipes; and
>
> 9.7.1.4 Missing overflow;
>
> 9.7.2 The defective roofing installation has caused the following defects:
>
> 9.7.2.1 Moisture damage to ceiling;
>
> 9.7.2.2 Corrosion.
>
> …
>
> *Justification*

> 9.7.4 The Homeowner has identified that during heavy rain the alfresco floods and water drips from the ceiling.
>
> 9.7.5 Details for the roof have been extracted from the roof plan drawing number A05 by Grant Seghers.
>
> …
>
> 9.7.6 As 3500.3 Section 4.8 does not allow ponding in gutter[s]
>
> …
>
> 9.7.10 As per AS3500.3 clause 3.7.8, downpipe is required to be fitted vertically to the base of a sump, yet the awnings are connected with gutters directly with no sump.
>
> …
>
> 9.7.12 As there is only one downpipe installed and no overflow there is no provision to prevent water entering the ceiling space if the single drainage outlet fails.

85 The Builder's expert Mr O'Donnell stated in the JSS that:

> nil defect exists. MKO and Andrew Steward are of the opinion the roofing installed requires a fall of 1 degree. The roofing has a fall of more than 1 degree.

86 The Tribunal member conducting the conclave commented:

> MKO Silent on this item. But maintains in accordance with manufacturer's specification LBI Reference not provided. AS fall is 1.6 Degrees manufacturer requirement 1Degree. Span deck Roofing expert disagrees. May need to apply for leave to file additional evidence - A

The Homeowner's submissions

87 Here the Homeowner simply states that this item is described by Mr Giaouris at p 238, and I have summarised that page and section 9.7 of his report above.

The Builder's submissions

88 I repeat my comments at [26].

Conclusion

89 In the SAFC, the parties agreed the scope or work and cost of the following defects:

(1) roof alfresco metal flashing;

(2) main roof capping corners (defect numbers 116, 117 and 118);

(3) main roof box gutters (defects numbered 119, 120 and 123).

90 I prefer the evidence of Mr Giaouris who actually went onto the roof, to the evidence of Mr O'Donnell, who did not. In addition, Mr O'Donnell conceded that the roof had not been constructed in accordance with the plans, but did not accept that the roof was not in accordance with the Building Code of Australia. He conceded that there were some defective aspects, but did not agree they were substantial.

91 I am satisfied that the Builder breached the statutory warranty in s 18B(a) of the HB Act that the building work the subject of the Contract be done with due care and skill and in accordance with the plans and specifications.

92 In the circumstances, I am satisfied that a work order should be made.

9.13 - Concrete topping

JSS

93 In the JSS, the Homeowners' expert Mr Giaouris stated:

> SG discolouration of polished concrete slab around the perimeter. Agree inconsistent finish. Not now pressing new slab new documentation . Agree there is discolouration.SG has identified visible discolouration throughout the polished concrete not addressed . 85m2 of griding and repolisng $119/m2 as per pg 258 of Rawlinsons = $10,115.Remove and reinstate furniture 32hrs @ $65/hr = $2,080MKO agreed to discolouration at conclave but noted this is inherent of concrete.

94 On the other hand, the Builder's expert Mr O'Donnell stated that:

nil defect exists. Work was not included in the Contract sum. Refer my 8.12

95 The Tribunal member conducting the conclave commented:

> concrete topping slab not installed. Additional work required to achieve uniform surface. MKO no comment owner may have carried out work MKO Nil defect.

The Homeowner's submissions

96 In summary, the Homeowners submit:

(1) this item relates to the visual discolouration throughout the polished concrete floor; Mr Abbott provided colour photographs of the issue, and Mr Giaouris sets out at pp 677 to 678 of the JTB how the work was not carried out with due care and skill;

(2) included in the evidence is an email from the Homeowners to the Builder relating to the Builder retaining $5,000 from its subcontractor for failing to carry out the works on the polished concrete floor satisfactorily;

(3) it is evident that the Builder has attempted to rectify the defect to the concrete floor which forms part the Builder's Claim;

(4) in the JSS on p 1309, discolouration is agreed to by the experts and the member conducting the conclave notes that additional work is required to achieve a uniform finish;

(5) in cross-examination, Mr O'Donnell conceded the inconsistency in the floor finish but disputed it was as bad as depicted in the photographs when he inspected the property;

(6) the Homeowners' evidence is uncontested. Mr Abbott's evidence should be preferred and is consistent with the opinions of the member conducting the conclave and Mr Giaouris;

(7) the Tribunal should find that the polished concrete floor has not been carried out with due care and skill by the Builder and the defect should be rectified;

97 A further issue was whether the Builder should have installed a topping slab. It is agreed by the parties that a topping slab has not been installed but there is a dispute about whether this was excluded from the building contract. It is the Homeowners' evidence that the Ground Floor Topping Slab plan on p 410 of the JTB is agreed plan that formed part of the Contract. In this respect:

(1) Mr Abbott gave uncontested evidence that the topping slab was not deleted from the Contract and the Builder installed an inferior solution that remains defective;

(2) Mr O'Donnell contends that the plans on pp [1272] and [1273] were the amended plans removing the topping slab from the contract. At pp 161 to 162 of the JTB in the Builder's Claim are relevant emails on this issue. By email dated 13 March 2018 (p 162) the Builder instructs the engineer to remove the topping slab detail. As the Contract is dated 30 January 2018, it would have been impossible for these plans to have been attached to the Contract;

(3) there is no evidence of any variation agreed in writing between the Homeowner and the Builder that complies with cl 14 of the Contract or otherwise where the Homeowners agreed to the removal of the topping slab from the contracted works;

(4) the Tribunal should find that the topping slab was part of the Builders contracted works and that the Builder failed to carry out those works in accordance with the plans;

(5) Mr Giaouris gave evidence in cross-examination that installing a topping slab now would be detrimental as it would necessitate the need to raise doors and other fixtures in the Property;

(6) the evidence of Mr Giaouris, which should be accepted, is there an alternate solution proposed by him remedy defective appearance and discolouration of the polished concrete floor.

The Builder's submissions

98 I repeat my comments at [26].

99 However, I note that in the JSS Mr O'Donnell referred to his "8.12" where he states:

> **8.12 Topping Slab (Giaouris item 9.13)**
>
> 8.12.01 The topping slab depicted in the plans was deleted at the Owners request at a meeting with the Builder on 13 December 2017. This is confirmed in an email from the Builder to the Owner and dated 14 December 2018 (refer document 3.07) and the cost of the topping slab was not included in the Builders Tender Sum.
>
> 8.12.02 The concrete raft slab was designed and detailed under the Owners instruction by Engineer's, Waddington Consulting Pty Ltd and further to the discussions held on 13 December 2017 the Owner had the raft slab detail altered by deleting the Topping slab (refer Document 3.27. Extract only provided, full copy of slab details available on request).

Conclusion

100 I find that the works the subject of the Contract included:

> 4.1 Raft Slab
>
> - Raft slab as per engineering plans
>
> - The steel reinforced raft slab consists of thick steel reinforced concrete slab integrated with
>
> steel reinforced concrete beams founded into the bearing soil for strength and support.
>
> - Polished concrete finish.

101 The email of 14 December 2017 relied on by the Builder relevantly states:

> Following from yesterday's meeting, Grant has had a chance to put together a list of allowances today as he didn't need to pour concrete due to the weather. Below is a list of the inclusions allowed for in your tender:

> - Concrete polished finish to entire slab including garage, no infill slab allowed for.

102 In the SAFC, the parties agreed that parties agreed that there was visible discolouration throughout the polished concrete, and that the concrete topping slab had not been installed.

103 On the weight of the evidence, I am satisfied that the topping slab remained part of the Contract and that the Homeowners had not agreed to its deletion from the contract at a meeting held on 13 December 2017 or otherwise.

104 I am satisfied that in this respect the Builder breached the statutory warranty in s 18B(a) of the HB Act that the building work the subject of the Contract be done with due care and skill and in accordance with the plans and specifications.

105 In the circumstances, I am satisfied that a work order should be made.

P24 - Sewer pipework

JSS

106 In the JSS, the Homeowners' expert Mr Giaouris stated:

> Page 22 of SG Report Supplied 29 january 2021, $22,406.00, SG costing of hydraulics engineers report. Ref forensic engineering 28 january 2021 Simon Ingegneri. SG has used MKO Calculations and identified if those levels are correct 670mm of potential fall over approx 32 metres. therefore builder should not have proceeded without specialist engineering advice. SG has not provided with any sewer design, as such can not identify why this is a defective design.

107 On the other hand, the Builder's expert Mr O'Donnell stated that:

> Refer item P24, Line 16 above. Designed levels do not permit adequate fall to the boards sewer main.

108 The Tribunal member conducting the conclave commented:

> Issue whether possible to control the finish Sewer backfall. Issue Owner provided plans asserted to be incorrect by MKO.

Conclusion

109 This item can be dealt with simply, as at the hearing Mr O'Donnell conceded that the work not in accordance with the BCA, and that significant remedial work was required.

110 In addition, in the SAFC the parties agreed:

1. The sewer pipes do not have sufficient cover; and
2. There is inadequate fall to the sewer main.

111 I find therefore that in this respect the Builder breached the statutory warranty in s 18B(a) of the HB Act that the building work the subject of the Contract be done with due care and skill and in accordance with the plans and specifications.

112 In the circumstances, I am satisfied that a work order should be made.

The alarm camera system

The Homeowner's submissions

113 The Homeowners submit:

(1) at p 496 of the JTB is an email from the Builder to the Homeowner stating that the contracted works include an alarm camera system as standard with the electrical works;

(2) the Builder concedes the security camera system has not been installed and suggests in the SAFC that the Homeowners elected to forgo the system;

(3) there has been no credit provided and there is no variation for the alarm camera system.

(4) they gave evidence that the Contract included the alarm camera system, and the alarm camera system has not been installed.

The Builder's submissions

114 I repeat my comments at [26].

115 However, I note that the Builder submits that the Homeowners elected to forgo the alarm system, as they simply did not want it.

116 There is no probative evidence to support that submission and I reject it.

Conclusion

117 As the Homeowners' evidence was not contested, I am satisfied that the Contract included the installation of the alarm camera system.

118 I find therefore that in this respect the Builder breached the statutory warranty in s 18B(a) of the HB Act that the building work the subject of the Contract be done with due care and skill and in accordance with the plans and specifications.

119 In the circumstances, I am satisfied that a work order should be made.

Liquidated damages

The Homeowner's submissions

120 The Homeowner submitted that:

(1) the Contract provided for a construction period to commence on 2 February 2018 with the new dwelling to be completed within 277 days being 1 December 2018;

(2) the Builder made a request for an extension to the completion time and the Homeowners granted an extension to 14 January 2019;

(3) the Homeowners gave uncontested evidence that the works were completed on 15 February 2019 and the property handed over on that day;

(4) the Contract provides for liquidated damages of $650 per week (see JTB at pp 79 and 83);

(5) in the circumstances the Homeowners are entitled to four weeks liquidated damages being $2,600.

The Builder's submissions

121 The Builder made no written submissions on this issue.

Conclusion

122 This issue was not contested by the Builder.

123 In the circumstances, the Homeowners are entitled to a money order of $2,600. This is to be paid by the Builder within 28 days.

Costs of the Homeowners' Claim

124 The Homeowners seek their costs.

125 The starting point is s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (**NCAT Act**) which relevantly provides:

> **60 Costs**
>
> (1) Each party to proceedings in the Tribunal is to pay the party's own costs.
>
> (2) The Tribunal may award costs in relation to proceedings before it only if it is satisfied that there are special circumstances warranting an award of costs.

126 However, rule 38 of the Civil and Administrative Tribunal Rules 2014 provides:

> **38 Costs in Consumer and Commercial Division of the Tribunal**
>
> (1) This rule applies to proceedings for the exercise of functions of the Tribunal that are allocated to the Consumer and Commercial Division of the Tribunal.
>
> (2) Despite section 60 of the Act, the Tribunal may award costs in proceedings to which this rule applies even in the absence of special circumstances warranting such an award if—

> (a) the amount claimed or in dispute in the proceedings is more than $10,000 but not more than $30,000 and the Tribunal has made an order under clause 10(2) of Schedule 4 to the Act in relation to the proceedings, or
>
> (b) the amount claimed or in dispute in the proceedings is more than $30,000.

127 The amount in dispute was $339,423.88. Accordingly, this is a matter where rule 38 applies, and I reject the Builder's submission that s 60 of the NCAT Act is the applicable rule and that the Homeowners need to establish "special circumstances" warranting an award of costs.

128 I see no reason why the Builder should not pay the Homeowners' costs of the Homeowners' Claim as agreed or assessed.

129 If either party wishes to seek any other order, they should file and serve submissions within seven days of these reasons, and the other party may respond within a further seven days.

130 If necessary, I propose to decide any issue as to costs on the papers. If either party disagrees, they should address that issue in their submissions.

131 Submissions are to be limited to three pages in length.

Consideration – the Builder's Claim

132 The Builder's Claim is sufficiently summarised at [4] and [5]. I will consider each claimed variation in turn. But before doing so, I will set out the relevant clauses of the Contract, and state the relevant principles that will guide me.

Clause 14 of the Contract

133 The relevant clause is cl 14 which provides:

> **4. Variations-How to Deal with Changes to the Work**
>
> a) The works may be varied by such things as:
>
> i) execution of additional work;

ii) decreases in or omissions from the works;

iii) changes in the character or quality of any material or work such as may be necessary due to the existence of a latent condition;

iv) changes in the levels, lines, positions or dimensions of any part of the works.

b) For the sake of clarity a variation is established by:

i) **written** instructions from the **Owner** or the **Owner's** representative; and or

ii) the supply to the **Builder** of post contract details such as drawings; and or

ii) the discovery of an otherwise unknown or latent condition; and or

iv) an instruction issued by a relevant authority under **Clause 12**

which alters the work done, the work to be done or requires adjustments to an existing situation or the work which was otherwise expected to be done.

Accordingly a variation may, for example, result from such things as a request from the **Owner**, a choice made by the **Owner**, dealing with latent conditions and complying with the requirements of an Authority.

c) The **Builder** is not obliged to vary the Contract works or carry out any extra work unless the **Builder** consents. Such consent will not be unreasonably.

withheld.

d) i) If the **Builder** agrees to undertake a variation requested or required by the Owner, the variation is to be detailed in **writing** and signed by the **Owner** (or the **Owner's** agent) and the **Builder**. Documents detailing the variation, including as appropriate, amended drawings or specifications, become contract documents.

ii) The **Builder** may require, prior to the execution of any variation that the **Owner** produce evidence, satisfactory to the **Builder**, of the **Owner's** capacity to pay for the variation.

Builder to Advise Value of Variations

e) The **Builder**, within a reasonable time of receipt of instructions to execute a variation (i.e. an instruction signed by the **Owner** or **Owner's** agent), is to notify the **Owner**, in **writing**, of the value of the variation.

Less Work due to a variation

Where the works are decreased or omissions from the works are made the cost of the work not now required is to be deducted from the contract price. Cost in this case means the actual cost of labour, subcontractors or materials saved by the **Builder** because the work is now not required to be done. No other deduction is required by reason of the work being decreased or omitted.

Additional work due to a variation

g) Where the work to be done is increased, the cost of the extra work is lo be added to the contract price. The **Builder** can choose when and how often to claim payment for variation work and is not required to wait until the next stage claim.

h) Where a price has not been previously agreed for additional work, the **Builder** may proceed with the variation work and the price to be paid for the work will be the cost as calculated in accordance with **Sub-Clause (i)** below, together with the allowance specified in **Item 1 of Schedule 2** for overhead and profit.

i) The cost referred to in **Sub-Clause (h)** above, unless otherwise agreed, will be calculated as follows:

i) for work by the **Builder's** employees, the rates for such labour are those set out in **Item 2 of Schedule 2**. lf no rates are shown, then the rates to be used are the rates published by the Master Builders Association of NSW current at the time the variation is made;

ii) where the work or some part of it is **executed by a sub-contractor**, the cost to be paid under **Sub-Clause (h)** above is the amount properly paid or payable to the sub-contractor which will be established by provision of a proper tax invoice from the sub-contractor engaged to do the extra work.

iii) the price for materials is the cost of the materials to the **Builder**. The **Builder** is not entitled to any discount other than a discount for prompt or cash payment.

All Directions Concerning Work are to be Given to the Builder

j) Neither the **Owner** nor any duly appointed representative will give or are entitled to give at any time directions to the **Builder's** workers or sub-contractors concerning the works or any part thereof.

All instructions are to be given to the **Builder** and are to be in **writing**.

(bolding and underlining as in original)

Builder's general submissions

134 The Builder submits that:

(1) the Contract was a fixed price contract;

(2) cl 14 of the Contract provides for variations to be established by:

(a) written instructions from the homeowners (cl 14 (b)(i));

(b) the supply to the Builder of post-contract and details such as drawings (cl 14 (b)(ii);

(c) the discovery of an otherwise unknown or latent condition (cl 14 (b)(iii)); or

(d) an instruction issued by relevant authority (cl 14 (b)(iv));

(3) it concedes that the items listed in the Builder's Claim were not set out as formal written variations, signed by the parties, as per the mechanism provided in cl 14 (d)(i) of the Contract;

(4) as provided in cl 14(b) of the Contract, requests were made by the Homeowners and recorded in writing, choices were made by the Homeowners and agreement was reached on the items, as reflected in the email exchanges with Homeowners included in Mr Patterson's evidence;

(5) the Homeowners are not illiterate, financially unsophisticated or uninvolved;

(6) it is apparent from the email exchanges that the changes to the items in the Contract, alleged in the Builder's Claim to constitute variations, arose either at the request of the Homeowners, or as a result of a negotiation process between the Homeowners and the Builder, which changes for made an order for added to the scope or deleted from the scope and offset against one another;

(7) the Homeowners have received the benefit of the items claimed as variations, and continue to enjoy the increase in the value of the Property brought about as a result of those variations, it would be unjust for the Homeowners to have and continue to enjoy that benefit, at the expense of the builder, without paying the agreed price, alternatively the market related price, alternatively the reasonable price, for those variations and additions.

Homeowners' general submissions

135 The Homeowners submit that the Builder has effectively conceded that it has no claim in contract for the purported variations, and in the alternative presses a claim in quantum meruit.

