Civil and Administrative Tribunal
New South Wales

Freshwater

> 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.

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:

(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:

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

Civil and Administrative Tribunal
New South Wales

Arncliffe

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

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

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.

****

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