Civil and Administrative Tribunal
New South Wales

Freshwater

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

Civil and Administrative Tribunal
New South Wales

Arncliffe

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

NCAT
NSW Civil & Administrative Tribunal
Consumer and Commercial Division

NOTICE OF ORDER

POLIS CONSTRUCTIONS PTY LTD
10 Culver Street
MONTEREY NSW 2217

File No: HB 20/16922
Quote in all enquiries
eNumber: 19289MS80

Application to the Tribunal concerning SALLY MCKENZIE - POLIS CONSTRUCTIONS PTY LTD

Applicant: SALLY MCKENZIE
Respondent: POLIS CONSTRUCTIONS PTY LTD

On 28-Sep-2020 the following order was made:

The application is dismissed.

Reasons for decision:

1. On 21 May 2012, the respondent entered into a Building Contract with Golden Brandling Pty Ltd and Dinheiro Holdings Pty Ltd (the Developer) for the construction of residential dwellings at Alexandria NSW.

2. The respondent relies upon the fact that the Building Contract was for construction only and that design and co-ordination of the design consultants was the responsibility of the Developer.

3. A Final Occupation Certificate for the entire project (including the applicant's property which is the subject of this application) was issued on 31 October 2013.

4. The applicant brought the present application on 15 April 2020. She withdrew an earlier application (HB 19/48451) on 11 November 2019. She gave evidence today that she withdrew the application because she understood that Mr Stavros of the respondent (Builder) would address by further rectification work, all issues concerning leaks inside the bedroom, and water damage to floorboards. Her present application says: "Each issue has been attended to by (the Builder) countless times over the years with no satisfactory resolution. After I submitted my last NCAT request in 29/10/19, (the Builder) agreed to fix the defects if I withdrew that NCAT hearing, so I withdrew in the utmost good faith at that time".

5. Mr Stavros of the Builder denied that he encouraged the applicant to withdraw the earlier application (HB 19/48451).The applicant did not seek any other orders in the earlier application e.g. a work order which could have been the subject of a renewal application. It appears she took the option of simply withdrawing the proceedings as she is entitled to do under s 48I(2) of the Home Building Act 1989 (NSW (the HB Act).

6. There is no doubt that there have been ongoing issues in respect of water ingress in the Applicant's property. These issues were apparent (as the applicant states in her written evidence for these proceedings received by the Tribunal on 7 July 2020) from the first six months of the applicant moving in.

7. Mr Stavros for the Builder says an initial membrane failure on the roof top balcony in 2015 was addressed by rectification work (i.e. repair by removal of tiles and old membrane and the installation of new membrane) and that further flood testing of the balcony since the work in 2015 has indicated that the balcony membrane is not leaking. The Builder's case is that the issue causing the present water ingress the subject of the present application is not the balcony floor but rather the external walls above the bedroom in the Applicant's Property and that this is not a defect for which the Builder is responsible.

8. The applicant says all defects are in the original construction of the Applicant's Property and that the Builder is responsible. She has provided quotes for rectification works but the quotes do not address whether or not the present water ingress issues are defects in construction. The applicant has not provided an expert building consultant report to substantiate her case as regards a defect in original construction.

9. Such omission in evidence may have been dealt with by an adjournment affording her the opportunity to obtain an expert report.

10. However, there is a fundamental issue as to jurisdiction which the applicant's evidence has not met. Her claim for damages relates to breaches of the statutory warranties: see s 18B of the HB Act. Time limitations apply: see s 18E. In respect of Contracts entered into or for work done after 11 February 2012 and for proceedings commenced after 16 January 2015 (as is the case with the present proceedings) the time period is 6 years from completion of the relevant work in respect of major defects such as waterproofing issues in residential building work.

11. The occupation certificate for the residential building work was issued on 31 October 2013. The last possible day for a claim to be lodged in respect of breach of the statutory warranties was 30 October 2019. The present application was lodged on 15 April 2020. Given the applicant's evidence as to ongoing issues with construction since shortly after she moved into the property, It is not available for her to say that the defect became "apparent" (see s 18E(1)(e)) with in the last 6 months of the relevant warranty period and as would enable a further six month extension of the time limitation period.

12. I find that the present application was brought out of time and the Tribunal has no jurisdiction under the HB Act to hear the application. For that reason the application is dismissed.

D Charles, Senior Member

28/09/20

For further information about your rights and obligations in relation to this order please read NCAT's Rights and Obligations Guideline available on the NCAT website at www.ncat.nsw.gov.au

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