136 The Homeowners further submit, and the Tribunal accepts, that:

(1) the elements for a successful claim in quantum meruit were set out by the Appeal Panel in *Nayak v Rockwall Constructions Pty Ltd* [2017] NSWCATAP 18 at [30] as follows:

(a) the subject building work fell outside the requirements of the contract, specifications, and other included contract documents;

(b) the owner had actual knowledge of the variation as they were being done;

(c) the owner knew that they were outside the contract;

(d) the owner knew that the builder expected to be paid for the work as a variation to the contract; and

(e) the builder had provided evidence that the amount claimed was fair value for the non-compliant variation work.

(2) in *Ingate v Andrews* [2018] NSWCATAP 99 at [47] the Appeal Panel, after referring to *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5, stated:

> the basis for quantum meruit the judges emphasise 'acceptance' as the ultimate critical issue.

(3) in *Brenner v First Artists' Management Pty Ltd* [1993] VicRp 71; [1993] 2 VR 221 Byrne J said that it was necessary to focus attention on the position of the party from whom payment was sought. The

enlivening principle of the entitlement to payment was "the injustice of the enrichment to that party" and that:

> In my opinion the appropriate inquiry is whether the recipient of the services, as a reasonable person, should have realised that a person in the position of the provider of the services would expect to be paid for them and did not take a reasonable opportunity to reject those services.

(4) in *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd* [2004] NSWSC 272 the Court held that a quantum meruit was the reasonable cost of work done and expenditure incurred with the assessment of reasonableness being undertaken by reference to the results produced and the evidence of what it would be in the course of ordinary things be necessary to outlay in order to produce those results;

(5) the Builder bears the onus of persuading the Tribunal that it is just and equitable to recover on a quantum meruit basis: *Urban Constructions (NSW) Pty Ltd v Shearer* [2015] NSWCATCD 9.

Consideration – Homeowners' Claims

Introduction

137 I commence by repeating my comments above about the lack of usefulness of the Builder's submissions. Again, the submissions are rolled up, generalised and make no attempt to cross-reference the evidence, save for the reference to "the email exchanges with the Homeowners" which were listed as annexures to the statement of Mr Patterson dated 18 August 2021 and annexed to the expert report of Mr O'Donnell dated 24 February 2021. In reply, the Builder admits that its submissions do:

> not address each specific element individually. The evidence before the Tribunal is clear in showing that the work involved is different in some way to what was initially required by the building contract, that the Homeowners were aware of the work and actively engaged instigation, and that [the Builder] expected to be paid for this work.

138 As for the Homeowner's' position, as noted above at [6], the Homeowners reject all the Builder's claims.

139 Ten variations are claimed by the Builder, and I will consider each in turn. However, I can state at the outset that I am not satisfied that any claimed variation is a variation in accordance with cl 14 of the Contract. As was conceded by the Builder, no variation claimed not set out as formal written variations, signed by the parties, as per the mechanism provided in cl 14 (d)(i) of the Contract.

140 What I need to determine is whether any claim is established in quantum meruit.

Removal of additional large quantities of soil, $19,562.40

Builder's submissions

141 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in quantum meruit.

142 As best that the Tribunal can determine, and without any assistance in the written submissions, the Builder relies on Mr Patterson's evidence set out in his statement dated 18 August 2021 in [4.1] headed "Removal of soil" and the sub-paragraphs immediately following.

143 In summary, Mr Patterson states that:

(1) when preparing the tender, he had not been provided with a survey document for the Property, and therefore did not include any amounts of soil removal in the Tender. In addition, there was an existing dwelling on the Property, making it difficult to estimate the degree of soil removal required;

(2) upon commencing construction he discovered that soil would have to be removed to achieve the correct levels;

(3) he subsequently removed more than 150 tons of soil in order to achieve the correct land levels prior to commencing the concrete works;

(4) on 30 April 2018, he had a discussion with Mr Abbott confirming that there would be variations as a result of works in soil removal. He does not recall the exact words used, but later that day he sent Mr Abbott an email relevantly stating:

> Craig as per our conversation regarding documenting extra works that will incur variation to contract.
>
> …
>
> One item we will need to talk about will be the amount of and removal of soil taken from site, we have removed upwards of 150 t so far and this is not including OSD tanks and earthworks to main slab. It is normally the owners responsibility for removal of soils as this is very hard to calculate when there is an existing house on the block etc and not knowing what lies beneath. Each type of soil is different, white, volume etc. …

144 Mr Patterson then attaches five weeks' worth of timesheets recording the hours of staff members and truckloads of soil removed from the property, an invoice of a subcontractor, Rogan Trading Co Pty Ltd for an additional truck and trailer load of soil which was removed from the property.

145 Mr Patterson contends that the Builder is entitled to a variation to the Contract as this constitutes an otherwise unknown or latent condition.

Homeowners' submissions

146 In summary, the Homeowners submit:

(1) there is no written or signed variation for soil removal relating to this amount claimed by the Builder;

(2) applying the principles of quantum meruit, the first consideration for the Tribunal is whether the works fell outside the requirements of the Contract;

(3) in cross-examination, Mr O'Donnell conceded that the Contract was a lump sum contract and there was no allowance or provisional sum for soil removal. This is contrary to the initial opinion expressed by Mr O'Donnell in his report where he suggested soil removal was a provisional sum;

(4) the building works as set out in the Tender included a pool and site works for the installation of rainwater and onsite detention tanks underneath the garage slab and the installation of stormwater. Each of these works required soil removal;

(5) the Tribunal should find that soil removal did form part of the (fixed price) Contract;

(6) Mr Abbott's relevant evidence was that:

(a) the Builder had the survey reflecting the land levels of the property when preparing the Tender. Therefore, the Builder cannot claim a latent condition existed;

(b) the Builder has already claimed and been paid variations for soil and rock removal as the Homeowners, at the request of the Builder, paid the Builder $16,000 cash in addition to the contract sum for soil and rock removal from the site;

(c) in addition, the Builder was paid a variation of $2,500 for soil removal that was included in the Builder's final payment claim (JMT, p 198);

(d) there was another variation charged by the Builder for "dirt preparation" for extra 40mm depth and width to allow for under slab foam installation for heating (JMT, p 212), and that invoice was paid in full;

(7) At JMT p 198, "rather tellingly" the Builder states at the fourth point:

> “Dirt Removal=$2,500 including GST: We have already removed the x2 truck and dog loads from the site, anything further required to be removed is chargeable"

(8) Mr Abbott was not cross-examined and his evidence should be accepted;

(9) the Builder is seeking further payment for alleged soil removal between 21 March 2018 and 1 May 2018. In this period there is an email from the Builder to the Homeowners dated 18 April 2018:

> the boys have stated off well on site and have completed a full set out and well and truly into digging the pool. The news is that we have hit rock and Grant has asked me to let you guys know that we will dig all dirt out first and measure the rock quantity and give you a price for removal of the rock as per contract"

(10) the Tribunal should therefore find that the Homeowners paid the Builder $16,000 cash on 8 May 2018 being timely to the dates claimed by the Builder as set out in its evidence;

(11) in cross-examination, the Builder conceded the cash payment from the Homeowners for soil and dirt removal. The Tribunal should find that amount paid by the Homeowner to the Builder was $16,000 and included rock and soil removal. The Builder also conceded that some soil removal was included in the Building Contract for the pool and an “OSD” tank;

147 As to the time sheets, the Homeowners submit that the Builder does not distinguish or provide any evidence as to whether those records relate to:

(1) rock removal; or

(2) soil removal in additional to what was included in the contract; or

(3) additional soil removal from a latent condition.

148 In conclusion, the Homeowners submit that:

(1) their evidence establishes that the Builder has already been paid $19,310 plus GST towards rock and soil removal;

(2) they have not been unduly enriched and have already paid for the work;

(3) they paid the Builder for soil removal even though it was already included in the fixed contract sum, and this suggests that the Homeowner has already overpaid the Builder and may be entitled to a credit for the amount paid that does not relate to rock excavation;

(4) the onus is on the Builder to prove its claim, which the Builder has failed to establish on the balance of probabilities;

(5) the evidence of Mr O'Donnell is of no assistance to the Tribunal, as Mr O'Donnell conceded in cross-examination that he was not aware of the payments already received by the Builder for the removal of rock and soil and conceded soil removal was not excluded under the contract. The evidence of Mr O'Donnell is not persuasive.

Conclusion

149 The Homeowners submit, and the Tribunal accepts, that the Builder bears the onus of proving this variation the other claims for variations on the balance of probabilities.

150 I find the Homeowners' submissions on this claim to be persuasive, and that on the balance of probabilities the weight of the evidence is firmly against finding that the Builder has established a claim on the quantum meruit basis. I do not accept that any email or other evidence provides "ample satisfaction" to support a claim in quantum meruit.

Additional piering, related to the raft slab, $1,274.37

Builder's submissions

151 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in *quantum meruit.*

152 As best that the Tribunal can determine, and without any assistance in the written submissions, the Builder relies on Mr Patterson's evidence set out in his statement dated 18 August 2021 in [4.2] headed "Additional piering" and the sub-paragraphs immediately following.

153 In summary, Mr Patterson states:

(1) the original specifications for concrete peering contained in drawings prepared by the Abbotts engineer, which called for 19 piers;

(2) after excavation it was found at the bedrock was close to the surface and the engineer directed that additional piering would be required. In this respect, the Builder relies on an email to Mr Patterson dated 7 May 2021 which states:

> …
>
> 2. It was noted that bedrock is actually quite close to the surface and that part of the new footing this will be founded directly on bedrock. Therefore all footing rips need to be found directly on bedrock with mass concrete block Downs (300×300) 2100 maximum centres. If the mass concrete lockdown is greater than 1000 mm deep and use pile detail P1.

(3) ultimately 45 piers were required;

(4) Mr Patterson contends that the Builder is entitled to a variation to the Contract as this constitutes an otherwise unknown or latent condition.

Homeowner's submissions

154 In summary, the Homeowners submit:

(1) there is no written or signed variation for additional piering between the Homeowners and the Builder;

(2) while Builder relies upon an email exchange with Mr Waddington, the Tribunal should find that the Builder contacted the Engineer directly to seek changes to the approved construction plans, and that the Homeowners are not included in the correspondence and there is no evidence from the Builder before the Tribunal that the Homeowner knew about these changes;

(3) the additional piering said to be required by the Builder relates to the removal of the topping slab, and the Homeowners deny instructing the Builder to remove the topping slab;

(4) it is agreed that the topping slab was never installed by the Builder. There is no variation or credit for the removal of the topping slab by the Builder;

(5) as the cost of any additional piering would be offset by less work required to be carried out by the Builder with the removal of the topping slab, tt follows that there has been no benefit to the Homeowners, and they have not been unjustly enriched. If anything, the Homeowners have been left without a topping slab and the additional piering was only necessary because the Builder changed the contracted works without instructions from the Homeowner.

(6) there are no actual costs put forward by the Builder for this work. While Mr O'Donnell opines that it would take two labourers an additional 16 hours to carry out the additional piering, neither the Builder nor Mr O'Donnell gives evidence in relation to:

    (a) who actually carried out the work;

    (b) the actual time it took the Builder to carry out the work;

(c) if the work was additional to what was required to install the topping slab which clearly would have involved some work and cost had it been installed.

Conclusion

155 As I have stated above, the Builder bears the onus of improving this variation the other claims for variations on the balance of probabilities.

156 I find the Homeowners' submissions on this claim to be persuasive, and that on the balance of probabilities the weight of the evidence is firmly against finding that the Builder has established a claim on the quantum meruit basis. I do not accept that any email evidence provides "ample satisfaction" to support a claim in quantum meruit.

Additional reinforcing and thickness in the raft slab, $3,870.44

Builder's submissions

157 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in *quantum meruit.*

158 As best the Tribunal can determine, and without any assistance in the written submissions, the Builder through Mr Patterson's evidence set out in his statement dated 18 August 2021 in [4.3] headed "Additional reinforcing and thickness in the raft slab" and the sub-paragraphs immediately following.

159 In summary, Mr Patterson states:

(1) the original specification prepared by the engineer made provision for a topping slab;

(2) the Homeowners decided to omit the topping slab; upon learning of this, the engineer directed both additional steel reinforcing and a thicker slab;

(3) the Homeowners had decided to supply and install Hydronic In-Slab floor heating;

(4) without the topping slab, the inclusion of the heating pipes may have compromised the integrity of the slab, possibly leaving it prone to cracking;

(5) accordingly, the slab was made thicker to compensate for the pipes, resulting in additional concrete and additional cost in the amount of $3,870.44.

Homeowners' submissions

160 In summary the Homeowners submit:

(1) there was already a signed and written variation to the Contract that relates to the raft slab with the installation of in-slab floor heating. The variation is at [212] - [214] of the JMT;

(2) the Homeowners paid a variation of $8,149.00 for in-floor heating. The invoice as at p [210 of the JMT;

(3) the Tribunal should find that any works required for the heating slab was included in the agreed variation;

(4) while Mr O'Donnell refers to the in-floor heating and says the Builder "decided that because of the thickness of the in-floor heating pipes that it was necessary to increase the thickness of the raft slab", it does not appear Mr O'Donnell was made aware of the agreed variation between the Homeowner and the Builder for the in-floor heating and therefore his opinion therefore is not persuasive;

(5) there is no variation or credit for the removal of the topping slab by the Builder;

(6) the cost to reinforce the raft slab would be offset by less work required to be carried out by the Builder with the removal of the topping slab;

(7) it follows that there has been no benefit to the Homeowners, and they have not been unjustly enriched. If anything, the Homeowner has paid for additional reinforcement of the concrete slab in the agreed in-floor heating variation;

(8) there are no actual costs put forward by the Builder for this work;

(9) it would be unjust for the Builder to now seek payment as the Homeowner relied upon his representation as to the cost of the variation to install the in-floor heating. Had the Homeowners known it would cost an additional $3,870.44, they may not have gone ahead with the in-floor heating and have been denied that decision by the Builder;

(10) there is no evidence that the Homeowner accepted the additional cost to reinforce the slab or that the Homeowner knew that the Builder expected to be paid for the work;

(11) in his affidavit Mr Abbott stated that he did not know about this work or that the Builder expected to be paid. As Mr Abbott was not cross-examined and his evidence is uncontested.

Conclusion

161 Again, I find the Builder's detailed submissions on this issue to be persuasive. This claim fails at the evidentiary level. In particular, there is no evidence that the Homeowners accepted the additional cost to reinforce the slab or that the Homeowners even knew that the Builder expected to be paid for the work. As submitted, in his affidavit Mr Abbott stated that he did not know about this work or that the Builder expected to be paid. As Mr Abbott was not cross-examined his evidence is uncontested and in my view should be accepted.

162 In my view, the weight of the evidence is firmly against accepting the Builder's claim in relation to the additional piering.

Variation to the windows, as selected by the Homeowners, $2,475.53

Builder's submissions

163 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in *quantum meruit.*

164 As best that the Tribunal can determine, and without any assistance in the written submissions, the Builder through Mr Patterson's evidence set out in his statement dated 18 August 2021 in [4.4] headed "Additional Window installation" and the sub-paragraphs immediately following.

165 In summary, Mr Patterson states that:

(1) as a result of the different windows, the installation process required the windows to be recessed into the slab edge beam. Not being necessary with the original specified windows and required a considerable amount of additional formwork to create the necessary resources;

(2) this additional carpentry was clearly not included in the Contract as it only became necessary as a result of the change required by the Homeowners after the Contract had been signed.

Homeowners' submissions

166 In summary, the Homeowners submit:

(1) "interestingly", Builder concedes that he entered and agreed variation with the Homeowners for additional cost for windows where the parties would pay 50% each;

(2) in his evidence, Mr Patterson said that the Builder made an error and ordered the wrong windows, and that Mr Patterson agreed that a builder's margin would not apply because it was his error;

(3) this was a variation reached between the parties on amicable and agreed terms. Therefore, it would be unconscionable and unreasonable in all respects for the Builder now seek additional payment on the basis of a quantum merit.

Conclusion

167 This claim must fail for lack of evidence. The contents of Mr Patterson's statement on this issue are submissions not evidence.

Additional installation costs due to revised windows, $1,558.01

Builder's submissions

168 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in *quantum meruit.*

169 As best that the Tribunal can determine, and without any assistance in the written submissions, the Builder through Mr Patterson's evidence set out in his statement dated 18 August 2021 in [4.5] headed Window installation" and the sub-paragraphs immediately following.

170 In summary, Mr Patterson states that:

(1) the Homeowners decided to change the windows from those specified in the Contract, resulting in additional cost of $22,504.90;

(2) in an effort to assist the Abbotts and keep them happy, Mr Patterson agreed that the Builder "would go 50/50" on the additional cost of the windows ultimately selected by them;

(3) this is confirmed an email sent to him by Mrs Abbott on 25 May 2018 which relevantly stated:

> "We appreciate you hearing us out and making room for compromise on the windows. …
>
> In summary, Craig and I wish to proceed with the Acclaim aluminium based on the addition of the two attached quotes…. This brings us to a total of $77,666.60 (incl. GST). Per you [sic – your] recommendation, we will forego the Warranty Paintwork.
>
> The total cost of W09 & W10 came to $22,504.90 (incl. GST) which we have agreed to share the cost of on a 50/50 basis. ….

(4) at the time, the Builder only charged the Abbotts 50% of the cost price for the supply the windows but should also have charged the builders margin and GST on the additional cost; accordingly, the Builder claims a total of $2,475.53.

Homeowners' submissions

171 In summary the Homeowners submit that:

(1) there is no written or signed variation for additional window installation between the Homeowners and the Builder;

(2) Mr Patterson gave uncontested evidence that the Builder made an error and ordered the wrong windows;

(3) the Homeowners and Builder agreed to a variation which reasonably included any additional costs incurred by the Builder to install the windows;

(4) there are no actual costs put forward by the Builder for his work;

(5) the evidence of the Homeowners was that they did not know that the Builder expected to be paid for the work as a variation to the Contract. The Homeowners in fact paid the agreed variation for the windows to the Builder, and it is unjust and reasonable for the Builder to seek

further payment for installation without the Homeowners being made aware of these works. Had they known about additional installation costs, they may have made a different agreed variation with the Builder for the windows.

Conclusion

172 This claim must fail for lack of evidence. Neither Mr Patterson's evidence on this issue or the Builder's submissions are persuasive.

Additional installation cost of recessed fireplace, $799.00

Builder's submissions

173 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in *quantum meruit.*

174 As best that the Tribunal can determine, and without any assistance in the written submissions, the Builder through Mr Patterson evidence set out in his statement dated 18 August 2021 in [4.6] headed "Fireplace" and the sub-paragraphs immediately following.

175 The totality of Mr Patterson's evidence is as follows:

> 4.6.1 The original specification called for a surface-mounted fireplace, however, Mr and Mrs Abbott then selected the fireplace to need to be recessed into the wall.
>
> 4.6.2 As this occurred once the wall had already been completed as per the specifications in the contract, additional work was required in order to recess the selected fireplace into the wall.
>
> 4.7 The cost of doing so was $779.00.

Homeowners' submissions

176 In summary, the Homeowners submit:

(1) it was agreed by the parties that the fireplace was always part of the contracted works;

(2) there is no written or signed variation for additional works relating to the fireplace between the Homeowner and the Builder;

(3) the evidence of Mr Abbott is that he provided the Builder with the specification for the fireplace, and it was the Builder that forgot to make provision for the fireplace before he built the wall;

(4) as Mr Abbott was not cross-examined his evidence is unchallenged;

(5) Mr O'Donnell conceded he had not considered any of the correspondence between the Builder and the Homeowner relating to the fireplace;

(6) there has been no benefit to the Homeowners, and they have not been unjustly enriched. The fireplace included in the contracted works and they paid the contract sum in full.

Conclusion

177 I find the Homeowners' submissions on this claim to be persuasive, and that on the balance of probabilities the weight of the evidence is firmly against finding that the Builder has established a claim on the quantum meruit basis. I do not accept that any email evidence provides "ample satisfaction" to support a claim in quantum meruit.

Additional structural steel in framing, due to specification change, $8,712.00

Builder's submissions

178 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in *quantum meruit.*

179 As best that the Tribunal can determine, and without any assistance in the written submissions, the Builder through Mr Patterson evidence set out in his

statement dated 18 August 2021 in [4.8] headed “Additional structural steel in framing” and the sub-paragraphs immediately following.

180 In summary, Mr Patterson states that:

(1) in May 2018, the plans were altered at the request of the Abbotts to provide for a brick veneer on the external walls. As a result, the engineer changed the specification for the structural steel in the walls, requiring additional steel elements that were not originally included in the Contract

(2) this resulted in additional cost and work by the Builder in the amount of $4,752.00;

(3) the revised details for the structural steel are apparent from the revised drawing from the revised drawing from the Abbotts’ engineer which is attached as Annexure I.

Homeowners’ submissions

181 In summary, the Homeowners submit:

(1) there is no written or signed variation for additional works relating to the additional structural steel between the Homeowner and the Builder;

(2) there is no evidence before the Tribunal to support any change to the external walls to the dwelling given by the Builder;

(3) the Homeowners were not included in correspondence relied on by the Builder being emails between the Builder and an Engineer Simon Waddington

(4) the Tribunal should find that the external walls being brick veneer was part of the contract works as was the structural steel;

(5) the Tribunal should not be persuaded by the evidence before it that additional structural steel was required or was not included in the contracted works.

(6) the date of the quotations of Shire Steel are 15 January 2018 and 26 July 2018. There are various reasons why the quotations could have changed including the cost of supply, and the revisions unrelated to any variation to the works, namely the window lintels which appear to have been simply incorrectly measured the first time. These are risks and costs that sit with the Builder as part of the fixed price contract;

(7) if the Tribunal needs to go further, there is no evidence before the Tribunal that the Builder accepted the Shire Steel quotations and no evidence of payment by the Builder;

(8) the Builder cannot reasonably claim a variation it has not actually paid as it would be unjustly enriched.

Conclusion

182 Again, I find that this claim fails at the evidentiary level. In my view, the weight of the evidence is firmly against accepting the Builder's claim in relation to the additional piering.

183 In particular, I do not find that the email correspondence relied on by the Builder supports its claim at all.

Concrete floor repeated cut and polish, $16,029.99

Builder's submissions

184 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in *quantum meruit.*

185 As best that the Tribunal can determine, and without any assistance in the written submissions, the Builder relies on Mr Patterson's evidence set out in his statement dated 18 August 2021 at [4.9] headed "Concrete floor" and the sub-paragraphs immediately following.

186 In summary, Mr Patterson states that:

(1) at the time of electing to dispense with the topping slab, the Homeowners were cautioned that an entirely consistent finish might not be possible at the time of cutting and polishing the slab;

(2) the slab was eventually cut and polished as required, and the overall finish was not entirely consistent, as Mr Patterson had indicated might turn out to be the case;

(3) as the Homeowners were not happy with the finish and in an effort to keep them happy, Mr Patterson procured a new flooring contractor to completely redo the floor finish on two separate occasions in an effort to secure a result more favourable to the Homeowners;

(4) this resulted in an additional cost to the Builder in the amount of $16,029.99.

Homeowners' submissions

187 In summary, the Homeowners submit:

(1) this item was put to Mr O'Donnell in cross-examination where he conceded that the Builder cannot claim the repair of defective work as a variation to the Contract;

(2) there is an email exchange between the Builder and Homeowner about the concrete floor where the Builder concedes the defect and that he withheld $5,000 from his subcontractor that carried out the work;

(3) the Homeowners claimed that the finish of the concrete floor was defective, and a quotation from the contractor the Builder engaged to rectify the defective floor clearly states it is to "rectify the floor finish";

(4) in the circumstances, this is not a variation to the Contract and the Builder cannot claim payment for carrying out rectification of defective work. The Builder has been paid to supply a polish concrete floor with due care and skill;

(5) the Homeowners have not been unjustly enriched or obtained a benefit.

Conclusion

188 This claim was misconceived and is rejected. Even the Builder's own expert conceded that the Builder cannot claim the repair of defective work as a variation to the Contract.

Supply and installation of a side gate, $1,874.40

Builder's submissions

189 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in *quantum meruit.*

190 As best that the Tribunal can determine, and without any assistance in the written submissions, the Builder through Mr Patterson evidence set out in his statement dated 18 August 2021 in [4.10] headed "Side gate" and the sub-paragraphs immediately following which state in totality:

> 4.10.1. Mr.and Mrs. Abbott requested a side gate, which had not originally been included in the contract.
>
> 4.10.2. Again, in an effort to keep them happy, I arranged for the supply and installation of a suitable side gate.
>
> 4.10.3. This resulted in an additional cost to Patterson Built in the amount of $1,874.40 incurred at the request of the owners.

Homeowners' submissions

191 The Homeowners say that:

(1) Mr Abbott gave uncontested evidence which should be accepted by the Tribunal about the side gate being part of the Contract and included correspondence about the claim;

(2) the side gate appears on the ground floor plan at p 333 JMT just above the word Boundary";

(3) there is no evidence that the Builder paid the invoice.

Conclusion

192 The Builder's claim for this item fails for lack of probative evidence.

Provision of additional side retaining walls, $4,658.20

Builder's submissions

193 As noted above there were no explicit submissions on this item provided by the Builder, other than the general submissions that "the email evidence already provides "ample satisfaction" to support its claim in *quantum meruit.*

194 As best that the Tribunal can determine, and without any assistance in the written submissions, the Builder through Mr Patterson evidence set out in his statement dated 18 August 2021 in [4.11] headed "Side gate" and the sub-paragraphs immediately following which state in totality:

> 4.11.1. At the request of Mr. and Mrs. Abbott, Patterson Built carried out a considerable amount of additional work building additional side retaining walls that were not originally a part of the contract.
>
> 4.11.2. Patterson Built was paid the cost price of the retaining wall work in the amount of $23,291.00, but neglected to invoice Mr. and Mrs. Abbott for the profit margin on this work, as it was entitled to do in terms of the contract.
>
> 4.11.3. The additional margin that Patterson Built is entitled to in terms of the contract is $4,658.20.

Homeowners' submissions

195 In summary, the Homeowners submit:

(1) the Homeowners' evidence was that the retaining works were not part of the contracted works with the Builder and constituted a separate contract to carry out work;

(2) these works were boundary fences with adjoining neighbours for which the neighbours were paying 50% of the cost. At JMT pp [48] to [54] Mr Abbott gave evidence about the arrangement. At JMT pp [300]-[325] there is email correspondence both with neighbours and the Builder about these works;

(3) at JMT [314] the Builder issues a quotation; each adjoining retaining wall includes both the name of the Homeowner and the adjoining property owner;

(4) it is submitted therefore that each retaining wall with each adjoining property owner was a separate contract to provide building work.

Conclusion

196 This claim fails. I am satisfied that this work was for the Homeowners and *their neighbours*, and do not find that it relates to the Contract the subject of the proceedings or can amount to a claim in quantum meruit to be maintained by the Builder in the Builder's Claim.

Costs of the Builder's claim

197 The Builder failed in all aspects of its claim. As the Builder's claim was for over $30,000, the same costs principles apply summarised above apply, and I see no reason why the Builder should not pay the Homeowners costs of the Builders' Claim as agreed or as assessed.

198 If either party wishes to seek any other order, they should file and serve submissions within seven days of these reasons, and the other party may respond within a further seven days.

199 If necessary, I propose to decide any issue as to costs on the papers. If either party disagrees, they should address that issue in their submissions.

200 Submissions are to be limited to three pages in length.

Conclusion

201 For the above reasons, in the Homeowner's Claim:

(1) by agreement, the Builder is to rectify following items (using the numbering in the Statement of Agreed Facts and Contentions found at pages 1311 to 1316 of the TB): P6, P12, 9.4, 9.6, P95-P98, P106, P112, P113-P115, P126, 9.8, P35, P 20, 070-P71, 9.11, P102, P116-P120, P123, P52, P38, P128, P9.10, P99-P101;

(2) the Builder is to rectify following items (using the numbering in the Statement of Agreed Facts and Contentions found at pp 1311 to 1316 of the TB): 9.2, 9.3, 9.7, 9.8, P124, 9.12, 9.13 and P24;

(3) the Builder is to pay the Homeowners $2,600 within 28 days.

202 No time frame for the rectification work was nominated in which any rectification work order was to be completed. I will allow four 4 months from the date these reasons are published, but both parties have liberty to have the matter relisted in the event that the defective works cannot be or are not rectified in the timeframe.

203 For the above reasons the Builder's Claim is dismissed.

Orders

204 In matter HB 20/04839:

(1) by consent, on or before 7 July 2022 the respondent is to rectify following items (using the numbering in the Statement of Agreed Facts and Contentions found at pages 1311 to 1316 of the Joint Tender Bundle): P6, P12, 9.4, 9.6, P95-P98, P106, P112, P113-P115, P126, 9.8, P35, P 20, 070-P71, 9.11, P102, P116-P120, P123, P52, P38, P128, P9.10, P99-P101;

(2) on or before 7 July 2022 the respondent is to rectify following items (using the numbering in the Statement of Agreed Facts and Contentions found at pp 1311 to 1316 of the Joint Tender Bundle): 9.2, 9.3, 9.7, 9.8, P124, 9.12, 9.13 and P24;

(3) on or before 4 April 2022 the respondent is to pay the applicant $2,600.00;

(4) both parties have leave to relist the matter in the event orders 1 or 2 are not complied or cannot be complied with;

(5) the Tribunal proposes to order the respondent to pay the applicants' costs as agreed or as assessed;

(6) if either party wishes to seek any other order, they should file and serve submissions on or before 21 March 2022, and the other party may respond on or before 4 April 2022.

205 In matter HB 20/04839:

(1) the application is dismissed;

(2) the Tribunal proposes to order the applicant to pay the respondents' costs as agreed or as assessed;

(3) if either party wishes to seek any other order, they should file and serve submissions on or before 21 March 2022, and the other party may respond on or before 4 April 2022.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

Stan Giaouris opined as to existence of Major Defect in a Class 2 construction. The result was the majority of alleged major defects were found to not be defects.

Pg 11 - "the evidence of Mr Giaouris should be preferred to that of Mr Verinder."

Civil and Administrative Tribunal
New South Wales

Case Name:	The Owners – Strata Plan 92283 v Aushome Construction Pty Ltd, Zapphire Investments Pty Ltd v Aushome Construction Pty Ltd, Aushome Construction Pty Ltd v Zapphire Investments Pty Ltd
Medium Neutral Citation:	[2022] NSWCATCD
Hearing Date:	7-8 November 2022
Date of Orders:	21 November 2022
Date of Decision:	21 November 2022
Jurisdiction:	Consumer and Commercial Division
Before:	Graham Ellis SC, Senior Member
Decision:	In HB 21/38931:

1 On or before 21 May 2023, the respondents are to undertake, at their own cost, using insured and licensed tradespersons, the scope of work set out in the joint report which commences at page 856 of Exhibit A, in the column headed "Rectification Method", but confined to the following items:

(a) in relation to the fire staircase – items 66, 67 and 68; and

(b) in relation to water ingress – items 4, 8, 10, 11, 12, 16, 17, 35, 37, 42, 43, 48, 51, 53, 54, 55, 56, 57 and 58; and

(c) in relation to corrosion – items 6, 9, 14, 18, 22, 24, 26, 30, 32, 36, 38 and 45; and

(d) miscellaneous matters – items 5 and 13.

2 To facilitate compliance with Order 1, the applicant is to provide and arrange for reasonable access, provided seven (7) days' written notice is given.

3 Under clause 8 of Schedule 4 of the *Civil and Administrative Tribunal Act* 2013 (NSW) the applicant is granted leave to renew its application on or before 30 June 2023.

4 Any submissions in support of an application for costs (not exceeding five pages), together with any supporting evidence, are to be filed and served by 5 December 2022.

5 Any submissions in response to any such application (not exceeding five pages), together with any supporting evidence, are to be filed and served by 19 December 2022.

6 Any submissions in reply (not exceeding two pages) are to be filed and served by 13 January 2023.

7 Any such submissions should indicate whether the party accepts that costs should be

determined on the papers, ie without the need for a further hearing.

In HB 22/13614:

1 Any submissions in relation to the costs of this application are to be made together with any submissions filed and served in the related application HB 21/38931.

2 Under clause 8 of Schedule 4 of the *Civil and Administrative Tribunal Act* 2013 (NSW) the applicant is granted leave to renew its application on or before 30 June 2023.

In HB 22/26264:

1 Any submissions in relation to the costs of this application are to be made together with any submissions filed and served in the related application HB 21/38931.

2 Under clause 8 of Schedule 4 of the *Civil and Administrative Tribunal Act* 2013 (NSW) the applicant is granted leave to renew its application on or before 30 June 2023.

Catchwords:	BUILDING AND CONSTRUCTION – Whether work defective – whether a major defect – work order BUILDING AND CONSTRUCTION – Developer's claim for indemnity against builder BUIKLDING AND CONSTRUCTION – Builder's claim for payment of retention monies
Legislation Cited:	Home Building Act 1989 (NSW), s 18B, s 18E, s 48MA

Cases Cited:	Ashton v Stevenson [2019] NSWCATAP 167 Bellgrove v Eldridge [1954] HCA 36 Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336 Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 The Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Ltd [2010] NSWSC 612 The Owners – Strata Plan No 66375 v King [2018] NSWCA 170 Vella v Mir (No 2) [2019] NSWCATAP 240
Texts Cited:	None cited
Category:	Principal judgment
Parties:	In HB 21/38931: Applicant - The Owners – Strata Plan 92283 First Respondent - Aushome Construction Pty Ltd Second Respondent - Zapphire Investments Pty Ltd In HB 22/13614: Applicant - Zapphire Investments Pty Ltd Respondent - Aushome Construction Pty Ltd In HB 22/26264: Applicant - Aushome Construction Pty Ltd Respondent - Zapphire Investments Pty Ltd
Representation:	Counsel: F Anwar - The Owners – Strata Plan 92283 F Clark - Aushome Construction Pty Ltd S Ivantsoff - Zapphire Investments Pty Ltd Solicitors: Sarvaas Ciappara - The Owners – Strata Plan 92283 CBD Law - Aushome Construction Pty Ltd Finn Roche - Zapphire Investments Pty Ltd
File Numbers:	HB 21/38931, HB 22/13614, HB 22/26264
Publication Restriction:	Nil

REASONS FOR DECISION

Outline

1 In the primary application (HB 21/38931), The Owners – Strata Plan 92283 (the owners) sought a work order against Aushome Construction Pty Ltd (the builder) and Zapphire Investments Pty Ltd (the developer) in relation to a strata-tiled building in Arncliffe. The developer lodged an application (HB 22/13614) which sought an indemnity from the builder, and the builder filed an application (HB 22/26264) seeking the payment of retention monies by the developer.

2 The joint report referred to 83 items, 80 of which were pressed, under eight headings. Issues requiring determination were: (1) whether there was defective work, (2) of so, was that a major defect, (3) if so, what should be the scope of work, which required a consideration of what method of rectification was reasonably required, and, from the answers to those questions, (4) what should be the form or the work order?

Hearing

3 The documents which became evidence in the proceedings were as follows:

Exhibit A	Joint Tender Bundle, volumes one and two
Exhibit B	MFI 5

4 Documents marked for identification during the hearing are listed below:

MFI 1	Owner's outline submissions
MFI 2	Builder's outline submissions
MFI 3	Developer's outline submissions
MFI 4	Copy of AS 3740 - 2010
MFI 5	Summary of Disciplinary Action
MFI 6	Owners' draft work order

5 After brief opening submissions, there was cross-examination of the experts on an item-by-item basis on the first hearing day and closing oral submissions on the second hearing day.

Jurisdiction

6 It was accepted by the parties that the statutory warranties set out in s 18B of the *Home Building Act* 1989 (HBA) apply and that the owners were entitled to

bring their claims against the builder and the developer, but only in relation to major defects. Since a work order is sought, it is not necessary to consider the prescribed lower and upper monetary limits to the Tribunal's jurisdiction. As a result, it is clear the Tribunal has jurisdiction under the HBA, but only in relation to major defects.

Relevant law

7 The statutory warranties for residential building work, set out in s 18B(1), are:

> (a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,
> (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
> (c) a warranty that the work will be done in accordance with, and will comply with, this and any other law,
> (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract or, if no time is stipulated, within a reasonable time,
> (e) a warranty that, if the work consists of the construction of a dwelling, the marking or alternations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
> (f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes know to the holder of the contractor licence or person required to hold a contractor's licence, or another person with express or apparent authority to enter into or vary any contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires that work to achieve, so as to show that the owner relies on the holder's or person's skill or judgment.

8 It is necessary to also set out s 18E of the HBA which, so far as is presently relevant, provides as follows:

> (1) Proceedings for a breach of a statutory warranty must be commenced in accordance with the following provisions:
>
> > (a) proceedings must be commenced before the end of the warranty period for the breach,
> >
> > (b) the warranty period is 6 years for a breach that results in a major defect in residential building work or 2 years in any other case,

…

(4) In this section:

major defect means:

(a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:

(i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or
(ii) the destruction of the building or any part of the building, or
(iii) a threat of collapse of the building or any part of the building, or

(b) a defect of a kind that is prescribed by the regulations as a major defect, or

(c) the use of a building product (within the meaning of the Building Products (Safety) Act 2017) in contravention of that Act.

major element of a building means:

(a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or

(b) a fire safety system, or

(c) waterproofing, or

(d) any other element that is prescribed by the regulations as a major element of a building.

9 It is noted that s 48MA of the HBA imposes a statutory preference for the rectification of defective work by the party responsible for that work, ie a preference for a work order rather than a money order, and that a work order is sought in this instance.

10 The Tribunal also notes that, where there has been defective work, the rectification method must be both necessary and reasonable: *Bellgrove v Eldridge* [1954] HCA 36 (*Bellgrove*).

11 Further, decisions such as *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 (*Makita*) make it clear that, for expert evidence to be accepted (1) the opinion must clearly indicate the facts upon which it is based, (2) those facts must be proved so there is a factual basis for the opinion, (3) reasons or the process of reasoning for the opinion must be disclosed, and (4) any opinion must fall within the expert's qualifications and experience.

Lay evidence

12 The Joint Tender bundle contained and affidavit of Steven Lekosi for the owners (A59, ie page 59 in Exhibit A) and an affidavit of Mr Zafiropoulos for the developer (A333). Documents were exhibited to both those affidavits. Neither of those deponents was cross-examined.

Expert evidence

13 Each of the experts provided a report: Mr Verinder for the owners (A130), Mr Freixas for the builder (A726), and Mr Giaouris for the developer (A468). There was also a joint report (A856). It is convenient to deal with the expert evidence on an item-by-item basis, within the eight categories which were used during the hearing to enable like items to be considered together, thereby minimising duplication and thus saving both time and cost.

Submissions for the owners

14 Outline submissions (MFI 1) set out the uncontested background, including when interim occupation certificates were issued and the statutory basis for the

Tribunal's jurisdiction. It was accepted that the owner's application was only within time in respect of major defects. A table not only grouped the items but also set out the position of both the builder (the first respondent) and the developer (the second respondent) as to whether it was accepted there was major defect, and whether there was agreement on the rectification method. The major portion of the hearing, being the cross-examination of the experts, was conducted by reference to that table.

15 Oral closing submissions of Mr Anwar suggested the Tribunal should have reservations in relation to the evidence of Mr Freixas by reason of his disciplinary record. It was noted that he had not turned over carpet to see if there was evidence of water ingress. The contended consequence was that the evidentiary dispute was between that of Mr Verinder and Mr Giaouris. A further submission was made that any lack of reasons in the evidence of Mr Verinder was remedied during the hearing.

16 Reference was made to *Ashton v Stevenson* [2019] NSWCATAP 167 (*Ashton*) at [65] which serves to remind that s18E is not confined to the current position because of the inclusion in that section of the words "*or is likely to cause*".

17 It was also suggested that regard should be had to the test proposed in *Briginshaw*, a reference to what was said be Dixon J (as he then was) in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 at 362, to the effect that regard should be had to (1) the nature of the allegation, (2) the inherent unlikelihood of the allegation, and (3) the consequences that would flow from the finding of fact when considering whether the onus of proof has been met.

18 It was also contended that the builder and developer were not excused if there was a design defect: *The Owners – Strata Plan No 66375 v King* [2018] NSWCA 170 (*King*).Submissions were made in relation to individual items which have been considered in what appears below. The owners contended for a work order in the form of MFI 6.

Submissions for the builder

19 Outline submissions referred to the relevant statutory provisions and to the decisions in *Vella v Mir* (No 2) [2019] NSWCATAP 240 at [26] and *Ashton* at [72]-[74]. It was contended that there are two steps which must be met to satisfy s 18E of the HBA: first, that the defect must relate to a major element; secondly, that the defect causes one of the three outcomes set out in s 18E(4)(a).

20 It was contended that the report of Mr Verinder did not refer to the limitation period or the definition of major defect and that, for the reasons set out in *Makita*, his opinions should not be accepted, or should be given little weight. The Tribunal was also reminded of what was said in *The Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Ltd* [2010] NSWSC 612 (*Kell & Rigby*) at [180], to the effect that testing a small number of units does not entitle an inference that the same defect exists in all units. These submissions also contained a suggestion that, if the owners were not entitled to a work order, the developer was not entitled to withhold the retention finds currently withheld.

21 In her oral, closing submissions, Ms Clark reiterated the matters the owners were required to prove: (1) that there was a defect, (2) that it affects a major element, and (3) that it has or is like to cause one of the three matters set out in s 18E(4)(a). She referred to the evidence of Mr Verinder in relation to various items.

Submissions for the developer

22 These outline submissions noted that the builder had not filed any defence to the developer's claim for a contract-based indemnity and should therefore be taken to have admitted that claim. It was also contended that the developer did not have to release the retentions, of about $91,000, to the builder unless and until any established defects have been made good.

23 It was noted that, on or about 8 June 2013, the builder and the developer entered a building contract (A338) with a contract price of $5,912,000, that practical completion was achieved on or about 22 September 2015, and that the owners' application was commenced just under six years later.

24 The developer's case was said to be that any work order and any costs order should be made solely against the builder, that the builder should be ordered to indemnify the developer, and that the builder's claim against the developer should be dismissed with indemnity costs.

25 In his oral closing submissions, Mr Ivantsoff also referred to individual items, especially to suggest they did not constitute major defects. It was contended that the evidence of Mr Giaouris should be preferred to that of Mr Verinder. Noting that the owners sought a work order against both the builder and the developer, it was suggested that the practical course was for the builder to be required to do the work failing which the developer would become responsible for that work, but with a contractual entitlement to be indemnified by the builder. It was suggested that the period of three months suggested by the owners was insufficient, bearing in mind the December-January break and current trade shortages. A period of six months was suggested. The developer's case was that the builder was only entitled to be paid the retention monies when the defects were remedied.

Submissions in reply

26 It was contended that something likely to occur in future was sufficient for the purposes of s 18E of the HBA, and that the method of rectification proposed by Mr Verinder should be preferred. The suggestion of a six-month period for a work order was not opposed. The Tribunal was urged to make a joint and several work order against both builder and developer.

Consideration – owners' application

27 The numbering used during the hearing and in these reasons is that used in the joint report with the convenient reference point for the position in relation to any item being the table which is Annexure A to MFI 1.

28 Mr Freixas did not accept that any of the 80 items in dispute involved a major defect and did not agree to the rectification method proposed for any of those 80 items. Having regard to his disciplinary record, the Tribunal does not

consider his opposing evidence can be accepted where Mr Giaouris agreed with Mr Verinder. The Tribunal considers the preferable course is to assess the differences between the evidence of Mr Giaouris and Mr Verinder and only refer to the evidence of Mr Freixas when necessary.

Fire staircase

29 This heading covers items 66, 67, and 68. These three items were agreed by all three experts to be defects which are major defects and they also agreed on the rectification method. Clearly, the wording of that rectification method in the joint report (A928, A930 and A932) should be included in a work order.

Water ingress in dwellings

30 This heading covers 24 items which were numbered 4, 8, 10, 11, 12, 15, 16, 17, 35, 37, 41, 42, 43, 48, 51, 52, 53, 54, 55, 56, 57, 58, 64, and 65. It is only necessary to consider the eight items numbered 11, 15, 35, 41, 43, 52, 64, and 65 because Mr Giaouris conceded that the remaining items involved a major defect and agreed with the proposed rectification method.

31 Item 11 raised the question of water penetration into unit 4. The Tribunal is satisfied that there is water penetration established by photos 20-23 at A168-170. Waterproofing is a major element. Wet carpet will have the effect of creating an inability to use that room for its intended purpose. The fact that this room may still be used during dry weather when there is no water penetration is no answer since wet weather is likely to cause an inability to inhabit this room. The rectification method proposed by Mr Verinder was not challenged. In those circumstances, the Tribunal is satisfied that this item should be included in the work order.

32 Item 15 raised the question of the floor at the southern end of the bathroom in unit 7 that is alleged to have not been properly tiled or finished but there was no testing done and there is no evidence of water penetration. There is insufficient evidence and reasoning to support a finding that this item involves a major defect with the result that it should be excluded from the work order.

33 Item 35 related to water damage in the base of the southern wall in bedroom one in unit 17. While there was no moisture testing carried out, there is a photograph which shows a swollen skirting board.

34 Mr Verinder's opinion is that the wall flashings have not been installed in a proper and workmanlike manner which appears to be his assessment of the cause, having seen the effect. It was suggested to him that it was only necessary to patch, sand, prime and paint the affected area but the Tribunal agrees with him that would be to treat the effect without ascertaining and dealing with the cause. This item relates to waterproofing and is a defect likely to cause an inability to use this room if not remedied. The Tribunal is satisfied that this item should be included in the work order.

35 Item 41 raised the question of water penetration in the eastern hallway fixed window in unit 19. The supporting photo was said to be numbered 75 (A196) but that photo does not show water penetration. When cross-examined in relation to this item, Mr Verinder's evidence included a suggestion this was symptomatic, based on other units. In accordance with what was said in *Kell & Rigby*, that evidence is insufficient. This item is rejected as the Tribunal is not persuaded that the owners have proved there is a defect.

36 Item 43. This item related to the window sill and reveals in bedroom two in unit 19. The supporting photos were 78 and 79 (A197-198) which do appear to show water damage, as Mr Verinder suggested. The suggestion, in cross-examination, that this damage could be due to the window being left open is rejected. Mr Verinder's evidence that the window reveal does not appear to have been properly installed is accepted. Mr Giaouris suggested there had been rectification work already undertaken but there is no evidence that the water penetration referred to in this item only occurred before such work.

37 Again, the method of rectification will need to include addressing the cause and not just the effect. This defect is considered a major defect as it relates to waterproofing which will, if left unattended, be likely to cause an inability to use the bedroom and destruction of that part of the building. The fact that the unit

owner may still currently be using this room is not a sufficient answer to this item. As a result, the Tribunal considers the work order should include this item.

38 Item 52 was an item that did not have any supporting photo. Mr Verinder suggested there is a water leak in the shower screen in unit 23. Even assuming this item relates to waterproofing, it does not satisfy any of the three tests listed in s 18E(4)(a) of the HBA and, accordingly, the Tribunal does not consider this item to involve a major defect.

39 Item 64 directed attention to the power-coated louvre window in the foyer on level 5 of the building. While Mr Verinder suggested this window should not permit window to enter the carpeted area of the common property, he did not look at the design documents and conceded that the window may have been built in accordance with the design. When asked if a nearby drainpipe not being properly maintained, he was unable to recall one being there. On contrast, Mr Giaouris was firmly of the view that the downpipe was causing a problem.

40 Again, the Tribunal is not satisfied that this is a major defect by reference to the three tests in s 18E(4)(a) with the result that the owners are not considered entitled to have this item included in the work order.

41 Item 65 is related to the previous item because it refers to water staining on the carpet under that louvre window. During his cross-examination, Mr Verinder suggested this item may not be caused by the louvre window as there may be another cause, but no alternative cause was identified. He also conceded that he had taken no moisture readings but suggested that extensive, invasive testing was needed. However, identifying a matter considered to warrant investigation falls short of establishing there is a defect and that it is a major defect. For the reasons indicated in relation to the previous item, this claim is rejected.

42 Accordingly, by way of summary, having rejected five items (15, 41, 52, 64, and 65), the work order should include the rectification method set out in the joint

report for the 19 items numbered 4, 8, 10, 11, 12, 16, 17, 35, 37, 42, 43, 48, 51, 53, 54, 55, 56, 57, and 58.

Bathroom tiles

43 This heading covers items 7, 20, 28, 34, and 40.

44 Item 7 raised the question of the bath not being set into the wall so that the tiles are installed over the edge of the bath with the result that any water that gets on the tiles flow into the bath. Here the tiles were installed on top of the edge of the bath with a silicon seal. Mr Verinder suggested that was a breach of AS3740-2010 which would allow water to travel behind the bath and accumulate under the bath. He suggested it was certain this would happen.

45 Mr Giaouris noted that section 3.8 of AS3740-2010, which contained the diagrams upon which Mr Verinder relied, was expressly confined to *"Baths and spas that are recessed into the wall …".* He referred to section 3.7.3 which required waterproofing and ventilation of the enclosed space under the bath.

46 It is clear section 3.8 of AS3740-2010 only applies when a bath is recessed into the wall. There is nothing to suggest that AS3740-2010 requires a bath to be recessed into the wall. Indeed, while Mr Verinder referred to the diagrams marked (a) and (b) in Figure 3.2 of AS3740-2010, what was done was in accordance with the diagram marked (c) in Figure 3.2. What was done might involve a defect if there is not ventilation under the bath but there is no evidence of that. This item does not involve a defect.

47 Items 20, 28, 34, and 40. As the experts accepted that the position is the same in relation to all five items under this heading, it is not necessary to separately consider these four items.

48 The Tribunal is not satisfied any of these five items involve major defects.

Water ingress in basements

49 This heading covers items 69, 70, 73, and 77. Whether there is a major defect, and the proposed method of rectification are both in dispute.

50 Item 69 raised the question of water entering the basement on the upper garage level. Mr Verinder contended that water on the floor opposite the lift was causing a safety issue and a loss of amenity. However, when questioned he conceded that the adjacent wall was designed to be a wet wall and that, as a class 7 building, a wet basement was permissible. He admitted he had not looked at the development application or any design documents but maintained that the installed drain was not capturing the water.

51 Mr Giaouris, when asked if the water was supposed to pond as indicated the photos, said yes to wetness and no to ponding. He did not accept that such ponding water would give rise to mould in that open area due to the extent of air circulation there.

52 The Tribunal finds (1) that this is not an area that should be waterproof, (2) that the water that does arrive on the floor should not pond but should enter the drain, (3) that failure to drain does amount to a defect, (4) that defect is not a major defect. It cannot be said this item relates to waterproofing when this area is permitted to be wet. Even if this defect could otherwise be said to relate to a major element, none of the three tests in s 18E(4)(a) is established.

53 Item 70 is related to item 69 in that it refers to the source of the water referred to in item 69. Mr Verinder suggested water is travelling across the soffit and not falling down the wall. Mr Giaouris agreed there was seepage and said that was expected, being a feature of all basements. Even assuming this item involves a defect, for the reasons indicated in relation to the previous item, the Tribunal does not consider this item to involve a major defect.

54 Item 73. Mr Verinder contended there was no perimeter draining system in the basement garage but did not refer to any Australian Standard or provision in the Building Code of Australia (BCA): he merely asserted a breach of paragraphs (a), (b) and (c) of the HBA without providing the reason(s) or

process of reasoning upon which that opinion was based. Nor did he explain what he meant by a "proper drainage system". The owners have not established that this item involves any defect.

55 Item 77 refers to an uncovered area on an access stairway on the western side of the building that is alleged to permit water to enter the underground garage area. This is another item that relates to a source of water referred to in another item. Mr Verinder conceded he had not looked at design documents. Again, there is no reference to an Australian Standard or to an applicable provision of the BCA and opinion expressed that there is a breach of s18B of the HBA is not accompanied by adequate reasons or reasoning. The Tribunal does not accept that this item involves any defect.

56 The Tribunal does not accept that any of the four items grouped under this heading warrant inclusion in any work order.

Corrosion points in balcony soffit

57 This heading covers items 6, 9, 14, 18, 22, 24, 26, 30, 32, 36, 38, and 45.

58 Item 6 involved corrosion points in concrete. The owners' case is that rust spots have appeared, that the cause is the bar chairs and the tie wires which do not have sufficient concrete cover. Mr Verinder's evidence that the rusting process, once started, will continue, and will result in concrete cancer if not addressed. He accepted that was a slow process, which might take as long as 15 to 20 years, depending on the exposure conditions. He also accepted that the method of rectification was simple.

59 The suggestion residents can still use the balconies only goes to s 18E(4)(a)(i), dealing with habitability and use, and not s 18E(4)(a)(ii), dealing with destruction of the building. Any suggestion that there is no immediate problem overlooks the fact that s 18E(4)(a) extends to cover matters "*likely to cause*" any of the specified outcomes.

60 Mr Giaouris conceded that corrosion is visible, that the bar chair and possibly the tie wire are involved, and that he did not know how far the corrosion has progressed.

61 As the remaining items under this heading involved the same issue, it is not necessary to deal with them separately.

62 The Tribunal is satisfied that there was a failure to carry out work with due care and skill by creating enough concrete cover, as required by Section 4 of AS3600-2009. Those breaches of s 18B(1)(a) of the HBA are considered major defects because they relate to load-bearing components of the building that are likely to cause the destruction of the building if left unattended. Accordingly, the suggested method of rectification for each of these 12 items is included in the work order.

Render

63 This heading covers items 3, 19, 23 25, 33, 46, 47, 49, 50, 59, 60, 61, 62, 75, 76, 78, 79, 80, 81, 82, and 83.

64 Item 3 was the first of 21 items that raised the issue of cracking and delaminating render. Even assuming, in favour of the owners, that this item involves a defect, the Tribunal is not satisfied that this item involves a major defect as it does not involve a major element. Any suggestion that render is a load-bearing component of the building is rejected.

65 Since the position is the same for each of the remaining 20 items, it is not necessary to consider each of them individually.

Miscellaneous

66 This heading covers items 1, 2, 5, 13, 21, 29, 31, 44, 71, 72, and 74.

67 Item 1 involved a leaking air-conditioning unit. Mr Verinder suggested the draining through the pipework was the cause of the leak. He suggested he saw

a mark on the wall indicating that leak but said that could not be seen from the photo (number 1 on A159). This item was said to be a major defect because it related to waterproofing, but it does not fall within any of paragraphs (i), (ii), or (iii) in s 18E(4)(a) of the HBA. This claim is rejected.

68 Item 2 was said to involve a window leak, based on being able to feel air coming through a close window. No testing was done and the suggestion that this item affect habitability is rejected. Even if that proposition were to be accepted, it has not been established that this item involves a major defect.

69 Items 5 and 13 were agreed by Mr Verinder and Mr Giaouris to involve a major defect and they also agreed in the method of rectification.

70 Item 21 raised the claim: *"Ensuite shower screen door fouls on the frame and does not allow it to close in Unit 9"*. It was suggested this was a major defect because it related to waterproofing and creates an inability to use this part of he building for its intended purpose.

71 The supporting photo (46 on A181) does not make clear how the shower cannot be used. The Tribunal is not satisfied that a shower door that needs adjustment or, at worst, replacement amounts to a major defect.

72 Item 29 raised a suggested lack of sealant to cover gaps in window reveals in bedrooms one and two in unit 14. It was suggested this is a major defect because it affects the ability to inhabit those bedrooms. However, there is no evidence that is the case, and the Tribunal is not satisfied that this item is a major defect.

73 Item 31 alleged that, due to no bracket attaching it to a wall, a balustrade on the balcony of unit 14 was able to be moved more than is allowed by AS1170. It was suggested this is a major defect as it introduced a threat of collapse of the affected balcony balustrade. There was no adequate evidence of the factual foundation for this item by reference to either how far the balustrade could be moved or what was the suggested limit of movement. In addition to

the absence of a factual foundation, the Tribunal is not satisfied that the balustrade is a major element.

74 Item 44 raised the same issue in relation to a balustrade on the balcony of unit 19. For the reasons indicated in relation to the previous item, this claim is also rejected.

75 Item 71 alleged that the absence of bunding in the car wash bay on the upper level of the garage and an inadequate grease trap on the lower level was a major defect. Mr Verinder referred to "*EPA requirements*" but did not identify them and claimed the grease trap is a building product as defined in the *Building Products (Safety) Act* 2017 but again did not provide any details. He conceded in cross-examination that he did not know if the car wash area was still being used.

76 The evidence has not adequately established there is a defect and the Tribunal is not persuaded this item involves a major defect.

77 Item 72 referred to *"Exposed steel reinforcement in the top of basement garage slab at car space No. 23*". The reason given for this to be a major defect was that *"exposed steel reinforcement in a trafficable area in a periodically wet garage area introduces the threat of over-stressing and collapse of this part of the building".* When it was put to Mr Verinder that the steel in question was not corroding, he gave a non-responsive answer. He accepted that rectification was a simple and straightforward job. The evidence of Mr Gaiouris and Mr Freixas, in the joint report, was that the exposed reinforcement is not spalling or deteriorating and there is no threat of collapse, and that evidence was not challenged. Again, the Tribunal is not persuaded that this item involves a major defect.

78 Item 74 related to what were alleged to be poorly sealed fire penetrations in the main switch room in the basement garage. Mr Verinder conceded, in cross-examination, that he had no qualifications or experience in relation to matters, and that he understood the fire safety requirement of the building would have

been inspected and certified. In re-examination, he referred to his experience and suggested he was well-versed with what is a defect as part of the building process.

79 Even assuming, in favour of the owners, that the work the subject of this item is a defect, the Tribunal is not satisfied that it is a major defect. Although it is a major element because it involves part of a fire safety system, there is nothing to suggest the work in question causes or is likely to cause any of the three matters set out in s 18E(4)(a) which may be summarised using the words habitability, destruction, and collapse. This item is therefore excluded from the work order.

80 Of these 11 miscellaneous items the Tribunal has rejected 9 and accepted two (items 5 and 13). Those two items will be included in the work order.

Not pressed

81 Items 27, 39, and 63 were not pressed and need not be considered further.

Form or work order

82 The work order will be based on MFI 6, but only include items shown to be both a defect and a major defect. Since the owners have statutory rights against both the builder and the developer there is an entitlement to a work order being made against both the builder and the developer. Bearing in mind the Christmas-New Year break and the current shortage of tradesperson, the Tribunal considers a period of six months should be allowed for compliance with the work order. The Tribunal is not persuaded it should make the rectification work subject to inspection by Mr Verinder as suggested in MFI 6.

Consideration – developer's application

83 The builder and the developer agree there is a contractual indemnity that applies, the practical effect of which is that the builder would be obligated to indemnify the developer if it incurred any cost by reason of having to do or arrange for work covered by the work order. There does not appear to be any

order sought at this stage and no submissions were made in relation to this application.

84 The practical course is to make no order in relation to this application now other than an order that entitles the developer to renew its application within a period after completion of the work order at which time any amount payable under the indemnity should be known.

Consideration – builder's application

85 Likewise, the builder and the developer appear to agree that the retention amount currently held by the developer should only be released to the builder after compliance with the work order. As with the owner's application, the Tribunal does not embark on any analysis of this application by reason of the agreed position between the builder and the developer. It is understandable that the developer would not want to release the retention amount to the builder and then find it incurred costs of compliance with the work order.

86 Again, the practical course appears to be to make no order in relation to this application other than an order that entitles the builder to renew its application within a period after completion or the work order, noting that the amount payable is known.

87 Ideally, (1) the owners will not need to initiate renewal proceedings due to compliance with work order, (2) the developer will not need to initiate renewal proceedings to enforce its contractual indemnity, and (3) the builder will not need to initiate renewal proceedings in order to obtain the retention amount.

Costs

88 Provision will be made for submissions to be made in relation to costs, including the question the Tribunal should determine costs on the papers, without the need for a further hearing.

Orders

89 For the reasons set out above, the following orders are made in relation to the three applications under consideration:

In HB 21/38931:

(1) On or before 21 May 2023, the respondents are to undertake, at their own cost, using insured and licensed tradespersons, the scope of work set out in the joint report which commences at page 856 of Exhibit A, in the column headed “Rectification Method”, but confined to the following items:

(a) in relation to the fire staircase – items 66, 67 and 68; and

(b) in relation to water ingress – items 4, 8, 10, 11, 12, 16, 17, 35, 37, 42, 43, 48, 51, 53, 54, 55, 56, 57 and 58; and

(c) in relation to corrosion – items 6, 9, 14, 18, 22, 24, 26, 30, 32, 36, 38 and 45; and

(d) miscellaneous matters – items 5 and 13.

(2) To facilitate compliance with Order 1, the applicant is to provide and arrange for reasonable access, provided seven (7) days’ written notice is given.

(3) Under clause 8 of Schedule 4 of the *Civil and Administrative Tribunal Act* 2013 (NSW) the applicant is granted leave to renew its application on or before 30 June 2023.

(4) Any submissions in support of an application for costs (not exceeding five pages), together with any supporting evidence, are to be filed and served by 5 December 2022.

(5) Any submissions in response to any such application (not exceeding five pages), together with any supporting evidence, are to be filed and served by 19 December 2022.

(6) Any submissions in reply (not exceeding two pages) are to be filed and served by 13 January 2023.

(7) Any such submissions should indicate whether the party accepts that costs should be determined on the papers, ie without the need for a further hearing.

In HB 22/13614:

(1) Any submissions in relation to the costs of this application are to be made together with any submissions filed and served in the related application HB 21/38931.

(2) Under clause 8 of Schedule 4 of the *Civil and Administrative Tribunal Act* 2013 (NSW) the applicant is granted leave to renew its application on or before 30 June 2023.

In HB 22/26264:

(1) Any submissions in relation to the costs of this application are to be made together with any submissions filed and served in the related application HB 21/38931.

(2) Under clause 8 of Schedule 4 of the *Civil and Administrative Tribunal Act* 2013 (NSW) the applicant is granted leave to renew its application on or before 30 June 2023.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.
Registrar

Stan Giaouris or The Construction Adviser was the Owners Expert
Peter Sarlos was the Builders Expert
Pg 40 - I also prefer the owner's expert's assessment that the flashing was uniformly defective
Pg 45 - I in any event accept the owner's expert's costings methodology in preference to that of the builder's expert.

Civil and Administrative Tribunal
New South Wales

Case Name:	**BAKER v/ats TNT BUILDING TRADES PL**
Medium Neutral Citation:	[2023] NSWCATCD
Hearing Date(s):	11 and 12 August 2022 with written submissions to 8 November 2022
Date of Orders:	1 March 2023
Date of Decision:	1 March 2023
Jurisdiction:	Consumer and Commercial Division
Before:	G K Burton SC, Senior Member
Decision:	1. Order that PL pay $180,197.14 on or before 29 March 2023. 2. Order as follows in respect of questions of costs: (1) Any costs application with further submissions and documents relating to questions of costs is to be filed and served on or before 22 March 2023. (2) Any submissions and documents relating to questions of costs in response is to be filed and served on or before 5 April 2023.
Catchwords:	REAL PROPERTY – HOME BUILDING – defective works – work order or money order – alternative contract claim – estoppel – mitigation, access, notice of defects - limitation - Home Building Act 1989 (NSW) ss 6(1)(b), 18B, 18BA, 18E, 18F, 18G, 48MA, Fair Trading Act 1989 (NSW) s 74
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 (NSW) Fair Trading Act 1987 (NSW) Home Building Act 1989 (NSW) Home Building Regulation 2014 (NSW)
Cases Cited:	Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25 Bajic v Paraskevopoulos [2018] NSWCATAP 205 at [27] Barwick v Shetab [2017] NSWCATAP 127

Bellgrove v Eldridge (1954) 90 CLR 613, [1954] HCA 36
BNT Constructions PL v Allen [2017] NSWCATAP 186
Bonita v Shen [2016] NSWCATAP 159
Brennan Constructions PL v Davison [2018] NSWCATAP 210
Brooks v Gannon Constructions PL [2017] NSWCATCD 12
Catapult Constructions PL v Denison [2018] NSWCATAP 158
Clements v Murphy [2018] NSWCATAP 152
El-Wasfi v NSW; Kassas v NSW (No 2) [2018] NSWCA 27
Galdona v Peacock [2017] NSWCATAP 64
Hanave PL v Wine Nomad PL [2022] NSWCATAP 361
Hazeldene's Chicken Farm PL v Victorian Workcover Authority (No 2) (2005) 13 VR 435, [2005] VSCA 298
John McDonald Building Services PL v Gusa [2022] NSWCATAP 60
Johnson t/as One Tree Constructions v Lukeman [2017] NSWCATAP 45
Kumar v Sabharwal [2017] NSWCATAP 200
Kurmond Homes PL v Marsden [2018] NSWCATAP 23
Latoudis v Casey (1990) 170 CLR 534
Marr v JCK Building Solutions PL [2018] NCATCCD, unreported, 4 December 2018, HB 16/43946
May v Pittwater Council [2010] NSWLEC 1027
Megerditchian v Kurmond Homes Pty Ltd [2014] NSWCATAP 120
Oppidan Homes PL v Yang [2017] NSWCATAP 67
Oshlack v Richmond River Council (1998) 193 CLR 72
Owners SP 63341 v Malachite Holdings PL [2018] NSWCATAP 256
Slotwinski v Nutek Constructions PL [2020] NSWCATAP 216
Steak Plains Olive Farm PL v Australian Executor Trustees Ltd [2015] NSWSC 289
Tabcorp Holdings Ltd v Bowen Investments PL (2009) 236 CLR 272, [2009] HCA 8
Thompson v Chapman [2016] NSWCATAP 6
Walker Group Constructions PL v Tzaneros Investments PL [2017] NSWCA 27

Texts Cited:

Category: Principal judgment

Parties:	Eli Baker (applicant in HB 21/46560, respondent in HB 21/52256) TNT Building Trades PL (respondent in HB 21/46560, applicant in HB 21/52256)
Representation:	Counsel: Ms B Anderson (Baker) Mr M Collins (TNT Building Trades PL) Solicitors: Harris & Co, Solicitors (TNT Building Trades PL)
File Number(s):	HB 21/46560 and HB 21/52256
Publication Restriction:	Nil

REASONS FOR DECISION

Outcome of proceedings

1 I have decided that the owner is entitled to a money order against the builder for $180,197.14.

2 On 12 August 2022, noting that the parties consented to a hearing on costs being dispensed with, I made an order to that effect. Again consistent with the parties' wishes, I ordered that costs be deferred until after delivery of the substantive decision. I have accordingly ordered a timetable for any further documents and submissions on questions of costs and set out some principles governing costs at the end of these reasons, which I trust may be of assistance in respect of costs submissions.

Background, issues, procedural

3 The applicant owns a property in Randwick, an eastern suburb in Sydney, NSW. By written contract dated 12 September 2018 she engaged the respondent builder to undertake construction work at the property at a contract price of $1,027,653 including GST, based on a written quotation dated 8 September 2018.

4 The owner appointed an architect to administer the contract on behalf of the owner: cl A6 with Sch 1 item 2. Under cl A6.3, the architect was the owner's agent for giving instructions to the builder but acted independently and not as the agent of the owner "in acting as assessor, valuer or certifier". Instructions were to be in writing under cl A7.

5 By email of 30 October 2018 the owner told the builder and the architect, among other things, that the owner would “take more of the day to day questions and monitoring and escalate/involve [the architect] as necessary … [the architect is] to process/approve [the builder’s] progress claims and in that certify that the builder has completed works in line with specifications”, make monthly site visits and notify approved variations. The architect communicated her withdrawal from the project to the parties on 9 April 2019 without dissent, confirmed to the builder on 7 October 2021. The architect’s emailed letter of 9 April 2019 said that “architectural services can be sought on an as needs basis”.

6 Work under the contract began on 22 September 2018 and practical completion occurred with the owner’s taking occupation on 1 October 2019. An occupation certificate (OC) issued on 29 April 2020.

7 The owner had paid all but the 1.5% of the monies (amounting to $15,414.80) remaining in retention security beyond practical completion: cl C6 with Sch 1 item 8 and Pt C.

8 The owner referred the works to Fair Trading (FT) on 27 August 2021. FT produced a report and rectification order dated 11 November 2021. The builder also complained to Fair Trading about absence of final payment.

9 In HB 21/46560 filed 12 November 2021 the owner claimed a money order for alleged defective works and resisted a work order. The outstanding defects were said to be as follows: the roof/ceiling was leaking and had been attempted by the builder to be fixed twice but was still defective, as another builder confirmed, with “proper water testing” on 22 October 2021; roof flashings were

inadequate; doors and windows were not “AWS semi-commercial” as the contract required; the doors were also the wrong size for the specified space so did not meet load safety testing requirements; information requested in August 2021 was not provided; there were no instructed variations; a ceiling beam in the living room was not as specified and suffered from veneer cracking and peeling; there were holes in the resin of the kitchen bench; upstairs there were missing joinery covers; silicon grout was not sealing in the shower.

10 In HB 21/52256 filed 22 December 2021 the builder claimed $15,414.80 being the unpaid 1.5% retention. In her points of defence filed 5 January 2022 the owner admitted that she owed the claimed money once defects were rectified. The builder disputed the owner’s right to withhold payment and to set off the amount owed against any money order in her favour.

11 There was no dispute that the subject of each contract was residential building work as defined in the *Home Building Act 1989* (NSW) (HBA): HBA Sch 1 para 2(1)(a) and/or (b) and (c), 2(3)(a), 3(1); *Home Building Regulation 2014* (NSW) reg 12. The building contract required homeowners’ warranty HBCF insurance since it exceeded $20,000 in the reasonable market cost of labour and materials involved: HBA ss 7(2)(f1), 92, 94; *Home Building Regulation 2014* (NSW) reg 53.

12 The claims were under the Tribunal’s jurisdictional limit in s 48K(1). There was no issue that the owner’s proceedings were brought within time under HBA s 18E with s 48K(7) for major defects as defined in s 18E. In its points of defence

filed 22 December 2021 the builder said that the owner's claim was out of the two-year time limit for other than major defects.

13 The builder was appropriately licensed at times of the work and apparently remains so (from the absence of dispute about that matter). There was no issue raised concerning adequate HBCF cover.

14 Leave for legal representation was granted to the builder on 8 December 2021 and to the owner on 27 June 2022. I was greatly assisted to navigate the voluminous and complex materials and issues by the submissions of counsel for both parties.

15 The owner made amendments to her original claim, with the owner's list of defects expanded in the amended claim filed on 31 March 2022. Both parties obtained extensions of time for evidence.

16 In opening the owner said that, in the event that the windows and doors were found not to be a major defect, the owner contested relevant awareness of the defect until within the last six months of the two-year warranty period which would place the windows and doors claim within time for the breach of warranty claim. For the windows and doors and the ceiling beam there was an alternative claim in contract that was within the relevant limitation period but was sought to be met by a defence in promissory and conventional estoppel.

17 It was accepted by the parties that the major focus in the proceedings was the owner's claim given the common ground on contract terms, amount paid and amount unpaid.

18 The owner relied upon the findings as to liability and cost of remediation in an expert report by a qualified and experienced builder dated 13 February 2022 with inspection on 8 December 2021. The builder relied on an expert report by a qualified and experienced architect dated 13 May 2022 with inspections on 25 January, 7 February and 22 April 2022. There was in evidence an earlier report from the builder's expert that responded to a report from a different expert retained apparently at an earlier time by the owner, which was not in evidence in complete form. No party referred in submissions to the earlier reports.

19 The builder sought a work order for any found defect, relying on HBA s 48MA.

20 In openings it was confirmed that there were significant areas of disagreement, and little agreement, between the parties' current experts, with short evidence from other witnesses and likely significant concurrent expert evidence to supplement and test the conclave report with a costing report still to be finalised by the experts. The 60 alleged defects were grouped within categories with the three primary focuses of dispute being the roof pitch (curved and flat roofs), flashings and the windows and doors. The builder contended that most of the contested works complied with the NCC vol 2 by being alternative performance solutions rather than deemed-to-satisfy. The focus of the windows and doors dispute was that a residential rather than a superior semi-commercial range of windows and doors had been installed. The builder said that what had been installed was the correct range, or the equivalent in quality.

21 The builder also said that there remained a major dispute on the lay and expert evidence whether the windows and doors supplied and installed complied with the contract, whether the owner was out of time under contract complaint processes to raise the major matters alleged in the proceedings and/or whether the owner was estopped from relying on the express written terms of the contract. What met the description "AWS semi-commercial" in the executed contract and incorporated documents was integral to the contest. The architect's ongoing involvement, including in respect of the defects list, and the absence of earlier complaint about the windows and doors, were also raised. Similar issues were in contest on the living room beam being a veneer rather than solid timber.

22 The experts did not have time to complete a document that set out competing positions on costings, so the competing separate documents were finalised without discussion of the competing positions. A two-volume conclave report dated 3 August 2022 and supporting documents including separate exhibits of the competing costings (to add to the existing five volumes of court book) were provided in electronic and hard copy.

23 The builder objected to a letter dated 5 August 2022, served 8 August 2022, from the brand owner Wideline Windows and Doors (whom I shall call Wideline) who licensed MYA, the actual manufacturer and installer (whom I shall call the supplier) of the "Wideline" brand windows and doors. The letter after onsite inspection identified the type of windows and doors installed as the "Horizon" residential grade within the "Wideline" brand. The windows and doors claim

rectification costing was approximately half of the total amount claimed by the owner in the proceedings.

24 The letter was said to express an unqualified opinion served well outside the directed times for the owner's evidence, three days before the final hearing and after service of the conclave report on 3 August 2022, not supported with appropriate substantiating documentation and not able to be tested after appropriate investigation.

25 The owner said that the document was not put forward as an expert opinion but, rather, as onsite observation by the licensor of the Wideline brand that was consistent with earlier evidence but met the specific criticism in the conclave report that the earlier evidence was based on inspecting photographs rather than onsite inspection.

26 The builder in response pointed to the lack of information on the qualification of the author of the letter to identify the model of the windows.

27 I rejected the tender of the letter with reasons set out in full at p 34 of the transcript provided by the parties. In summary: the matter was important so needed to be the subject of proper proof; the material tendered was too vague as to the author's qualification to identify the window range and too lacking in objective support (such as a catalogue) for an identification; the lack of clarity on the builder's expert's part that was put forward as the reason for obtaining it meant that it ought to have been obtained earlier so it could properly be tested.

28 The owner's ultimate claim in closing submissions was for rectification costs of $191,550.31.

Contractual claims and estoppel defence

29 The builder said that cll M11 and M14 of the contract precluded the owner's contractual claims because their requirements as to completing or remedying defective works were not complied with by a notice from the architect within the nine-month defects liability period from 1 October 2019 being the agreed date of practical completion.

30 I accept the owner's contentions in reply. Clauses M11 to M14 were directed to rectifying defects and under HBA s 18G could not override a claim for breach of statutory warranty brought within time under ss 18E and 48K. It did not apply in any event to a claim for damages for breach of a provision of the contract to supply a specified type of window or beam (if so found as breaches). Even if it did cover the alleged incorrect supply, there was nothing pointed to in the contract that made such provisions an exclusive remedy for such breach or that precluded general law remedies for breach of contract.

31 Turning to the estoppel defence, both promissory and conventional estoppel were able to be raised within the Tribunal's jurisdiction under ss 6 and 7 of the *Law Reform (Law and Equity) Act 1972* (NSW), the application of which to the Tribunal was confirmed in *Steak Plains Olive Farm PL v Australian Executor Trustees Ltd* [2015] NSWSC 289 at [75]-[78] as applied in *Slotwinski v Nutek Constructions PL* [2020] NSWCATAP 216.

32 It was common ground that there were no written variations that complied with Pt J of the contract and in conformity with HBA s 6(1)(b).

33 There was no evidence of written instructions in compliance with HBA s 18F, so this defence would be precluded if it was alleged against a breach of statutory warranty. I assume without deciding that it is available against a claim for breach of contract terms other than a claim for breach of statutory warranty, even though such breach of contract claim has the same content as the breach of statutory warranty claim in respect of non-supply of the specified windows and doors and the specified timber beams: s 18B(1)(a).

34 Turning first to estoppel in respect of the windows and doors, it was common ground that the owner did not seek relief for a change of brand in respect of the windows and doors. The owner said that, if brand was the only alteration then it was accepted that it would not succeed because of the proportionality principle discussed below, but relied upon the brand change as a part of her complaint that the windows in the changed brand were not “semi-commercial” as required by the contract documents.

35 Both directors of the builder gave evidence but the builder’s director with apparent principal involvement in the project was Mr Hoang, who is hereafter referred to as the builder’s director. The builder’s director’s evidence in chief referred only to a change of brand at date of contract, not the designation “semi-commercial”.

36 The owner said during cross-examination that she remembered that the builder’s director did not raise any questions or refer to the windows and doors

being “AWS semi-commercial” at signing of the contract and that she did not verbally approve a change to the windows and doors specification.

37 The submissions pointed to no contemporaneous documentary evidence recording or referring to oral variations or relevant information about what windows or doors were actually installed despite the builder’s evidence in cross-examination that he provided such information. Rather, the contract specification required, if an alternative to what was specified was proposed, to “submit sufficient information to permit evaluation of the proposed alternatives” which had the “necessary properties” of the item being substituted.

38 There was no written instruction by the architect to resolve any alleged ambiguity or discrepancy in the documents in response to a written notice from a contracting party under cl B1. (If such an instruction varied the order of precedence of documents it constituted a variation under cl B2.3.)

39 On the state of the above evidence I do not accept that the builder has established an estoppel in respect of the windows and doors.

40 Turning to the estoppel claim in respect of the living room beam, again there no evidence of a compliant variation or of compliance with HBA s 18F. The builder’s director’s witness statement described a conversation between him and the owner in which a veneer beam was approved and that the owner saw the beam delivered and raised no objection. It was not described how the owner would know it was a veneer beam when it arrived. The owner said in her witness statement that she never approved any substitution to a veneer

beam and never received a variation request from the builder for such a change.

41 In cross-examination the owner was asked if she recalled (as the builder's director said in his witness statement) that the builder's director told her that he couldn't get one length of the required type of timber beam of the right size, which she recalled he said at some point in time. She was then asked if she recalled that he could get a different type of timber beam but it wouldn't look like the timber she wanted (which matched her furniture), which she didn't recall.

42 The owner was not asked whether she had been requested to change to a veneer beam to get the finish she wanted, nor was it put to her that it was probable that she chose the veneer because she wanted that finish (including more than wanting a solid beam).

43 In the absence of those specific challenges and in the context of the disputed core of the conversation on the other evidence and the absence of contemporaneous documentation to support its contention, in my view the builder has not established the estoppel in respect of the beam for which it contends.

Builder's defences of failure to mitigate, inform and grant access (HBA s 48BA)

44 The builder in closing submissions relied upon what it had said in its opening submissions on alleged failure of the owner to grant access, inform the builder about alleged defects in written notices and in a timely manner and to mitigate

her loss. The opening submissions did not analyse these matters by reference to the evidence. There was no detailed analysis of the communications and activity from the end of the defects liability period to support these defences in either opening or closing submission.

45 In my view the builder has not established these defences on the evidence. The communications and observations in the evidence indicated that the builder had access and opportunity for arranging access to attend in respect of the owner's requirements, expressed in emails, to remediation of defects during 2020 and 2021, but the parties were in increasing dispute about what remediation was required and about terms of access and notice for access. In the latest of these communications, being an email dated 26 October 2021 shortly before filing her proceedings, the owner requested a timetable for further attendance for remedial work; there was no response in evidence. At this point another builder had been engaged to report on the works but not to undertake them (with the builder warning not to do so) and Fair Trading had been approached by both parties.

NCC non-compliance

46 It was common ground between the experts, with no other evidence from the parties that was relevant on this topic, that the building's classification was "Class 1a – dwelling" and that vol 2 of the 2016 version of the NCC (referred to at times as the BCA and containing the BCA) was the relevant part of the NCC.

47 It was also common ground that the works alleged to be defective were not within the deemed-to-satisfy compliance requirements of the NCC where such non-compliance was alleged.

48 If the builder was to demonstrate compliance there was an evidential onus on the builder to put forward performance solutions and demonstrate that such met the qualifying requirements. It was not up to the owner to deal with an undefined range of performance solutions that hypothetically could be put forward.

49 There was no evidence contemporary to approvals, construction or certification for an OC that the alleged defective works met the requirements of the NCC to qualify as performance solutions. In particular: they were not documented on the CC or OC; documentation prior to commencement of work was not in evidence; there was no evidence of satisfactory testing by one of the required assessment methods (NCC vol 2, misnamed vol 1, ss 1.0.3(b) and 1.2); the owner's expert had not dealt with performance solutions other than deemed-to-satisfy because none had been put forward.

50 The builder did not dispute these propositions. Having set out exhaustively the provisions governing qualification as a performance solution in NCC vol 2 ss 1.0.1 to 1.0.5, 1.0.7, 1.1.1, 1.2.1 and 1.2.2, the builder's essential submission was that the Tribunal was an "Authority" for the purposes of approving a performance solution, that the expert opinion obtained by the builder for the purposes of the litigation and after the OC was an "expert opinion" that qualified

as one means to satisfy the performance solution requirements and, if this was relevant, the builder's expert opinion was uncontradicted on this aspect.

51 The owner's reply submissions disputed this essential submission. The owner said that the Tribunal was not an "Authority" on the plain meaning of that term, even if in the 2016 NCC it was not explained by a note as it was in the 2019 NCC. Such a meaning would be contrary to the plain intent of the provisions which was to provide evidence within the process of regulatory approval.

52 I accept the owner's contention. It seems to me that it is consistent with the text of the other means of satisfying the performance solution requirements and with the context and purpose of the NCC regulatory regime. The Tribunal is not an approvals or other regulatory authority. Its function is to resolve disputes on the existing facts and the law, including under the HBA the NCC and Australian standards, not in effect retroactively to grant approval by its findings on often-contested expert evidence generated for the purpose of the proceedings rather than for obtaining a regulatory approval. Such an interpretation would be inconsistent with the other means of satisfying performance requirements.

53 The authority cited by the builder in fact deals with what satisfies the requirements for regulatory approval, in that case issue of a building certificate, with the contested expert evidence occurring in the context of the council's refusal of such a certificate: *May v Pittwater Council* [2010] NSWLEC 1027 esp at [31] et seq.

54 I respectfully disagree with one matter in the owner's submission that does not affect the preceding conclusion, namely, that the recording requirement in NCC 2016 vol 2 p 11, which is expressed cumulatively, imports that cumulative requirement into the assessment requirements. The cumulative recording is logical if there is more than one assessment method used or required to demonstrate that the proposed performance solution meets the performance requirements; it does not require the use of more than one.

55 Accordingly, I accept that the builder's expert's opinion is not conclusive on there being a proved performance solution. There was no contemporary evidence sufficient to support the conclusion that performance solutions were established, as is examined in respect of each alleged defect later in these reasons.

56 This does not leave the builder's expert opinion necessarily without work to do. If it is the basis for accepting that what the builder did was sufficient to satisfy the performance requirements for a performance solution if such process had been engaged in, then it will not cure the breach of statutory warranty for non-compliance but may, in the context of all the evidence, be relevant to the appropriate remediation and its cost, including under the proportionality principle. This is taken into account below in consideration of each alleged defect.

57 To do that work just described, the expert report would require to identify the putative performance solution and provide adequate reasons for the conclusion that it meets the relevant performance requirements, including supporting

documentation such as certifications and records of reliance on any relevant testing or third party (such as engineering) opinion. Whether such matters have been satisfied is discussed in the context of each claimed group of defects.

Limitation issues

58 There was no contest, and I accept, that the flashing, roofing/awning and internal waterproofing alleged defects were within time and therefore within the Tribunal's jurisdiction. They fell within paras (a) or (c) (load-bearing component or waterproofing) of the definition of major element in HBA s 18E(4). If the defects were found, it would be the result of defective or faulty workmanship or a failure to comply with the NCC. The resultant water ingress would be likely to cause the inability to use or inhabit the building as a residence.

59 The limitation issue focused on the doors and windows and the living room beam defects claims for breach of statutory warranty.

60 The owner contended that the windows and doors issues were a major defect and therefore subject to a six year limitation period within the definitions in HBA s 18E with HBA s 48K(7). If not so found, then for both the windows and doors and the living room beams the owner was entitled to a further six months to bring the claim, as was done, because the owner became aware of the defects within the last six months of the warranty period: HBA s 18E(1)(e). As said earlier, damages were claimed for breach of contract in not installing the contract-specified windows and doors and beams which was not subject to the same limitation restriction (the alleged contractual restriction under cll M11 and M14 has already been dealt with).

61 It is arguable that the windows and doors were part of the waterproofing of the building and so were a major element of the building. However, the evidence did not demonstrate that the defective materials supplied and installed (the wrong windows and doors), if found, caused or was likely to cause inability to inhabit or use the building as a residence or to come otherwise within this requirement of the definition of major defect in HBA s 18E(4).

62 That does not matter because in my view the evidence demonstrates that the breach of warranty, if found, first became apparent within the last six months of the warranty period, which under HBA s 18E(1)(e) extends the warranty period by a further six months, making this claim within time. "Becomes apparent" is defined in s 18E(1)(f) to mean when any person entitled to the benefit of the warranty "first becomes aware (or ought reasonably to have become aware) of the breach".

63 The evidence shows that the owner first became aware of the discrepancy on quality of range with the doors and windows in August 2021, being within six months of the expiry of the two-year warranty period from date of practical completion. The builder did not, in response to the owner's request at this point, provide copies of the window and door specifications, saying by the builder's director that the owner should always go back to the builder for any defects.

64 The owner asked, in an email on 10 August 2021, a representative of the supplier what range her doors were. In an email on 18 August 2021 the supplier representative identified that the doors were its "Horizon" range. In a

chat sequence with Wideline on 18 August 2021 the “Horizon” range was identified as “our base residential range”. I do not regard it as reasonable to find that what prompted the timing of the inquiry was enough in itself to find reasonable awareness in the owner of the alleged defect at any particular earlier point in time.

65 There had been email communication between the builder’s director and the owner in April 2019 about the ability of single-glaze frames to take double-glazing and the replacement of those frames, which did not deal with the range and quality of the windows. In my view this does not demonstrate a sufficient basis to say that the owner ought reasonably to have become aware of a change in grade of the windows. The owner was not a glazing or building expert. As will be discussed below, the parties’ experts have engaged in detailed, vigorous and unresolved (as between them) debate over the range of the windows and doors that were supplied and installed, which shows the difficulty of someone like the owner working out an answer...

66 The architect was engaged by the owner to provide an independent report on visible defects and incomplete work, attended with the owner site inspections on 24 and 30 September 2019 and, like the owner, did not identify the issue at that time. The architect stated, in an email response on 20 August 2021 to the owner’s question why the range change was not in the defects report or site inspections, that the architect was not a party to the processes germane to identifying that a non-specified brand and type of windows and door had been installed, being “the Contract admin, regular site meetings or communication between the builder … or yourself” or to “confirmation, review of shop drawings,

or instructions for any substitutions of the specifications", with the consequence that "we are uncertain as to what was undertaken. The site meeting and defects review was collating the outstanding items, and the visible defects prior to practical completion as an impartial record of the status. At the time, we were not made aware of any concerns with the windows and doors".

67 There was no evidence to establish that the different quality range of windows and doors was a visible defect to a trained or untrained eye on a visual inspection for defects which was the scope of the architect's engagement.

68 Any lack of reasonableness in the architect's non-awareness was not attributable to the owner if the architect was not the owner's agent for the purpose of that knowledge. I consider, on the foregoing evidence, that it is likely that the architect was not such an agent given the constrained terms of engagement and instructions. Even if the architect was such an agent, on the same evidence it was not reasonable for the architect to have reported that the wrong type of windows and door had been installed.

69 There was no suggestion that the knowledge (actual or reasonable) of other persons was relevant.

70 Accordingly, the windows and doors claim was within time on the claim for breach of statutory warranty in respect of them.

71 The contract claim for alleged non-supply of the specified type of windows and door was in any event within time. It was brought within three years of the

supply in March 2019 of the discrepant (if so found) windows and doors as required by HBA s 48K(3).

72 This was in any event a consumer claim as defined in Pt 6A of the *Fair Trading Act 1987* (NSW) (FTA) and was brought within three years of the supply in March 2019 of the discrepant (if so found) windows and doors as required by s 79L in that Part.

73 For completeness, I note that in *John McDonald Building Services PL v Gusa* [2022] NSWCATAP 60 at [133] et seq, esp [151]-[169], the Appeal Panel held that HBA s 74(3) did not expand the Tribunal's jurisdiction in respect of a consumer claim under s 236 of the *Australian Consumer Law* (ACL) with s 28 and FTA Pt 6A - the avenue to obtain relief for a claim for alleged misleading conduct under ACL s 18 - when it was brought in proceedings that also properly invoked the Tribunal's jurisdiction under the HBA (as in the present proceedings). The maximum recovery for a consumer claim if successful was $40,000 which was the Tribunal's jurisdictional limit for consumer claims when these proceedings were filed.

74 There were legislative amendments in 2022 that raised the Tribunal's jurisdictional limit for consumer claims to $100,000. The retroactive effect (if any) of the increased limit was not argued in the present proceedings. I do not need to consider this jurisdictional issue because of my findings that the HBA-based building claims in both contract and statutory warranty were within jurisdiction and time and without such a restrictive capped amount.

75 It appears that the living room beam was a load-bearing component and so a major element of the building. The alleged defect, if found, would be the result of defective or faulty workmanship. The resultant water ingress would be likely to cause the inability to inhabit the building as a residence due at least to the unsightliness and loss of amenity. Accordingly, this claim was within time.

76 The living room beam was supplied in about June 2019 and was advised as a defect to the builder – being veneer and not solid wood as specified in the contract – in late 2019. It was also within time under HBA s 48K(3) and as a consumer claim for the same reasons as given for the windows and doors.

77 Other minor claims were not brought within time since they did not fall within either definition of "major defect" or "major element". They appear to be the claims not pressed that are listed later in these reasons.

Principles governing loss arising from defective and incomplete work

78 The ordinary, natural and probable consequence of a breach of statutory warranties under HBA s 18B as to compliance with approved plans (and laws, codes or standards), due care and skill and fitness for purpose is remediation to achieve compliance, care and fitness by doing of the remediation work or paying to have it done by others. As the High Court said in *Bellgrove v Eldridge* (1954) 90 CLR 613, [1954] HCA 36 at 617, cited with approval by the High Court in *Tabcorp Holdings Ltd v Bowen Investments PL* (2009) 236 CLR 272, [2009] HCA 8 at [15]:

> "In the present case, the respondent was entitled to have a building erected upon her land in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by

> the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract."

79 This is applicable unless disproportionate on the principles discussed below.

80 Under HBA s 48O(1)(c) the owner is required to specify action by the builder that is grounded in proof by the owner of, not only the defect, but also the manner of remediation: *Catapult Constructions PL v Denison* [2018] NSWCATAP 158 at [46]-[61] and the authority there cited. In my view as I set out in *Marr v JCK Building Solutions PL* [2018] NCATCCD, unreported, 4 December 2018, HB 16/43946 at [46]-[54] and in subsequent decisions, an element of the manner of remediation in certain circumstances may inherently require inspection, properly defined so as to be sufficiently specific, to establish the need for and required scope of remediation.

81 In *Bellgrove v Eldridge* (1954) 90 CLR 613, [1954] HCA 36, the High Court said that the scope of remedial works must not be disproportionate to the defect. The High Court has also stated that there is a high bar for unreasonableness or disproportion once a breach is established: *Tabcorp Holdings Ltd v Bowen Investments PL* (2009) 236 CLR 272, [2009] HCA 8 at [13]-[20]; see also *Walker Group Constructions PL v Tzaneros Investments PL* [2017] NSWCA 27 at [186]; *Barwick v Shetab* [2017] NSWCATAP 127 at [87]-[88].

82 The analysis in the paragraphs in the *Tabcorp* decision, and the authority there reviewed, also makes it clear in these passages that reinstatement, provided it is not extravagantly disproportionate, is the appropriate measure of relief.

83 Reinstatement means what the builder was obliged to build, namely, contract works with a certain standard of amenity and presentation which includes not being at risk of emergent problems returning or growing. It also means that the form and finish of remediation and rectification produces an outcome that matches other components of the contracted works in form and finish and makes the works of the originally-intended quality and integrity.

Consideration and conclusion on defects and remediation method

84 The contract listed an order for precedence in respect of documents in Sch 3 with cl B2d-f. The specification was at number 4 and the architect drawings were at number 5, preceding the builder's quotation dated 8 September 2018 at number 6.

"Credibility" of builder's expert and builder's director

85 The owner submitted that the owner's expert provided opinions founded on thorough inspection and consideration of the evidence and substantiated by detailed reasoning referencing documents and photographs. In contrast, the builder's expert was said to have provided opinions based on instructions as to assumptions from the builder rather than the evidence (including the contract documents), with internal contradictions. The builder rather than the builder's expert undertook water testing. The builder did not inspect all areas of defective work and did not get onto the roof but, rather, inspected for the alleged leaks from inside the house. The owner's expert's preparedness to make informed concessions was contrasted with the builder's expert's approach.

86 The builder's director's credibility was also challenged on the following grounds: a change of evidence on the meaning of "semi-commercial"; an absence of documentary support for contentions that the builder submitted information to provide an alternative to the contract-specified product and provided a plan for the rectification works; contradiction between the builder's evidence in cross-examination and written and oral evidence, with agreement in cross-examination that "AWS" and "semi-commercial" were confirmed in documents prior to the contract drawings and in the quotation, the contract and the construction drawings.

87 The builder's submissions said that the criticisms were generalised and inadequately supported in relation to the builder's expert and inadequately supported and informed by language difficulties in relation to the builder's director.

88 Even if I accepted the force of the above criticisms, they are not "credibility" issues in relation to the experts in this generalised form. The "credibility" criticisms of the builder's expert really go, as demonstrated in both parties' submissions, to which of the expert opinions ought to be preferred for reasons such as adequacy and depth of investigation and reasoning.

89 In relation to the builder's director's credibility, the criticism was in relation to matters on which what the builder said was essentially not relevant to interpretation of a written contract when there was an absence of variation to the contract in the manner required by its provisions and by HBA s 6(1)(b). It

formed part of the matters in reinforcing the absence of evidence to found an estoppel against the owner's contract claims, as I have already found.

90 The alleged defects are dealt with below in the categories into which the parties grouped them. The builder's submission criticised, and reserved for questions of costs, the changes in classification of alleged defects through the proceedings and the withdrawal at hearing or in written closing submissions of 11 of the 60 alleged defects. The owner's reply submissions noted, and reserved for costs submissions, the following: at a directions hearing on 8 April 2022 the builder requested ungrouping of the defects in a new Scott schedule; the defects not pressed in closing submissions comprised 7.6% of the owner's expert's costings; the one defect not pressed at hearing comprised 1.8% of the costings; not pressing matters was consistent with the guiding principle and parties' duties in s 3(d) and s 36 of the NCAT Act defined below.

91 As already said, the conceded items appeared to be consistent with expiry of the limitation period for other than major defects.

Windows and doors (grouped items P54-55, P58-59)

92 There was no dispute that the contract specified "AWS semi-commercial range" for the windows and doors. What was installed was "Wideline" brand (not disputed) that were not semi-commercial standard or grade (disputed).

93 The architectural drawings specified the aluminium doors and windows as "AWS semi-commercial range". The builder's quotation specified them as "semi-commercial windows and doors as per schedule of finish and GWA Architect design".

94 As already said, the specifications and architectural drawings took precedence in the event of inconsistency, under Sch 3 to the contract with cl B2d-f. However, any inconsistency is resolved by the quotation description itself referring to the architect design (with the reference to the schedule of finishes being neutral).

95 Even without the late document from a Wideline representative dated 5 August 2022 that I rejected from evidence, it was clear on the communications with the supplier in August 2021 referred to earlier that there was support for the conclusion that the doors installed were Wideline "Horizon" which was a residential and not a semi-commercial range. The builder's expert confirmed in concurrent evidence what was in his report - that he had been told that conclusion on 26 April 2022 by a director of the supplier (under licence from Wideline) of the windows. The owner's expert said, without apparent contradiction from the builder's expert, that it was usual practice for doors and windows to be of the same range so that the profiles matched throughout the house. The owner's expert identified the windows and doors to be from the same range.

96 I do not accept that the builder's expert's disagreement with the characterisation of the range of windows and doors installed detracted from this evidence. There was nothing to suggest that in identification of window range there was a superiority in onsite inspection compared with viewing a "section" and apparently a photograph as the supplier's representative referred to. The fact that the items viewed were not in evidence did not detract; there was no summons to have them produced so that the observation could be tested.

There was no range identified on the shop drawings referred to by the builder's expert. There was doubt that the mid-range windows that the builder's expert identified (and said were of "semi-commercial" quality) were in supply at the relevant time. There were two quality levels within the mid-range identified by the builder's expert. There was no acknowledgement of the change between ranges (Horizon to mid-range) in the builder's expert's original report and the conclave report. The owner's expert's report contained two photographs which showed that the section of frame surrounding the glass on sides other than the sill/track base was 50mm not 100mm. This was consistent with his evidence that such frame size apart from the sill/track base was the difference between residential and a higher grade of semi-commercial. That evidence was not contradicted by the builder's expert, who referred to the sill/track base dimension. The sill/track base dimension was the same in both ranges.

97 Both experts were (as they stated) not glazing experts, neither was an employee of Wideline or the supplier. Wideline had been making windows and doors for 45 years and had a consistent product range of three of which "Horizon" was clearly residential and not semi-commercial. In those circumstances the owner's expert's reliance on a representative's observations of which product had been installed was appropriate and the owner's expert's experience that a uniform range of windows and doors was usually installed, which was not contradicted, ought also to be accepted.

98 The builder's expert referred in his report to other aspects of his discussion with the supplier's director, to the effect that some of the windows were fabricated using a top-of-the-range suite and others were fabricated using in part materials

from a top-of-the-range suite. It seems to me that the preponderance of the evidence I have already discussed means that this discussion does not outweigh factors such as the measurement and observation evidence that I have referred to, nor the evidence that a uniform range would usually be supplied and installed. There was no elaboration to suggest that completed windows with these elements delivered a semi-commercial outcome, as opposed to simply containing common parts from higher ranges.

99 I also do not consider that what constitutes “semi-commercial” varies between different suppliers and has no set meaning affects the conclusion when there is a clear basis for conclusion that the “Horizon” range was installed, that range was unchallenged as residential and not semi-commercial and there were clear differences in quality and properties between a residential range and other ranges.

100 The supplier’s certification was for standards for the type of windows and door that were supplied and installed, not that the window was the correct window under the contract specification. Further, the certification cannot reduce statutory warranty rights against the builder under HBA s 18G if in fact the type of window installed was (for instance, as to height) not compliant.

101 In those circumstances, the builder has installed the wrong windows and doors according to the contract specification and is in breach of contract. Absent a mitigating factor on remedy put forward in evidence by the builder and found to be established on all the evidence as reducing the measure of compensation for loss, the owner is entitled to supply and installation of the specified windows

and doors, being “AWS semi-commercial range”, in replacement of the existing windows and doors.

102 For the same reasons, the builder has breached the statutory warranty in HBA s 18B(1)(a). Absent the builder putting forward evidence which is found to establish on all the evidence that some other remedy is appropriate and replacement is disproportionate as the measure of compensation for loss, the owner is entitled to supply and installation of the specified windows and doors, being “AWS semi-commercial range”, in replacement of the existing windows and doors.

103 The owner also alleged that the doors were not compliant as to contract requirements for height. The “Horizon” range was for a maximum height of 2400mm whereas the contract window schedule specified 2800mm and it was not in dispute that the installed doors were 2800mm high, which required a higher range window that met the semi-commercial description.

104 As the owner’s expert explained uncontradicted, the glass for whichever range was supplied in large sheets that could be cut to the contract-specified height but such larger sheets to the installed dimensions were then outside of the manufacturer’s load-tested specifications if they were installed with “Horizon” specifications. Rather than showing that a range other than “Horizon” had been installed, this either reinforced the findings of breach of contract and warranty because the “Horizon” specifications were used for installation, or was neutral in determining what range was used.

105 There was also no supporting evidence for the builder's expert's opinion that the mid-range product he ultimately identified as what was installed could meet the 2800 specification. The available material on that mid-range suggested a maximum height of 2700mm.

Curved corrugated roof ground floor and first floor (grouped items P34-36, P26 with P10)

106 Non-compliance with the manufacturer's guide in minimum radius, causing stress lifting at the roof frontage from excessive pressure, popping of fasteners, non-compliance with the NCC in roof form and pitch and avenue for water ingress was alleged in this group of issues.

107 It was common ground between the experts that fasteners needed to be replaced.

108 The experts also agreed that the corrugated roofing sheets needed to be pre-sprung for curvature. The builder relied upon the narrative in a sub-contractor's invoice "sheets to be curved on site" as evidence that such was done. The owner's expert referred to determining "whether sheets have been sprung curved onsite or offsite" and inferred a distinction between onsite and offsite pre-springing or curving. The builder's closing submissions pointed to the absence of distinction between site of curving or who did the curving, including in the manufacturer's documents.

109 The builder's closing submissions submitted the following: the curved roof was constructed in accord with the architectural drawings by the owner's architect; the manufacturer's guide recognised that radii tighter than the tabulated

minimum of 8m could be permanently roll-curved and had been used successfully on some projects; this had been done by specialist curving onsite; there was no allegation of NCC non-compliance in this defect; removal and pre-springing with new sheets would achieve only the same outcome.

110 In response the owner's submissions said: the invoice narrative was insufficient to show that the onsite pre-springing had actually occurred and there was no other evidence; it was not controversial that the manufacturer had not pre-sprung the sheeting; the builder's submissions failed to consider the deficiency of the roof pitch which was less than 5 degrees and there was no evidence of a performance solution for this non-compliance with the NCC; the overlapping sheets in itself was a defect which was not the subject of the builder's submission and the sheeting was experiencing significant pressure by the tight radius.

111 It seems to me that the builder's submissions on site of pre-springing, the ability to achieve tighter radius by pre-springing and the inference from the invoice are persuasive on the limited evidence. However, in my view they are not determinative.

112 It is clear that the pre-springing, if it occurred, to a tighter radius than the tabulated recommendation has stressed the roof in *this* instance (as opposed apparently to some other instances referred to in the manufacturer's guide), caused fasteners to pop and caused the front to lift and sheeting to overlap which creates a non-compliant roof pitch and risk of water entry, with absence of waterproofing from external water entry itself being a non-compliance.

There is no evidence of compliance with HBA s 18F to obtain a written instruction to proceed with the architectural design when these were risks if the usual minimum radius was not followed. There was no evidence that substantiated a performance solution for what was constructed.

113 In those circumstances I accept that the existing curved roof needs to be replaced with a curved roof designed with a radius not less than the minimum in the manufacturer's guidelines and not less than the compliant minimum roof pitch. The owner's expert said that this was cheaper than attempting to repair and powder-coat onsite the existing curved roof sheeting.

Flat roof first floor above stairs (below highlight windows) and lower roof above living room (grouped items P11, P18, P25, P29-30 with P12)

114 Non-compliance with the NCC roof pitch performance requirement causing deterioration of rubbers over time and resultant water ingress was alleged and supported by the owner's expert's opinion.

115 The experts agreed that at 2 degrees the roof pitch in both locations was not compliant as a deemed-to-satisfy performance solution for this requirement.

116 Where there was a chimney entry in the ground floor flat roof section, the experts agreed that the sealing solution, while able to accommodate in some circumstances a 1 and 2 degree pitch, could not do so with corrugated roof sheeting under 5 degrees pitch, with consequent water pooling.

117 The owner's expert found evidence of active water leaks including a puddle of water in the ceiling and leaks from water testing. He said that a roof of this pitch required a concealed fixing system.

118 The builder's expert did not go into the ceiling, his moisture meter reading was not sufficiently specific and in his second report he accepted that the builder's water testing was not appropriately carried out. His suggestions that the defects in roofing and flashing were due to someone other than the builder simply reflected the builder's instructions.

119 The builder's expert and the builder in closing submissions did not contest non-compliance with the relevant DTS performance requirements. The builder relied upon its expert's opinion that the performance solution reflecting what was done complied with the performance requirements. I have already found such an expert opinion not to be sufficient for the purposes of liability for non-compliance and breach of warranty.

120 Additionally, the builder's expert's opinion was not supported by documentation such as manuals or specifications and at points appeared to rely upon there being no leaking, which was contradicted by the evidence already described and in any event did not address risk of such water entry. The owner's expert said that in his experience he had never seen such supporting documentation and that insurers always require a re-pitch to a roof that was under-pitch. There was also no written instruction compliant with HBA s 18F as to building in accordance with alleged onsite architect and certifier instruction, which in any event was based a matter of instruction rather than the expert's reasoning.

121 In this respect, and as pointed out in the owner's reply submissions: there was insufficient substantiation for the opinion that Dakaflash adhesive-backed aluminium-faced flashings had properties and characteristics to meet the performance requirements, were suitable for use in this site and were correctly installed; there was a similar lack of substantiation for these matters in respect of the chimney penetration sealing solution; simply pointing to absence of water penetration was not sufficient substantiation and there was a similar lack of substantiation for the same matters (properties, characteristics, suitability for use in this site and correct installation) in respect of the two forms of flashing glued together and the cladding in the gable.

122 In respect of the builder's expert's opinion about the different composition of the cladding, there was insufficient reasoning to demonstrate why this composition removed the risk of water penetration.

123 I consider that the owner has established the alleged defects.

Flashings (items P 12-13, P16-17, P19, 21-23 with P12, P27, P31-33 with P29, P39)

124 Non-compliance with the NCC causing water ingress was alleged. The owner said that the Dakaflash flashing was uniformly defective because it had been installed with the overlap being upstream, contrary to manufacturer specifications that it be required to be installed downstream. Sheet joints were not heat-welded or taped and waterproofed.

125 The owner's expert also said that in the ground floor roof over the living room and under the window there was an adhesion failure in comparison with the manufacturer's specifications in that it could be lifted up with two fingers, due

to its being laid on dirty substrate, and the flashing under the window was incorrectly turned up, blocking water inside. Further, in the first floor roof highlight windows there was no tray flashing under the windows as required by the NCC and AS 2047 and the Dakaflash in conjunction with pre-fitted plastic flashing was trapping moisture inside the window and diverting it internally. In the ground floor roof over the living room the fibre cement cladding flashing was defective in that there was no 6mm minimum gap under it.

126 The experts importantly agreed that the Dakaflash had been installed over the existing flashing when, as said by the owner's expert, it must be installed under. They agreed that the 6mm minimum gap was required but the builder's expert said that it was present.

127 I accept, as the owner's expert contended, that AS 2047 in its provisions relating to aluminium-framed windows applies. That is apparent from the standard itself and was recognised in the Wideline documentation.

128 The builder's expert was not present when the owner's expert conducted a hose test on the windows. He did not contest that they leaked when hosed. Since he was not present, he was not in a position to comment on how the test was conducted. There was no evidence to say that it was not conducted properly.

129 The builder's expert and the builder in closing submissions did not contest non-compliance with the relevant DTS performance requirements including in Pt 2.2.2. The builder relied upon its expert's opinion that the performance solution reflecting what was done complied with the performance requirements. I have

already found such an expert opinion not to be sufficient for the purposes of liability for non-compliance and breach of warranty.

130 The builder's expert's opinion was to the effect that Dakaflash (the general flashing used) and Smartform flashings (used on the eastern gable and eaves roof) were a modern alternative to traditional flashing that used a rubber strip with aluminium face and adhesive backing. In cross-examination the expert agreed that the Dakaflash guide did not say that it could effectively seal to another adhesive flashing. The glue's life expectancy, like Sikaflex, was about 20 years which was the warranty for colourbond finishes.

131 In my view, the builder's expert's opinion was not sufficiently supported by documentation that the adhesive-backed aluminium-faced flashings had properties and characteristics to meet the performance requirements, were suitable for use *in this site* and were correctly installed. This was particularly the case when there was evidence of adhesion failure in comparison with the manufacturer's specifications in that the flashing could be lifted up with two fingers, due to being laid on dirty substrate. Although the builder's expert said that the flashings were "difficult to lift", there was no denial of the dirty substrate which would reduce adhesion. Further, it was not contradicted in the builder's submissions that the experts agreed that Dakaflash had been installed over the existing flashing when, as said by the owner's expert, it must be installed under.

132 If, contrary to my view, the documentation was seen as sufficient, then the state of the substrate and installation on that substrate alone was sufficient to require removal and replacement of flashings in the affected locations.

133 Further, of general and important application to all the flashing, it was not contradicted in the builder's submissions that the experts agreed that the Dakaflash had been installed over the existing flashing when, as said by the owner's expert, it must be installed under. I also prefer the owner's expert's assessment that the Dakaflash flashing was uniformly defective because it had been installed with the overlap being upstream, contrary to manufacturer specifications that it be required to be installed downstream and that sheet joints were not heat-welded or taped and waterproofed.

134 I prefer the owner's expert's assessment that the 6mm gap needed to be created under the sheeting. This gap was recommended by the manufacturer and not following it would be inappropriate if it was for aesthetic reasons.

Living room beams (item P42)

135 Non-compliance with the contract and with statutory warranty was alleged, causing splitting, peeling and bubbling veneer from moisture entry. The beam was not solid as specified in the contract. There was no complying variation.

136 The owner's expert's photographs clearly showed the deformation. There was no challenge to the actual defect. The evidence was limited to demonstrating that it was damage to the veneer not to the structure of the beam, which was relevant to the limitation defence and could be relevant to limiting a proportionate remediation to fixing the veneer if such was possible.

137 The owner's primary claim for replacement of the beam was in contract, which has already been found.

Defect items agreed in whole or part

138 The following defect items were wholly or partially agreed: items P3 (stormwater pit ponding in base); P4 agreed on removing weep hole covers only, not damp proof course (DPC); P8 (east end roof gutter damaged sheet and insufficient fall) and P9 (west façade roof sarking behind gutter) where amount was not agreed; P17 (trim flashing only); P 34 (side fasteners only); P42 (refix veneer only); P53 (Stormtech drain sliding door).

Remaining defect items including parts where liability not agreed

139 For item P4 (DPC) I accept the photographic evidence and opinion of the owner's expert that the DPC, to be compliant and installed with due care and skill, needs to be through to the outside wall. The builder's expert's evidence suggested uncertainty that the DPC was uniformly visible, which it is required to be for compliance.

140 For item P6 (deformed gutter), the experts agreed that the gutter was deformed and there was moisture staining the underside of the eave. I accept the owner's expert's opinion that the deformation outwards was not consistent with an unknown person leaning a ladder against the gutter.

141 For items P14-15 (barge capping and verge flashing), I prefer the owner's expert's analysis. NCC s 3.5.1.3(e.i) was agreed to require complete length roof sheets to be used where possible. There was no clear evidence as to why this was not done, especially with the greater risk created by the low pitch and full-length roof. The builder's expert's reference to work sequencing was not explained. The builder's expert's reference to construction detailing (add-on

brackets that pre-determined the slope of the awning) not resolved in the architect's detailing was insufficient in the absence of an instruction that complied with HBA s 18F. Any interference with re-sealing of the interleaved sheeting was not relevant to the issue whether there should have been interleaved sheeting in the first place. Re-sealing the joint also did not address that central concern and the risk from interleaved sheeting. For the verge flashing aspect, the experts agreed that the hob or step onsite could not be identified on the drawings. If the onsite construction departed from the drawings by reason of boundary constraints as the builder's expert surmised, then it should have been the subject of an instruction that complied with s 18F and which possibly would have included the flashing protection that the owner's expert said was required. The builder's expert's final comments said that he understood the owner's expert's concerns but questioned the necessity.

142 For item P24 (deteriorating timber in ground floor roof awning), the builder's submission said that the "confirmation" referred to by the owner's expert's report had not been provided but also relied upon the builder's expert's comments in the conclave report. Those comments noted agreement to a cutout and reinstatement of a 50mm section of deteriorating timber instead of the owner's expert's proposed 100mm. In the absence of further evidence, I have assumed that was the "confirmation" and have adopted the agreed solution but at the original costing since it seems to me that a 50mm difference is unlikely materially to reduce the four hours of carpenter's time allowed for the owner's expert's solution.

143 For items P46 and P50 (missing waterstops on thresholds of bathroom and internal laundry doors), these were substantially reduced from replacement of the waterstops to removal of grout over the waterstops (as not in accord with AS 3740), cleaning and replacement with sealant. The owner's expert explained that AS 3740 required the waterstop at the top of the surface and AS 3958.1 required sealant in order to accommodate the junction of aluminium, timber and tiles that could move and crack given the different materials. The builder's expert pointed to a waterproofing certificate, what appeared to be mastic sealant at the internal laundry door threshold, sealant (not identified) at the internal bathroom door and that AS 3958.1 was not referenced in the NCC and was for guidance only. I accept that the reduced solution of the owner's expert is appropriate. There is no basis put forward not to follow guidance and reduce the risk of differential movement and resultant cracking. A waterproofing certificate does not preclude or determine finding of a defect on other evidence.

Items not pressed, removed as non-major or incorporated into other items

144 Items not pressed by the owner in opening, as non-major, were P1, P2, P5, P7, P21 (which appears to be an error since it was also included with P22-23 in flashing defects and was included as not pressed in one part of the owner's submissions but not another table), P28, P37, P38, P45, P47, P48, P51, P52 and P57.

145 Items removed as non-major and out of time were P40 (staircase nose), P41 (missing control joint), P43 (staircase nose), P44 (stair landing), P49 (grouting

of joints behind toilet), P56 (missing drawer covers) and P60 (incomplete drawer covers).

146 These totalled $2,150 (corrected from $1,850) net trade cost on the owner's expert's costings and $141 net trade cost on the builder's expert's costings of his view of liability and scope of work (the builder's expert did not attribute a costing to some of these items).

147 Items that had their rectification incorporated into other items, as noted in the headings above, were P10 (in P26), P13, P19-20 and P21-23 (in P12), P15 (in P14), P17 (in P16), P30 (in P29 and P12), P32 (in P31), P33 (in P29 and P31), P35-36 (in P34). I could not discern a double-count in their treatment.

148 As to windows and doors, if item P54 at $32,131 net trade cost was not found, then $8,812 was added to the amounts claimed for items P58-59 if found to cover removal, disposal and repair which had been included for all of P54 (and I infer item P55 which alleged the same type of defect) and P58-59 in item P54.

Costings

149 Each party dealt with these separately from defects and remediation method, consistent with the completion of the conclave report by instalments by their experts that was described earlier in these reasons.

150 I have preferred the remediation solutions of the owner on the four major areas of dispute items separately dealt with above. This renders irrelevant the builder's expert's costings on his scope of works for those items.

151 I do not consider that I have sufficient information on the builder's expert's costings of the owner's remediation solutions that was provided shortly before the hearing. It also seems to me to have been too late to enable the owner's expert properly to consider it and respond.

152 I in any event accept the owner's expert's costings methodology in preference to that of the builder's expert. Both used Rawlinson's costing guide 2019 edition for net trade costs by the time of the conclave report, drawing on the "average tender" column. The owner's expert used an average of the range of rates; the builder's expert took rates from the low end of the range and did not explain why. The average seems more appropriate.

153 Further, the owner's expert's pricing for the windows and doors (items P54-55 and P58-59) totalled $54,071 including installation, which compared reasonably with a quotation in the owner's evidence from October 2021 of $42,702 net trade price for supply of windows and doors without installation. The inference of reasonableness across other pricing can be drawn in the absence of specific evidence to the contrary that can be relied upon. This inference is also supported by the owner's expert's more reasonable approach of taking commercial pricing for the windows and doors which, although slightly more than semi-commercial, accounted for the 20% uplift for custom sizes. In contrast, the builder's expert added only 10% to residential standard prices which was not an appropriate comparator given the dispute on differing quality that has already been discussed in these reasons.

154 Both experts were asked in cross-examination about uplift in pricing given market conditions in the twelve months preceding the hearing. It would have been preferable if this had been the subject of reasoned and documented opinion in a supplementary report. However, I do not accept the builder's invitation to dismiss the evidence out of hand. Both experts were qualified to give an answer and must, from the answers that they gave, have considered the matter as likely to arise and thought about it. Both experts agreed that there had been a significant increase in materials and labour costs.

155 On the basis that both agreed an uplift reflected the current market, I accept that the best-informed evidence I have is the owner's expert's estimate of 45-50% uplift. I accordingly accept the owner's submission that an uplift at half the lower end of that range for prudence (22.5%) is appropriate; it is probably conservative.

156 I disagree with where the owner has applied the uplift of 22.5% in her final calculation of claim. It seems to me that the uplift directly relates to what is included in net trade costs (labour and materials) and should be applied to that figure, before adding preliminaries and margin and GST. This gives a slightly higher amount than the owner's method of calculation.

157 The categories for the usual split between preliminaries, HBCF, possibly contingency and margin (also known as builder's profit including for supervision) are not entirely reflected in either expert's breakdown of these types of addition to net trade cost. The builder's expert also gave two versions.

158 Doing the best I can with the material, it seems to me that there is a basis in the evidence for preliminaries including HBCF at 13% and margin at 20%. Such would also reflect higher preliminaries and margin for remedial work than for original work owing to increased need for co-ordination and the piecemeal nature of the work, together with the possibility of unknowns.

159 If a money order is made, the net trade cost outcome therefore is, for all items categorised earlier as still pressed (and described earlier in these reasons) a total of $107,055 comprising: P1 $124 (parties agreed to split the difference between each estimate); P4 $1,152; P6 $648; P8-P9 $1,258 + $472 equalling $1,730; P10, P26, P34-36 $4,706 + $13,286 equalling $17,992; P11, P18, P25, P29-30 $2,877 + $2,418 + $1,011 (corrected for a scaffolding double-count of $702) + $2,012 equalling $8,318; P12-13 with P19 and P21-23, P16-17, P27, P31-33, P39 $3,307 + $1,596 + $1,302 + $4,234 + $4,234 equalling $14,673; P14-15 $534; P24 $288; P46 and P50 each $338 (revised from $1,976 for each) equalling $776; P42 $3,149; P53 $3,600; P54-55, P58-59 $32,131 + $1,601 + $3,462 + $16,877 equalling $54,071.

160 With uplift for price increases of 22.5% the amount is $131,142.37.

161 With preliminaries including HBCF the amount is $148,190.87. With margin at 20% the amount is $177,829.04. With GST the amount is $195,611.94.

162 Accordingly, if a money order is to be made, the owner is entitled to $195,611.94 remediation costs, less the $15,414.80 admittedly owed under the contract, leaving a balance of $180,197.14.

Work order or money order

163 Under HBA s 48MA, a work order is the preferred, not the mandatory, outcome for defective work: *Galdona v Peacock* [2017] NSWCATAP 64 at [65]. Personal animosity is not sufficient to displace the primacy of a work order for defective work, as the test is objective and the flexibility of s 48O permits an order that the builder fulfil a work order by engaging another party to carry out the work order on behalf of the builder. However, relational breakdown is an element in objective assessment, as can be the builder's conduct in unrelated projects and as will be doubts about the builder's capacity (including being licensed) or skills to undertake the required remediation, the builder's attitude to the standard of work done and willingness to return and the likelihood of further dispute not meaning that a work order would be a timely or cost-effective resolution: *Brooks v Gannon Constructions PL* [2017] NSWCATCD 12 (appeal not affecting s 48MA decision); *Galdona* at [64]; *BNT Constructions PL v Allen* [2017] NSWCATAP 186 at [33]-[36]; *Kumar v Sabharwal* [2017] NSWCATAP 200 at [29]-[30]; *Clements v Murphy* [2018] NSWCATAP 152 at [30], citing with approval *Kurmond Homes PL v Marsden* [2018] NSWCATAP 23 at [31]-[32], [46]; *Brennan Constructions PL v Davison* [2018] NSWCATAP 210 at [15]-[21].

164 In my view the evidence discussed above, including particularly in relation to the mitigation and access issues, establishes an objective breakdown of relationship between the parties from the loss of confidence of the owner in the builder’s willingness and ability. This loss of confidence arose from a history of attempts to remediate defects and the builder’s resistance (in my view unsuccessfully) to what the owner she maintained were defects or items not

supplied in accord with the contract. A work order would in all likelihood in the present circumstances lead to a renewal application for a money order.

165 Accordingly, there will be a money order in favour of the owner against the builder as previously set out.

Costs

166 CATA s 60, together with rule 38 of the *Civil and Administrative Tribunal Rules 2014* (NSW) (the Rules), provide that the ordinary costs rules apply, even in the absence of special circumstances required by s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW) (NCAT Act), where "the amount claimed or in dispute in the proceedings is more than $30,000".

167 In *Allen v TriCare (Hastings) Ltd* [2017] NSWCATAP 25 at [37]-[38], the Appeal Panel found that "'[P]roceedings'" refers to the process set in motion, or commenced, by lodging an application or notice of appeal. That process includes the steps taken by the Tribunal to hear and determine whether to grant the relief sought in the application or notice of appeal, as well as any interlocutory or ancillary steps. Proceedings are defined by the subject matter raised in the application or notice of appeal. The participants in proceedings are limited to the parties determined in accordance with [CATA s 44 and the Rules]". The fact that an order was made that the proceedings be heard together with evidence in one being evidence in the other does not affect this analysis.

168 In *Owners SP 63341 v Malachite Holdings PL* [2018] NSWCATAP 256 at [3]-[5] the Appeal Panel summarised the operation of r 38 as follows:

"[3] Rule 38(2)(b) applies to the following proceedings:

(1) Where the relief claimed in the proceedings is for an order to pay a specific amount of money, or an order to be relieved from an obligation to pay a specific amount of money, and that amount is more than $30,000;

(2) Where an order is sought in the proceedings for the performance of an obligation (such as to do work), and the Tribunal has power make an order to pay a specific amount of money, even if not asked for by the claimant, provided that

(a) there is credible evidence relating to the amount the Tribunal could award; and

(b) that evidence, if accepted, would establish an entitlement to an order for an amount more than $30,000.

[4] Rule 38(2)(b) may also apply to proceedings where the orders sought in the proceedings depend upon the claimant proving there is a debt owed in order to establish an entitlement to the relief sought, and that amount is in dispute and is more than $30,000.

[5] Rule 38(2)(b) does not apply to proceedings:

(1) Where a claim for relief in the proceedings (not being a claim for an order to be paid or be relieved from paying a specific sum) may, as a consequence of that relief being granted, result in the loss of any property or other civil right to a value of more than $30,000; or

(2) Where there is a matter at issue amounting to or of a value of more than $30,000 but:

(a) no direct relief is sought and no order could be made in the proceedings requiring payment or relief from payment of an amount more than $30,000; or

(b) the relief sought does not depend on there being a finding that a specific amount of money is owed."

169 In *Hanave PL v Wine Nomad PL* [2022] NSWCATAP 361 at [40]-[42] the Appeal Panel expounded aspects of the above summary:

"[40] As made clear in *Malachite* at [75] and following, r 38 is not concerned with the value of rights that might be in issue or any change in wealth. Unlike s 101(2)(r) of the *Supreme Court Act 1970* (NSW), r 38 does not require consideration of whether the proceedings:

> (1) involve a matter at issue amounting to or of a value of $30,000 or more, or
>
> (2) involve (directly or indirectly) any claim, demand or question to or respecting any property or civil right amounting to or of the value of $30,000 or more.
>
> [41] Rather, r 38(2)(b) applies where "the amount claimed or in dispute in the proceedings is more than $30,000".
>
> [42] The questions to be determined are what is the amount "claimed", what is the amount "in dispute" and what are "the proceedings" in circumstances where there are two applications, the second in the nature of a cross-application ("cross application")."

170 The threshold amount was exceeded in the owner's claim on the test as explained in *Allen*, *Malachite* and *Hanave*.

171 The starting point for exercise of costs discretion on the usual principles is that costs follow the event. "The event" is usually the overall outcome of the proceedings – did the successful party have to go to the Tribunal (in this case) to get what it achieved, rather than being offered at least that relief. If there are distinct, separate or dominant issues on which the party seeking relief did not succeed, that may be taken into account in the exercise of costs discretion, either as an award of costs of those issues to the party who had success on them or as a discount of the costs of the overall successful party, or some other appropriate exercise of principled discretion. The exercise of the discretion involves impression and evaluation. Appeal Panel decisions have made no order as to costs (to the intent that each party paid its or their own costs of the appeal) where there has been a measure of success on both sides: *Johnson t/as One Tree Constructions v Lukeman* [2017] NSWCATAP 45 at [25]-[29]; applied in *Oppidan Homes PL v Yang* [2017] NSWCATAP 67.

172 Costs will include the assessed or agreed amount for the expenses on expert reports if these have not been claimed and allowed as damages.

173 Costs are usually ordered on the ordinary basis as agreed or assessed, unless the parties tender material and/or make submissions that justify an award of costs on the indemnity basis as agreed or assessed, in whole or part.

174 For an award of costs on other than the ordinary basis, a party's conduct of the proceedings themselves, or the nature of the proceedings themselves (for instance, misconceived), or an outcome less favourable than an offer, are considered.

175 The above principles are authoritatively explored in *Latoudis v Casey* (1990) 170 CLR 534 and *Oshlack v Richmond River Council* (1998) 193 CLR 72 and followed and applied in this Tribunal in *Thompson v Chapman* [2016] NSWCATAP 6 and *Bonita v Shen* [2016] NSWCATAP 159, citing earlier consistent authority.

176 The principles on indemnity costs have resonance with at least some of the "special circumstances" in CATA s 60(3) that are required to justify a costs order when rule 38 does not apply; special circumstances means out of the ordinary but not necessarily extraordinary or exceptional: *Megerditchian v Kurmond Homes Pty Ltd* [2014] NSWCATAP 120 at [11]. If special circumstances are required to be found to justify a cost order, it is logical that such an order would be on the ordinary basis unless there is something in extent or type beyond what justifies the finding of special circumstances in order to award costs on the indemnity basis. Otherwise the anomaly could arise that any special

circumstance justified indemnity costs being ordered for the same reason as special circumstances were found.

177 Principles on offers are explored in *Thompson v Chapman* at [91] in reliance upon authority in the NSWCA and Supreme Court there cited, to which can be added *Hazeldene's Chicken Farm PL v Victorian Workcover Authority (No 2)* (2005) 13 VR 435, [2005] VSCA 298 and *El-Wasfi v NSW; Kassas v NSW (No 2)* [2018] NSWCA 27, together with the effect of legal representation in *Bajic v Paraskevopoulos* [2018] NSWCATAP 205 at [27].

178 In summary: the offer must constitute a real and genuine compromise; rejection must be unreasonable in the circumstances; reasonableness of rejection is to be assessed at the time the offer is made, not with the armchair of hindsight; relevant factors in assessing unreasonableness include the stage of the proceedings when the offer was made, time allowed to consider the offer, extent of compromise in the offer, the offeree's prospects in the litigation at the time the offer was made, clarity of terms of the offer, whether an application for indemnity costs was foreshadowed in the event of rejection and whether there was legal representation for the party considering the offer.

Orders

179 I make the following orders:.

1. Order that pay $180,197.14 on or before 29 March 2023.

2. Order as follows in respect of questions of costs:

(1) Any costs application with further submissions and documents relating to questions of costs is to be filed and served on or before 22 March 2023.

(2) Any submissions and documents relating to questions of costs in response is to be filed and served on or before 5 April 2023.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar