Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Ferguson v Riviera Building & Construction Pty Ltd;; Riviera Building & Construction Pty Ltd v Ferguson [2017] NSWCATCD 16**
Hearing dates:	26 November 201527 November 201516 March 201617 March 201628 July 2016Submissions closed 19 September 2016
Date of orders:	14 March 2017
Decision date:	14 March 2017
Jurisdiction:	Consumer and Commercial Division
Before:	P Boyce, Senior Member
Decision:	In HB14/60367 the Tribunal orders: the builder, Riviera Building & Construction Pty Ltd to pay to the owner, Doug Ferguson the amount of $5269.00 being the amount of damages in respect to the defects on or before 21 March 2017. In HB15/33869 The Tribunal orders the owner, Doug Ferguson to pay to the builder, Riviera Building & Construction Pty Ltd, the amount of $$53,893.77 on or before 21 March 2017. Costs Any application for costs by a party is to be supported by evidence and submissions of no more than 3 pages in length and is to be filed with the Tribunal and served on the other party on or before 7 April 2017. If there is no application made for costs by 7 April 2017 there will be no order as to costs. Any evidence and submissions in response to an application for costs from the party opposing the application for costs is to be filed with the Tribunal and served on the other party on or before 5 May 2017. The parties are to advise the Tribunal in their respective submission if they consent to the issue of costs being determined dealt with on the papers. Alternatively the parties are to make submissions as to why such an order should not be made pursuant to section 50 of the Civil and Administrative Tribunal Act 2013.
Catchwords:	HOME BUILDING-repudiation and termination of contract,

	incomplete and defective works, home owners damages, builders damages, quantum meruit claim, interest on damages, liquidated damages, interests of justice served in allowing reopening of case after hearing.
Legislation Cited:	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulations 2000
Cases Cited:	Urban Transport of Authority of NSW v Nweiser (1992) 28 NSWLR 471 Smith v New South Wales Bar Association (1992) 176 CLR 256 Turner Corporation Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd (1994) 13 BCL 378 The Craftsmen Restoration & Renovations v Boland [2008] NSWSC 660 Wheeler v Ecroplot Pty Ltd [2010] NSWCA 61 Tabcorp Holdings Pty Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272 Howard v Pickford Tool Co.[195] 1 K.B. 417. Smith v Butler [1900] 1QB 694 Cornwall v Henson [1900] 2 Ch 298 Haines v Bendall (1991) 172 CLR 60 Foran v Wright (1989) 168 CLR 385 Bellgrove v Eldridge (1954) 90 CLR 613 Bruno Pisano v Georgia Dandris (2104) 17 BPR 33,583; [2014] NSWSC 1070 Jones v Dunkel (1959) 101 CLR 298 Robert Symes & Anor v Mick Fabar Constructions Pty Ltd [2014] NSWCATCD 229 Adam Eftimoski v Mericon Homes Pty Ltd [2014] NSWCATCD 254 Crichton & Bridle v Leighton [2009] NSWCTTT 157; Walton v Illawarra (2012) 28 BCL 202; [2011] NSWSC 1188; Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79; Ringrow Pty Ltd v BP Australia Pty Ltd (2005) 224 CLR 656; Andrews v Australia and New Zealand Banking Group Ltd (2012) 247 CLR 205; Paciocco v Australian and New Zealand Banking Group Ltd (2014) 309 ALR 249; Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd (2014) 45 VR 79; Build Environs Pty Ltd v Tali Engineering Pty Ltd [2013]

	SASC 84; Peter Turnbull & Co Pty Limited v Mundus Trading Cop (Australasia) Pty Limited (1954) 90 CLR 235; Toll (FGCT) Pty Ltd v Alpharpharm Pty Ltd (2004) 219 CLR 165; Concut Pty Ltd v Worrell (2000) 176 ALR 693; DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd [2016] NSWCA 117; Shervill v Builders Licensing Board [1982] HCA 47; 149 CLR 620; Laurinda Pty Ltd v Capalaba Park hopping Centre Pty Ltd [1989] HCA 23; 166 CLR 623; Koompahtoo Local Aboriginal Land Council v Sanoine Pty Ltd [2007] HCA 61; 233 CLR 115; Universal Cargo Carriers Corporation v Citati [1957] 2 QB 401; Gold Coast Oil Company Pty Ltd v Lee Properties Pty Ltd [1985] Qd R 416 Smith v Butler [1900] 1QB 694; Cornwall v Henson [1900] 2 Ch 298; Update Constructions Pty Limited v Rozelle Child Care Centre (1990) 20 NSWLR 251; Trimis v Mina [1998 NSWCA 140; Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd (1996) ATPR 41-522; Renard Constructions (ME) Pty Limted v Minster for Public Works (1992) 26 NSWLR 234; Brooks Robinson Pty Limited v Rothfield [1951] VLR 405; Iezzi Constructions Pty Limited v Watkins Pacific (Qld) Pty Limited [1995] 2 Qd R 350; Ettridge v Vermin Board of the District of Murray Bay [1928] SASR 124; ABB Constructions Pty Limited v Abigroup Contractors Pty Limited [2003] NSWCS 665; Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd [2004] NSWSC 273; Riverside Motors Pty Ltd v Abrahams [1945] VLR 53;
Texts Cited:	Brooking on Building Contracts (5th edition,2014)
Category:	Principal judgment
Parties:	In HB 14/60367: Applicant: Doug Ferguson Respondent: Riviera Building & Construction Pty Ltd In HB 15/33869: Applicant: Riviera Building & Construction Pty Ltd

	Respondent: Doug Ferguson
Representation:	Counsel: In HB 14/60367: Applicant Home Owner: D. Moujalli Respondent Builder: M. Auld In HB 15/33869: Applicant Builder: M. Auld Respondent Home Owner: D. Moujalli Solicitors: In HB 14/60367: Applicant: Maguire & McInerney Respondent: William Cotsis & Associates In HB 15/33869: Applicant Builder: William Cotsis & Associates Respondent Home Owner: Maguire & McInerney
File Number(s):	HB 14/60367HB 15/33869
Publication restriction:	Unrestricted

REASONS FOR DECISION

APPLICATIONS

1 In application HB 14/60367 filed with the Tribunal on 17 December 2014 the applicant home owner commenced proceedings against the respondent builder (“home owner’s application”).

2 In matter number HB 15/33869 filed with the Tribunal on 18 May 2015 the applicant builder commenced proceedings against the respondent home owner (“builder’s application”).

3 The applicant home owner in HB 14/60367 is the respondent in HB 15/33869 and the applicant builder in HB 15/33869 is the respondent in HB 14/60367.

4 Throughout this judgement the parties will be referred to respectively as builder and owner.

5 Both applications are heard together and the evidence of one application is to be the evidence of the other.

6 In the home owner’s application the owner sought an order against the builder that it pay to him the amount of $81,763, being the amount the owner estimated it would cost to complete the incomplete building works.

7 In the builder’s application it sought orders against the home owner that the home owner pay to the builder the amount of $163,622.98 plus interest and costs.

Legislative and jurisdictional considerations

8 S48KI (1) of the HBA provides that any person may apply to the Tribunal for determination of a building claim.

9 Pursuant to s 48K(1) of the HBA the Tribunal has jurisdiction to hear and determine any building claim brought before it in which the amount is less than $500,000.00.

10 The provisions of the section 18E (1) (a) and (b) of the HBA relevant at the time the contract was entered into provided that proceedings for a breach of statutory warranty must be commenced before the end of the warranty period. The warranty period relevant to this application is a period of six years for a breach that results in a major defect or two years in any other case after the completion of the work to which it relates.

11 Section 3B (3) of the HBA provides that it is presumed that practical completion of residential building work occurred, in the circumstances of this application, on the date on which the contractor last attended the site to carry out work, that is November 2015.

12 As to the matters now before the Tribunal, the Tribunal is satisfied that the claims are less than $500,000, the home owner has standing to bring his application, the respondent was and is a licensed contractor for the purposes of the HBA and has standing and the work carried out was residential building work for the purposes of the HBA.

13 The Tribunal is also satisfied on the evidence before it that the owner and the builder entered into a contract for the carrying out of residential building work being a two storey 4 bedroom addition and alteration to premises owned by the owner at Bawley Point in NSW on or about 8 March 2014 and the total contract sum was $330,000 inclusive of GST (“Contract”).

14 It is uncontentious that the building work pursuant to the Contract commenced on or about 10 March 2014.

15 On 9 March 2015 the owner issued to the builder a notice of default pursuant to the Contract and on 27 March 2015 purported to issue a notice of termination.

16 The builder sought to terminate the Contract on 23 November 2015.

17 The Tribunal will consider in this judgement the date of termination of the Contract.

18 The owner’s proceedings were brought in time as they were commenced within 6 years of the last building works being carried out on site.

19 The builder commenced its proceedings for its building claim within 3 years of the last supply of building goods and services and accordingly pursuant to s48K(4) of the HBA has been brought in time.

20 As to the matters now before the Tribunal, the Tribunal is satisfied that the claims are less than $500,000, the home owner has standing to bring his application, the builder was and is a licensed contractor for the purposes of the HBA and has standing and the work carried out was residential building work for the purposes of the HBA.

21

The Tribunal formally finds that it has jurisdiction to hear and determine claims.

22 S18B of the Act provides:

> **Warranties as to residential building work**
>
> (1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:
>
> (a) a warranty that the work will be performed with due care and skill and in accordance with the plans and specifications set out in the contract,
>
> (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
>
> (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
>
> (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
>
> (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
>
> (f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

23 The Home Building Amendment Act 2014 No 24 (2014 Amendment) amended the Home Building Act 1989 (HBA) by inserting a new "Part 20 Provisions consequent on enactment of Home Building Amendment Act 2014" into Schedule 4 of the HBA. Included in those 2014 Amendments were clauses relating to the amendments to statutory warranties and the time limitations contained in section 18E of the HBA.

24 The relevant 2014 Amendments to section 18E commenced on 15 January 2015.

25 After the 2014 Amendments section 18E provided that:

> **18E Proceedings for breach of warranties**
>
> (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,
>
> (c) the warranty period starts on completion of the work to which it relates (but this does not prevent proceedings from being commenced before completion of the work),
>
> (d) if the work is not completed, the warranty period starts on:
>
> (i) the date the contract is terminated, or
>
> (ii) if the contract is not terminated-the date on which work under the contract ceased, or
>
> (iii) if the contract is not terminated and work under the contract was not commenced-the date of the contract,

(e) if the breach of warranty becomes apparent within the last 6 months of the warranty period, proceedings may be commenced within a further 6 months after the end of the warranty period,

(f) a breach of warranty **"becomes apparent"** when any person entitled to the benefit of the warranty first becomes aware (or ought reasonably to have become aware) of the breach.

(2) The fact that a person entitled to the benefit of a statutory warranty specified in paragraph (a), (b), (c), (e) or (f) of section 18B has enforced the warranty in relation to a particular deficiency in the work does not prevent the person from enforcing the same warranty for a deficiency of a different kind in the work (**"the other deficiency"**) if:

(a) the other deficiency was in existence when the work to which the warranty relates was completed, and

(b) the person did not know, and could not reasonably be expected to have known, of the existence of the other deficiency when the warranty was previously enforced, and

(c) the proceedings to enforce the warranty in relation to the other deficiency are brought within the period referred to in subsection (1).

(3) The regulations may prescribe defects in a building that are not (despite any other provision of this section) a major defect.

(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.

Note : The definition of **"major defect"** also applies for the purposes of section 103B (Period of cover).

"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.

26 The 2014 Amendments inserted Clause 120 and of Schedule 4 into the HBA (“Clause 120”) and provides that:

120 Application of Part

(1) This Part prevails to the extent of any inconsistency with any other provision of this Schedule.

(2) Regulations made under clause 2 of this Schedule have effect despite any provision of this Part.

27 The 2014 Amendments also inserted Clause 121(1) of Schedule 4 of the HBA (“Clause 121”) and provides that:

121 General operation of amendments

> (1) Except as otherwise provided by this Part or the regulations, an amendment made by the amending Act extends to:
>
> (a) residential building work or specialist work commenced or completed before the commencement of the amendment, and
>
> (b) a contract to do residential building work or specialist work entered into before the commencement of the amendment (including a contract completed before that commencement), and
>
> (c) a contract of insurance entered into before the commencement of the amendment, and
>
> (d) a loss, liability, claim or dispute that arose before the commencement of the amendment, and
>
> (e) an application for a licence or certificate that is pending on the commencement of the amendment.
>
> (2) However, an amendment made by the amending Act does not apply to or in respect of:
>
> (a) proceedings commenced in a court or tribunal before the commencement of the amendment (whether or not the proceedings were finally determined before that commencement), or
>
> (b) a claim made before the commencement of the amendment under a contract of insurance (whether or not the claim was finalised before that commencement).

28 The 2014 Amendments further inserted Clause 140 of Schedule 4 of the HBA ("Clause 140") and provides that:

> **140 Changes to terms of contract**
>
> An amendment made by the amending Act that changes the terms that a contract must contain applies only to a contract entered into after the commencement of the amendment.

Summary of Background

29 The owner and the builder entered into a standard form "Home Building Contract for Work Over $5,000" on 8 March 2014 for building work being for additions and renovations to an existing dwelling owned by the owner at Bawley Point for a price of $330,000 including GST.

30 The Contract provided for works to commence on 10 March 2014 and that they were to be completed within six (6) months of commencement, which is 10 September 2014.

31 The Contract provided for the owner to pay the builder the Contract price by instalments (called in the Contract "progress payments").

32 The building works commenced on 10 March 2014.

33 On 21 July 2014 the builder issued to the owner a claim for payment for Stage 6 (rear deck) and stage 7 (fix out) totalling $50,000.

34 A dispute arose between the builder and the owner about the works involved in stage 6 and 7 and whether those works had reached completion.

35 The dispute remained unresolved and continues to remain unresolved. The owner contends that he terminated the Contract pursuant to clause 25 of the Contract on 27 March 2015.

36 The builder contends that it terminated the Contract on 23 November 2015

37 The building works were not completed.

Owner's Claim

38 The owner's claim is now amended to be claims for:

(a) Damages for defective, incomplete and non-complaint condition of the building works;

(b) Identifying what works are necessary to complete the building and rectify the defects;

(c) The owner's entitlement to damages for delay and completion of the works;

(d) The effectiveness of the purported termination of the Contract.

Builders Claim

39 The builder's claim is now that as a result of the alleged repudiation of the Contract by the owner the builder suffered loss and is entitled to damages as follows:

(a) Outstanding Contract payments $44,600.00;

(b) Interest on outstanding payments of $9,856.49;

(c) Variations of $25,999.50 (excluding margins);

(d) Delay costs of $38,319.00;

(e) Quantum Meruit of $213,660.43.

Evidence

40 The agreed bundle of documents filed by the parties in accordance with the Tribunal directions amounted to 2638 pages contained in 9 large lever arch folders. From that agreed bundle of documents the parties tendered those parts into evidence they relied upon.

41 The owner's evidence comprised:

(a) The cross examined and sworn evidence of James Douglas Ferguson;

(b) The cross examined and sworn evidence of Douglas Ferguson;

(c) Exhibit 1-Affidavit of James Ferguson sworn 25 September 2015;

(d) Exhibit 2-Affidavit of Doug Ferguson sworn 16 April 2015;

(e) Exhibit 3-Affidavit of Doug Ferguson sworn 24 September 2015;

(f) Exhibit 4-2014 Calendar

(g) Exhibit 5-Expert report of Illawarra Building Appraisal Services authored by Andrew Connor ("Expert Connor") and dated 9 May 2015 ("Connor report 1");

(h) Exhibit 6-Expert supplementary report in regard to roofing damage following storm and alleged defects with roof of Illawarra Building Appraisal Services authored by Andrew Connor and dated 13 July 2015 ("Connor report 2")

(i) Exhibit 7-Working Scott Schedule prepared for second conclave on 18 February 2016

(j) Exhibit 8- Adjournment notes of Member Topolinsky dated 18 February 2016

(k) Exhibit 9-Joint memorandum of Experts Conclave dated 18 February 2016 and signed by Expert Connor and Expert Brincat;

(l) Exhibit 10-Minutes of conclave dated 19 November 2015 signed by Expert Connor and Expert Brincat;

(m) Exhibit 11-Expert Quantity Surveyors report prepared by Taylor & Partners Quantity Surveying (Aust) Pty Ltd and authored by Peter Taylor ("QS Taylor") dated 19 November 2015 ("Taylor report");

42 The builders evidence comprised of:

(a) The cross examined and sworn evidence of Michael James Jones, director of the builder;

(b) Exhibit A-Affidavit of Michael James Jones sworn 13 August 2015;

(c) Exhibit B-Exhibits to Affidavit of Michael James Jones sworn 13 August 2015;

(d) Exhibit C- Affidavit of Michael James Jones sworn 3 September 2015;

(e) Exhibit D- Exhibits to Affidavit of Michael James Jones sworn 3 September 2015;

(f) Exhibit E- Affidavit of Michael James Jones sworn 10 February 2016;

(g) Exhibit F-Expert report Number 1 of Auspro Building Services Pty Ltd authored by Edward Brincat ("Expert Brincat") and dated 28 June 2015 ("Bincat Report 1");

(h) Exhibit G- Expert report Number 2 of Auspro Building Services Pty Ltd authored by Edward Brincat and dated 4 August 2015 ("Brincat Report 2");

(i) Exhibit H- Expert report Number 3 of Auspro Building Services Pty Ltd authored by Edward Brincat and dated 3 September 2015 ("Brincat Report 3");

(j) Exhibit I-Interim Scott Schedule to be read in conjunction with expert report at Exhibit 5 containing costing based on Cordells to incomplete and carry remedial work to defective work (totalling $199,770.73);

(k) Exhibit J- Minutes of Conclave dated 19 November 2015 signed by Expert Connor and Expert Brincat (repeating Exhibit 10)

(l) Exhibit K-Expert Brincat's reply to Expert Connor's-minutes of Conclave signed by Expert Brincat dated 24 November 2015

(m) Exhibit L-Expert Brincat's costing for defect item as agreed at Conclave dated 19 November 2015 (total if found $4,535.60);

(n) Exhibit M- Expert report Number 5 of Auspro Building Services Pty Ltd authored by Edward Brincat and dated 11 February 2016 ("Brincat report 5");

(o) Exhibit N-Minutes of Conclave dated 19 November 2015 as signed by Expert Connor on 18 February 2016;

(p) Exhibit 0- Conclave document dated 18 February 2016 (same as Exhibit 7);

(q) Exhibit P-Scope of works extracted from Scott Schedule of Expert

Connor at Conclave held on 18 February 2016;

(r) Exhibit Q-Scott Schedule of Expert Connor with items tabulated.

43 Expert evidence is that of:

(a) The cross examined sworn evidence of Expert Connor and his reports;

(b) The cross examined sworn evidence of Expert Brincat and his reports;

(c) The cross examined sworn evidence of QS Taylor and his report.

Submissions

Builder

44 The builder has made 2 submissions:

(a) Submissions in chief filed 20 June 2016 in regard to the builder's claim HB15/33869;

(b) Submissions in reply to owner's submissions filed 8 September 2016 in regard to the owner's claim HB14/60367.

45 The owner has made 2 submissions:

(a) Submissions in chief filed on 24 June 2016 in regard to the owners claim HB14/60367;

(b) Submissions in reply to the builder's submissions filed 19 September 2016 in regard to the builders claim in HB15/33869.

Issues

46 The multiple matrixes of issues in these applications will be dealt with in this judgement by the Tribunal as each issue is considered.

Reopening of builder's case

47 On 28 July 2016 the builder sought to reopen its case by the tender of further documents.

48 The owner objected to the builder's application.

49 The builder contends the documents sought to be tendered are relevant to the matters pleaded in the points of claim going to the termination of the Contract and that their omission from the evidence at the hearing was an oversight.

50 In support of the builder's application to reopen its case it cites the NSW Court of Appeal decision in *Urban Transport of Authority of NSW v Nweiser* (1992) 28 NSWLR 471. In that case the court held that the guiding principle for a court in determining whether to grant an application for leave to re-open is whether the interests of justice are better served by allowing, or by rejecting, the application. In *Smith v New South Wales Bar Association* (1992) 176 CLR 256 where the High Court found that where a case is reopened, the nature and extent of the review must depend on the error or omission which led to the application for re-opening. In the case of a factual error the extent of the review will vary depending on whether the error goes to the heart of the

matter or whether the significance is confined to a discrete subsidiary issue.

51 The owner submits that he will be prejudiced if the further documents are admitted into evidence. As the case is closed the owner will have no opportunity to cross examine on the further documents. If the documents had been tendered at the hearing he would have undertaken extensive cross examination on them.

52 The builder submits that if the documents are allowed into evidence then the owner will have an opportunity to address the issues raised in the documents in his submissions.

53 The Tribunal has considered the material sought to be tendered by the builder. It is such that it assists the Tribunal in consideration of the issues, but does not significantly change the evidence before the Tribunal. On that basis to allow it to be relied upon after the close of the case does not bring about an alteration to the evidence adduced. Notwithstanding that the owner has not cross examined on the further evidence, there is no significant adverse impact on the owner's case by allowing it to be relied upon by the builder. As such, the interests of justice are better served by allowing the builders application and it can rely on the documents.

Witness Credit

54 In respect of the lay and expert witnesses the builder contends that the evidence of lay witnesses Mr Jones should be preferred to that of Mr Ferguson and of Mr James to Mr Ferguson.

55 The builder submits that:

(a) Mr Jones gave honest and forthright answers to the questions he was asked.

(b) Mr Ferguson gave equivocal evidence to important matters and made artificial distinctions where he thought such a distinction would benefit his case including his answers in regard to variations that he used language that he thought would make a legal distinction between agreeing to a variation and asking for option on how work was to be carried out.

(c) Mr James Ferguson evidence was of little assistance as he had little recollection of the evidence that the owner sought o adduce from him.

56 The Tribunal has heard the evidence and formed its own assessment of the witnesses and where necessary applies the weight their respective evidence carries where due.

Consideration of experts' evidence

57 The builder contends that although the experts have agreed as to how to characterize the items in dispute, the scope and cost of the works necessary to rectify the works remains an issue to be determined by the Tribunal.

58 The builder submits that a review must be made of the documents identified as joint documents to determine what the genesis of those documents were:

(a) Exhibit J was based on Appendix B to the Brincat report 1;

(b) Appendix B was the base document considered by the experts at the first Conclave;

(c) Member Topolinsky made notes on Appendix B and both Expert Connor and Expert Brincat signed a copy of the notated Appendix B;

(d) That notated document became Exhibit J.

(e) After the Conclave and Expert Connor retyped what is now Exhibit J and Expert Brincat then notated matters on the document that he felt were not agreed at the Conclave. That document is now Exhibit K.

(f) Exhibit L is a list of items agreed to be defective as noted in Exhibit K and it is the document that was prepared by Exhibit L without contribution from Expert Connor being a result of the orders made on 26 November 2015 for the experts to each prepare a scope of works prior to the next Conclave.

(g) Expert Connor did not prepare such a document as directed by the Tribunal prior to the second conclave. The failure by the owner to prepare a scope of works was the subject of a denial by the Tribunal of an application for an extension of time request by the owner on 8 February 2016, but the Tribunal left it open for a further application for leave to be made before the second Conclave on 18 February 2016. No such application was made by the owner.

(h) Exhibit 10 is identical to Exhibit K except that:

(i) It was hand annotated in the left hand margin during the second conclave; and

(ii) It was signed by Expert Connor on the bottom left margin.

(i) Exhibit N is also identical to Exhibit 10 and Exhibit K except that it has been annotated by Expert Brincat beside the signature of Expert Connor on the first page noting that it was signed by him at the second Conclave.

(j) Exhibit 7 was prepared by Expert Connor during the second Conclave and was his version of the scope of works and is unsigned by Expert Brincat as he requested during the Conclave to have an opportunity to review the documents, verified by Member Topolinsky's adjournment notes no being Exhibit 8.

(k) Exhibit O is the same document as Exhibit 7:

(i) Except that Expert Brincat's comments now appear in red print as a result of the discussions and his opinion of the required scope of works that took place at the second Conclave; and

(ii) Makes it clear that Expert Brincat's account that Exhibit 7 was prepared during the second Conclave by Expert Connor and attempted to introduce new and expanded scope material by Expert Connor to avoid the difficulty the owner was under as a result of failure to prepare a scope of works prior to the second Conclave.

(l) Exhibit Q is based on Expert Connor's initial Scott Schedule, but has introduced a unique lettering system for each item, with the description for that column being referred to as the "sub item".

59 The builder agitates for the Tribunal not to accept Expert Connor's evidence for three reasons:

(a) His evidence was given from the perspective with compliance with the Building Code of Australia, regardless of the terms of the contract or the use and performance of the materials and works on site;

(i) Expert Connor conceded that he did not have a copy of the Contract when he prepared his defective and incomplete works report. His finding in regard to:

- Head flashing defect was given without regard for the design and operation of the windows specified for use in the building and without there being evidence of leaks from the windows;
- Evidence given about the failure of the Z4 roofing screws was not made out on the evidence of photograph 62. The roof is not leaking. He did not take into account the need for the builder to match the existing profile and gradient of the roof; and,
- Having firstly stated that there was no waterproofing installed on the basis of his inspection he then concedes that waterproofing is visible up the walls in the bathroom and then retreats to a position that it was damaged and ought to be replaced.

(b) Expert Connor's evidence in relation to costing can be given no weight as it has been done on a "indicative basis" having a global figure rather than being assessed by reference to reliable sources, rather than merely stating the methodology adopted and conceding in evidence that he adopted figures given to him by the owner without making that disclosure in his report.

(c) Expert Connor included in his independent opinion information that he received instructions directly from the owner without disclosing their source. He conceded in cross examination that a reader of his report would not be able to distinguish between his independent opinion and what he had been told by the owner.

(d) Expert Connor should not be accepted as an independent witness, on the builder's submission he allowed himself to become a mouthpiece for his client, passing off his client's figures and information as his own.

60 The builder further contends that Expert Taylors report and evidence cannot be accepted as reliable or informative because:

(a) He adopts Expert Connor's opinions as to the value of the defective work, which cannot be accepted by the Tribunal;

(b) In regard to Expert Taylors consideration of the builders quantum meruit claim, he had an assistant consider the invoices relied on by the builder and categorise them. The builder contends that it was the assistant who made that assessment as to what invoices were appropriate and not Expert Taylor. The assistant was not called to give evidence and there is no evidence as to her assessment or her expertise, if any.

(c) His instructions came directly from the owner and were not disclosed by him in his report;

(d) His evidence was argumentative, prevaricative and did not offer assistance to the Tribunal to disclose his methodology to what use it would be to the Tribunal;

(e) If the report is of any use, the assessment made by Expert Taylor was theoretical, without regard for the work done by the builder including variations in reaching that value. He merely relied on Expert Connor's opinion to discount those works.

(f) Having regard to the builder's objections to the report, it is of no weight.

61

The builder contends that Expert Brincat's evidence is, on the other hand, logical and consistent disclosing his process of reasoning. Where appropriate in his opinion, he made concession in his report and at the conclaves and when giving evidence to the Tribunal.

62 From the Tribunal's perspective, the approach of the respective Expert's has worked to obfuscate the identity of the issues. The differences between the Experts, particularly evidenced by the multiple versions of the Joint Report of the Conclaves, have served to confound rather than identify the real issues for determination. The nature of expert evidence is to assist the Tribunal not to promote intransigent positions which appear to be taken to advocate on behalf of the parties.

63 Notwithstanding, where the evidence of Expert Connor and Expert Brincat conflict, the Tribunal will attribute greater weight to Expert Brincat's evidence. Expert Connor's evidence is given less weight as his report and evidence were given referenced to compliance with the BCA, without the benefit of contractual consideration, reliant on the information supplied by the owner without independently assessing that information and that his estimates of costing is on an indicative basis rather than an accurate costing.

OWNER'S CLAIMS

64 ***The builder's work is defective, incomplete and non-compliant***

65 ***Rectification and completion of the works***

66 ***Legal principles***

Owner's submissions

67 The owner contends that where a builder breaches a building contract, the owner is entitled to be compensated for the purpose of bringing the building works into conformity with the contract. This flows from the fundamental compensatory principle stated by the High Court in *Haines v Bendall* (1991) 172 CLR 60.

68 In *Bellgrove v Eldridge* (1954) 90 CLR 613 affirming *Tabcorp* the High Court set out the general compensatory principles in relation a claim for breach of a building contract in that:

(a) Where a plaintiff is entitled to have a building constructed in accordance with a contract, the plaintiff's damage is the loss sustained by the failure to perform this obligation. The loss can be measured only by ascertaining the work which is reasonably necessary to complete the building and rectify the defects complained of so as to give the plaintiff the equivalent of a building which is substantially in accordance with the contract;

(b) The work reasonably necessary to remedy defects in a building and so produce conformity with the contract may, and frequently will, require the removal or demolition of some part of the structure.

69 The owner submits that the principle in Bellgrove applies to breaches of Statutory Warranties because of the effect of section 18B implying Statutory Warranties within

the Contract. Hammerschlag J in *Bruno Pisano v Georgia Dandris* (2104) 17 BPR 33,583; [2014] NSWSC 1070 (although appealed from, the principles were uncontested) summarised the principles in *Bellgrove* application to a claim for breach of the Statutory Warranties and also found:

> [66] there is no issue that the quantum of damages for breach of the warranties is the amount which is reasonable and necessary to:
>
> (a) remedy the work which has not been performed in a proper and workmanlike manner;
>
> (b) provide materials which are suitable for the purpose for which they are used; and
>
> (c) expend so as to result in a dwelling that is reasonably fit for occupation as a dwelling.

70 The owner further submits that the Tribunal has discretion to either award damages or order that rectification work be carried out. The owner is entitled to have the building conform to the contract.

71 In *Tabcorp* the High Court considering whether rectification works are reasonable and necessary to bring about conformity with the contract said that, “The qualification… is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt…the test of “unreasonableness” is only to be satisfied by fairly exceptional circumstances.”

72 The Contract between the owner and the builder provided a warranty that the works would be carried out by 10 September 2014 plus seven days agreed as an extension of time to 17 September 2014. The experts agree that not all work has been completed by the builder and that the work completed has been done defectively. The owner submits that the Tribunal is assisted by the substantial agreement reached by the experts as recorded in Exhibits 9 and 10.

Experts Conclave on completion and rectification works

73 The owner contends that if there is any controversy as to any difference between the record of scope of works to be completed and rectification of defects in Exhibits 9 and 10, the Tribunal should find that Exhibit 9 is Exhibit 10. Also noting that Member Topolinsky notes on 18 February 2016 say “Conclave concluded on 18/2/16. Rectification scope of works is agreed”. To put the owner in the position in which he would have been had the builder performed the Statutory Warranties, the owner submits the Tribunal must order that the works referred to in Exhibit 10 should be carried out.

Defective Work

74 The owner submits in respect of his claim for defective work against the builder that substantial agreement has been reached on the items in respect of which the builder’s work was in breach of the statutory warranties as set out in Exhibit J.

75 The builder largely agrees with the Scott Schedule (being the Schedule prepared by Expert Brincat being Annexure B to his first report (Exhibit J) as to the incomplete

works and the defective works

76 The defective works identified in Exhibit J are items:

77 3-5, 7-10, 12-14, 16-31, 43, 44, 51-70, 90, 96-98, 111, 113, 115, 126, 127 and 129.

78 There is no agreement between the experts as to items now set out and the Tribunal will consider each parties' submission and make its determination in regard to each.

Wet area tiling

79 Items 3-5,7-10, 12-14, 16-31:

(a) The experts are agreed that various wet area tiling are defective;

(b) The disagreement between the experts is as to the extent that it is necessary demolish the work to rectify the work. Expert Connor says all of the area is to be demolished and replaced and Expert Brincat limits the area to be demolished.

(c) The owner urges the Tribunal to accept Expert Connor's opinion for rectification. Expert Connor identifies no waterproofing by reference to photographs. The owner contends that if it had been waterproofed then the waterproofing would have been visible,

(d) The Tribunal should infer from the builders failure to give evidence as to whether or how the waterproofing was installed that such evidence would not have assisted his case: *Jones v Dunkel* (1959) 101 CLR 298;

(e) A building is not fit for occupation until an Occupancy Certificate can be issued. It is not a matter in dispute that in a class 1 building such as is being built, water proofing is a critical stage inspection for the purposes of the *Environmental Planning and Assessment Act* 1979.

(f) The waterproofing critical stage inspection did not occur.

(g) The owner urges the Tribunal to reject Expert Brincat's suggestion that the missed critical stage inspection can be cured by the builder giving a certificate as:

(i) No certificate has been given by the Builder;

(ii) The builder has not given evidence that he is able or willing to give a certificate;

(iii) There is no evidence that Council is prepared to accept a certificate from the builder as a resolution to the missed waterproofing inspection.

(iv) There is a risk that the deficiencies identified in Expert Connors photographs will provide a reasonable basis for Council not accepting a certificate given by the builder;

(v) The wet area defective tiling agreed by the experts are caused by the builder failing to carry out the works in a proper and workmanlike manner in breach of section 18B (a) of the HB. The failure to do the work without the critical stage inspection in breach of the *Environmental Planning and Assessment Regulations* 2000 will preclude the issue of an occupation certificate and therefore being a breach of section 18B(e) in that the building is not fit for occupation.

(vi) The scope of works propounded by expert Connor should be

accepted by the Tribunal as the work to put the owner in the position he would have been in had the builder complied with the Statutory Warranties.

80 The Tribunal is satisfied on the evidence of Expert Brincat that any defect evident with the installed wet area tiling can be rectified by demolishing and removing the installed wet area tiling at the doorways only to the en suite, bathroom and shower room and then tile and compete to the AS 3958.2. To also demolish the floor tiling to the laundry area to a diagonal line from the re-entrant corner of the shower room, adequately waterproof the laundry wet are to BCA2015Part 3.8.1, tile and complete the laundry wet area to AS 3958.2.

81 The costs of such works are set in by Expert Brincat in Exhibit L and are included in the amount the Tribunal will allow for rectification.

Head flashings

82 Items 46, 47, 48 and 49:

(a) Expert Brincat considered these items as incomplete works and Expert Connor considered them as defective works.

(b) The owner contends regardless of their status the builder breached the statutory warranties in their regard.

(c) The builder submits that the head flashing referred to by Expert Connor as defective is a wrong conclusion and that Expert Brincat's finding is preferred who identified that:

(i) The standard referred to by Expert Connor is for timber windows and the windows installed are aluminium;

(ii) The window manufacturers guide to installation does not require flashing above windows as depicted in photos 11 and 21; and

(iii) There is no evidence of leakage or water damage

83 For the reasons submitted by the builder, the Tribunal prefers Expert Brincat's determination and finds that these items are incomplete works.

Floor sheet step down

84 Item 50:

(1) The step down from the internal floor to the front external balcony is approximately 30mm on Expert Connor's finding. The Australian Standard and Manufacturer recommends 100mm. Expert Connor regards the step down as a defect.

(2) Expert Brincat considers this to be constructed as per drawing, although no drawings have been referenced in the evidence.

(3) The builder contends that the owner supplied all drawings and gave a warranty as to the buildability of the drawings in clause 2(2)(a) of the Contract.

(4) In the absence of a plan or drawing to reference the requirement for a 30mm step down the Tribunal is satisfied that a failure to comply with the Australian Standard and the Manufacturer requirements is sufficient to establish a breach of the statutory warranty (*Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [10]).

The Tribunal finds that item 50 is a defect.

(5) QS Taylor, as the owner's expert witness, does not attribute a separate value to remedy the defect.

(6) Expert Brincat regards as a technical defect and that no physical damage was observed due to the defect and does not regard the technical defect as needing to be remedied.

(7) In the absence of evidence that the "technical defect" has caused a failure in the flooring system the Tribunal accepts that the performance provisions of the BCA Part 1 have been complied with and consequently do not require rectification. Further in accordance with *Tabcorp Holdings Pty Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 the rectification would be an unreasonable course to take.

(8) The Tribunal makes no order as to rectification or damages as a result of the defect.

Roofing Screws

Owner

85 The experts agree and the evidence shows in regard to Item 62, the roofing screws, that:

(a) Buildex zip 4 screws were used by the builder to affix the roofing sheets;

(b) Zip 5 screws should have been used; and,

(c) The only method of rectification is to replace the zip 4 screws with zip 5 screws

86 Expert Brincat does not dispute that zip 4 screws are not suitable for severe marine environments, but contends that as they are not failing they do not need to be replaced. The owner submits Expert Brincat gives no evidence to demonstrate that zip 4 screws will continue to perform in highly corrosive conditions created by severe marine environments.

87 The owner further submits there is no evidence on which the Tribunal could conclude that the rectification of the defect is "unreasonable" in light if the Tabcorp Holdings observations.

88 The owner is entitled to have the screws rectified by replacement and the Tribunal allows the quantum of the claim as costed by Expert Brincat and included in the total amount allowed..

Bugle fixing screws

89 Item 78-:

(a) Both experts agreed that stainless steel bolts were to be installed to the rear balcony and not the bolts as used. The owner contends that regardless of whether this item is classified as incomplete or defective the builder has breached the statutory warranty.

(b) The builder does not draw issue on the need to replace the bolts, but relies on Expert Brincat's costing of $140.00.

(c) The Tribunal finds that the failure to use stainless steel bolts is defect and the builder is liable to replace the bolts.

(d) In the absence of other evidence as to the cost of the bolts, the Tribunal orders that the builder compensate the owner in the amount of $140.00 for the cost of the supply of stainless steel bolts.

Stair width

90 Item 82:

(a) The stairs to the rear balcony were specified and show on the plans to be 1310mm wide. Expert Connor contends they were built at 1065mm. Expert Brincat says they are 1100mm. In any case, they are constructed narrower than specified in the plans and as a result are in breach of section 18B(a) of the HBA.

(b) This has been characterised as a contractual matter in Exhibit 10. The owner contends that the builder has breached the Statutory Warranties in respect of the upper deck stairs and the owner is entitled to have the work rectified to conform to the Contract.

(c) Again, the owner relies on the *Tabcorp Holdings* to support its contention that there is evidence that the rectification of the stairs is not unreasonable.

(d) The remedy to rectify would require demolition, removal and replacement. The builder contends that to do so would fall foul of the rule in *Tabcorp Holdings Pty Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 that is, to require the stairs to be demolished, removed and replaced would be an unreasonable course to adopt.

(e) The tribunal notes Expert Brincat's opinion that there is "no loss of amenity for the stairs as constructed and in my opinion is a better construction to that drawn by the draftsman".

(f) The Tribunal is satisfied that the stairs as constructed is a defect as they have failed to comply with the plans and specifications. However, the Tribunal accepts that the rule in *Tabcorp* should be invoked and that it is not appropriate to require the stairs to be demolished and replaced as to do so would be unreasonable.

Timber Floor architraves/skirting boards specified timber species

91 Item 116:

(a) The specifications provide that "architraves-timber TBA (possibly Sydney blue gum)".

(b) Expert Connor identifies that an inferior timber, pine, has been used. Expert Brincat states that the specification is non-specific as to the species of timber to be used.

(c) The owner rejects Expert Brincat's interpretation and contends that it is based on a false premise that the parties did not mean anything by reference to Sydney blue gum in the specification. A reasonable person would interpret such a statement to mean that the species of timber to be used for the architraves would be Sydney blue gum or a species of timber of comparable quality.

(d) The owner contends that by using inferior quality timber the builder has

breached section 18B(a) by failing to carry out work in accordance with the specifications and failing to use suitable materials.

(e) This has been characterised as a contractual matter in Exhibit 10. For the reason previously submitted by the owner, he contends that he is entitled to have the work completed in Sydney Blue Gum or a timber species of comparable quality.

(f) The builder contends that although the owner submits that the grade of timber is deficient the standard 50mm profile has been exceeded and the builder installed 75mm profile instead.

(g) The Tribunal does not find that the builder breached the statutory warranties in providing and using pine.

(i) The skirting and architraves have been painted. The width of the timber is wider than that which was specified in the Contract. There is no evidence before the Tribunal that pine is an inferior grade of timber for use as skirting and architraves.

(ii) The Contract at best specifies that the timber species to be used is “to be advised”. The addition of the words “(possibly Sydney Blue Gum”) is not sufficiently descriptive to displace or qualify the words “TBA”.

Garage Length

92 Item 128:

(a) The plans, that are part of the Contract, specify that the internal length of the garage be 6200mm and that the external length be 6600mm. Expert Connor’s measurement of the garage as built is that its overall length is 5750mm.

(b) Expert Brincat disagrees and says in the Scott Schedule that the overall length is 6200mm and not the internal length. He contends that if the thickness of the walls makes the garage comply with the plans. He does not say he has measured the garage.

(c) The plans speak for themselves. The internal measurement should have been 6200mm and the external should have been 6600mm.

(d) The Tribunal is satisfied with the evidence of Expert Connor as the only evidence of the “as built” garage being measured. The Tribunal finds that the garage has not been built to plan and is a defect.

(e) No value is attributed to the cost to rectify the garage by either expert or QS Taylor. QS Taylor adopts Expert Connors global estimate of rectification costs. The Tribunal does not have before it specific evidence of the cost to rectify this defect.

(f) In the circumstances the rule in *Tabcorp Holdings* should apply and it is not reasonable to order the garage be demolished and replaced.

Roof Pitch

93 Expert Brincat accepts in his evidence that the roof pitch does not comply with the BCA. However, he justifies that breach of the BCA by saying that it should be allowed to remain as it matches the roof pitch of the existing roof, which in any case does not comply with the BCA. This is a design aspect of the alterations and additions to visually

conform with the existing roof. The Tribunal finds no defect.

Front Doors

94 The specifications provide for the supply and the installation of double front doors. The door supplied by the builder does not comply with the specifications.

95 The Tribunal is satisfied that the door installed is in breach of the statutory warranty in that it is not in compliance with the plans and specifications and is therefore a defect.

96 Expert Connor assesses the cost to replace the front doors in the amount of $4,600.00. Expert Connor does not provide a calculation of how he arrives at the figure.

97 Expert Brincat assesses the cost to supply double solid core doors in the amount of $760.00 made up of materials of $400 and labour of 8hours at $80 per hour totalling $760.00.

98 The Tribunal allows the owner the amount of $760.00 which is included in the amount allowed for the defects claim.

Compensation for defects

99 Exhibit J sets out both Expert Brincat and Expert Connor estimate of the cost to remedy the defects. For the reasons given as to the preferred report to assist the Tribunal to determine the cost of making good the defects, the Tribunal accepts Expert Brincat's assessment in the amount of $5269.00

Incomplete work

100 The incomplete works identified in Exhibit J agreed by the experts are items:

101 1, 2, 32-42, 64, 71-77, 80, 81, 83-89, 93-95, 102-110, 118-122, 124, 125 and 130-132.

102 In respect of a number of incomplete works Expert Brincat opinion is that the reason for incompleteness is because the builder has been delayed by an act or omission by the owner, in particular items 32 and 33.

103 The owner contends that this is no answer or defence to the builder's breach to complete the work within the time permitted under the Contract. The Contract makes provision for the builder to request an extension of time if the owner causes delay. The builder did not invoke that procedure. Where a builder with a contractual right to extend time for completion because of an act or omission of the owner fails to exercise that right he cannot then say that he was prevented from completing the works on time: *Turner Corporation Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd* (1994) 13 BCL 378 at 384. The only defences to a breach of a statutory warranty claim available to the builder are those in section 18F of the HBA (*The Craftsmen Restoration & Renovations v Boland* [2008] NSWSC 660) and neither apply in the circumstances

104 The owner contends that the Tribunal should find that the builder breached section 18B(d) of the HBA in failing to complete the work within the time stipulated in the Contract.

105 The builder submits that the owners claim ignores the informal approach by both parties abandoning the contractual mechanism. The evidence shows that the builder did request a 7 day extension of time granted by the owner and the owner volunteering, but not concluded, a further three week extension because of his failure to order the kitchen on time. The email exchange between the builder and the owner clearly show the builder was waiting for instructions before he could progress the building work.

106 The unchallenged evidence of Expert Brincat is that the contractual date for completion was “ongoing” as the owner failed to complete the work or provide instructions. See the reasons under the sub heading “Termination” below.

107 The Tribunal is not satisfied that the incomplete work is to be considered defective works. The circumstances are that the owner and the builder were in dispute. The Tribunal is satisfied that the builder could not obtain clear instructions from the owner at critical stages during the building work resulting in the works not being completed.

108 If the Tribunal finds that the builder terminated the Contract because the builder accepted the owner’s repudiation of it, the owner is not entitled to damages for the incomplete works. The Tribunal makes its finding in regard to the termination of the Contract subsequently in this judgement.

Rectification or Damages

Owner

109 The preferred outcome of a dispute about a breach of Statutory Warranties is that the builder would have been that the builder be ordered to carry out the rectification work. The owner contends that is not available to the Tribunal as the provision introduced under section 48MA of the Act is for work carried out after 1 January 2015.

110 The owner relies on section 48O(1)(a) & (c) for a money order and or a work order.

111 The owner contends that the power to make a work order by the Tribunal is discretionary: *Robert Symes & Anor v Mick Fabar Constructions Pty Ltd* [2014] NSWCATCD 229. Such discretion should be exercised judicially with due consideration of the circumstances: see *Adam Eftimoski v Mericon Homes Pty Ltd* [2014] NSWCATCD 254.

112 The owner seeks a money order. In support of that application he submits:

113 The relationship between the parties has clearly broken down: *Crichton & Bridle v Leighton* [2009] NSWCTTT 157;

(a) The scope of works to give effect to the rectification of defects set out in Exhibits J and 10 is substantial;

(b) The builder has made no offer to rectify the defective works;

(c) The rectification will involve the demolition of the wet area tiling;

(d) The delay in completion of the building work has caused the owner considerable emotional stress at a time when it was his intention that his wife could spend her last remaining days before her death at the dwelling. That stress could be exacerbated by having to have further

dealings with the builder through a work order.

(e) The builder made misleading statements to NSW Fair Trading in relation to the balustrade that it was not part of the rear deck and that he was waiting on direction from the owner as to the type of balustrade to be installed as the owner had given that instruction to the builder six months earlier.

(f) Some of the defects are of a serious nature, such as the critical stage water proofing inspection.

114 The Tribunal in consideration of whether an appropriate order is rectification or damages is not limited by a consideration of the time of when Section 48MA applies from. For the purpose of the owners application the Tribunal's discretion is unfettered except for proceedings commenced after after 1 January 2015 (see section 121(2) Sch 4 of the HBA) the preferred outcome is that a builder be ordered to carry out rectification work.

115 In any case, even if section 48MA is limited to works carried out after 1 January 2015 as submitted by the owner,, the Tribunal will consider what the appropriate order is.

116 The Tribunal has considered whether it should make a work order for the rectification of any works found to be defect for breach of the statutory warranties under section 18B.

117 The Tribunal accepts the reasons for the owner's contention that the appropriate order is that the builder pay damages. On the evidence before it the builder has not demonstrated that the rectification work would be carried out in compliance with the statutory warranties of the HBA.

118 The owner submits that the Tribunal should make a determination as to the scope of works required to rectify the defective work and then rely on the experts to produce a joint report as to the quantum required to rectify those defects. Such a course is unsatisfactory to the final determination of the dispute and offers a further costly delay and does not give effect to the guiding principles of the NCAT Act. Although, the evidence before the Tribunal as to the quantum of the appropriate money order is less than would otherwise be acceptable, this is not a reason for the Tribunal to not make an order quantifying the damages arising from the defective works.

119 The Tribunals will make such a determination as set out in the reasons of this judgment.

Termination of Contract

Owner's submissions

120 The owner submits that he gave notice of termination of the Contract to the builder on 27 March 2015 and that the Tribunal should find the termination as valid.

121 The owner submits:

(a) He was entitled to terminate the Contract:

(i) Pursuant to Clause 25 of the Contract; or

(ii) at common law for the builder's repudiation

122 Clause 25 of the Contract provided that:

> (i) if the builder among other things:
>
> (ii) was unable or unwilling to complete the work or abandoned the work,
>
> (iii) suspended the work before completion without reasonable cause,
>
> (iv) failed to proceed diligently with the work, or
>
> (v) failed to remedy defective work,

123 the owner may, if such default can be remedied, notify the builder in writing that unless that default is remedied within 10 business days or such longer period as specified, the owner will terminate the Contract.

124 If the builder did not comply with the owner's request within the time allowed, the owner may terminate the contract by giving written notice to that effect to the builder.

(a) In *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 the majority of the High Court said:

> … regard should be had to "familiar principle of construction that clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of the contract arising by operation of law". Thus, an express provision for termination for breach in certain circumstances may be regarded as designed to augment rather than to restrict or remove the rights at common law which a party otherwise would have had on breach.

(b) There is nothing in Clause 25 to indicate that the owner's common law rights for breach of contract are excluded. The use of the word "may" intended the rights under Clause 25 are to be augmented by the common law rather than such rights being the exclusive domain of the Contract.

(c) The owner had rights at common law to terminate the Contract for the builder's repudiation in addition to the rights conferred by Clause 25.

(d) The principles in relation to termination for repudiation at common law were summarised by the Court of Appeal in *DCT Projects Pty Ltd v Champion Homes Sales Pty Ltd* [2016] NSWCA 117 at [39]:

> [39] For the conduct of a party to constitute a renunciation of its contractual obligations it must be shown that the party is either unwilling or unable to perform its contractual obligations, that is, it has evinced an intention to no longer be bound by the contract, or stated that it intends to fulfil the contract only in a manner substantially inconsistent with its obligations and in no other way: Shervill v Builders Licensing Board [1982] HCA 47; 149 CLR 620 (Shervill) at 625-626 (Gibbs CJ); Laurinda Pty Ltd v Capalaba Park hopping Centre Pty Ltd [1989] HCA 23; 166 CLR 623 at 634, 647-648, 658; Koompahtoo Local Aboriginal Land Council v Sanoine Pty Ltd [2007] HCA 61; 233 CLR 115 (Koompahtoo) at [44]. Repudiation is a serious matter and is not lightly found or inferred: Shervill at 633 (WilsonJ)
>
> [40] Where inability to perform is declared the conduct amounts to a refusal to perform and the innocent party need not prove that the other party was actually unable to perform when the time for performance came: Universal Cargo Carriers Corporation v Citati [1957] 2 QB 401 at 437.
>
> [41] A renunciation can be made either by words or conduct, provided it is clearly made: Universal Cargo Carriers Corporation v Citati [1957] 2 QB 401 at 436. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it: Koompahtoo Local Aboriginal Land Council v Sanoine Pty Ltd [2007] HCA 61; 233 CLR 115 (Koompahtoo) at [44]; Laurinda Pty Ltd v Capalaba Park hopping Centre Pty Ltd at 659 (Deane and Dawson JJ) and 647 (Brennann J).

(e) In relation to whether a party has evinced an intention to no longer be bound by a contract, Connolly J said in *Gold Coast Oil Company Pty Ltd v Lee Properties Pty Ltd* [1985] Qd R 416 at 420*:*

> This intention is to be judged from the acts of the party and is made out where a reasonable man would infer that party does not intend to take the contract seriously and that he is preferred to carry out his part of the contract only if and when or, as I have recently had occasion to say, if and as it suits him. When such an intention is shown, the innocent party is entitled to rescind.

Builder's submissions

125 The builder submits that the Contract came to an end either:

(a) As a result of the owner's repudiation or unlawful termination of the Contract by:

126 On 24 February 2015, by filing his current points of claim seeking damages, being inconsistent with the owner keeping proceedings on foot, including prior to any notice of default being served by the owner

(i) Commencement of these proceedings were inconsistent with the Contract remaining on foot, repudiated and unlawfully terminated: *Smith v Butler* [1900] 1QB 694; *Cornwall v Henson* [1900] 2 Ch 298. The builder remained ready, willing and able to carry out the Contract, but was prevented from doing so by the failure of the owner to provide instructions: *Foran v Wright* (1989) 168 CLR 385.

127 (b) On or about 27 March 2015, serving a Notice of Termination alleging the builder's default on the Contract, such defaults are denied by the builder;

(i) The notices of default were served on 24 February 2015 after the filing of the points of claim and on 9 March 2015 after commencing proceedings with Fair Trading before the Fair Trading proceedings were resolved.

(ii) The builder claimed the notice was defective as the alleged breaches were not adequately specified notice of default alleged

128 (iii) Refusing access by requesting the return of the keys, accepted by the builder in returning the keys on 30 May 2015; and/or,

129 (iv) Failing to pay progress payments numbered 6 and 7, both issued on 21 July 2014, while the owner maintained a dispute about there being due and payable, in part or at all.

(a) (c) Or where the Contract remained on foot, on the builder's termination:

(i) By serving a notice of default on or about 28 October 2015; and,

(ii) Those defaults having not been remedied within the contractual allowance of 10 business days, by serving a notice of termination.

130 The time for completion became at large as the owner could not benefit from his own breach and insist on completion by the builder by the contractual date.

131 The period when the builder submits the completion of the works were at large, the owner contends that the builder repudiated the Contract by:

(a) The owner's contention that the letter of 17 August 2014 from the builder repudiated the Contract which stated that "work at your property has ceased since our last email last week" as set out in his points of claim. Only to elect that the Contract remain on foot by his email tot eh builder the next day, 18 August 2014 where he writes "I urge you to reconsider your irrational approach and get on with this job without delay".

(b) The builder rejected that letter as being repudiatory.

(c) On 24 September2014 the owner wrote to the builder and said in that letter "You are required to fulfil your commitment of meeting contractual obligations and complete the project".

(d) The builder contends that even if the letter of 17 August 2014 was repudiatory, the repudiation was not accepted by the owner and is no legal effect. "An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind" Lord Justice Asquith in *Howard v Pickford Tool Co.*[195] 1 K.B. 417.

132 Further the builder contends that the letter of 17 August 2014 was not repudiatory, but a plea for the owner to provide necessary instructions, but:

(a) The owner refused to meet the builder on site;

(b) The owner's evidence that the builder "was only 'requesting' a meeting, rather than 'arranging' a meeting".

(c) The owner's evidence claiming to arranging a meeting with the builder for 14 September 2014 which he attempted to corroborate with a 2014 calendar produced by the owner at the hearing on 27 November 2014 and admitted into evidence as Exhibit 4, claiming that the builder did not attend;

(d) The owner claims he took photos when he attended the site on 17 September 2014, but no photos are available in evidence to support his assertion and then retreats from that assertion and accepts in his evidence that the date was incorrect;

(e) The owner tried to recollect when the planned meeting occurred in July, August or September 2014.

133 The builder contends that limited work continued on the site despite the lack of instructions about critical decisions to be made by the owner and that no repudiation or breach as alleged by the owner can be established by the owner on the facts and accordingly the owners claim that the builder repudiated the Contract.

134 The builder denies the validity of the Notice of Default served by the owner on 9 March 2015.

Owners further submissions

135 The owner submits:

(a) That even if there was repudiatory default by the owner, there was no acceptance by the builder prior to the owner's termination of the Contract on 27 March 2015. The Contract can only be terminated if the owner's alleged repudiation was accepted by the builder and it was not.

(b) The builder's allegations of the various dates that it says the Contract was repudiated by the owner, cannot be sustained. Once a contract is

terminated it is brought to an end and there can be no further termination of it.

(c) The owner issued a notice of default pursuant to clause 25 of the Contract on 9 March 2015. At that time the builder was almost six months past the completion date in the Contract of 17 September 2014. Such delay is evidence to support the contention that the builder was unable or unwilling to complete the works and proceed diligently with the work. The owner was justified in terminating the Contract.

Tribunal

136 The builder's contention that the commencement of the proceedings was inconsistent with the Contract remaining on foot is not accepted by the Tribunal. Even if such an action by the owner was repudiation it was not accepted by the builder and work continued on site by the builder.

137 For the Tribunal to find that the Termination of the Contract by the owner on 27 March 2015 it must first determine whether the Notice of Default was valid.

138 The Notice of Default of 9 March 2015 stipulated alleged breaches by the builder of the Contract which the builder responded to, in brackets after each alleged breach, as follows:

(a) The builder did not provide a copy of the Home Owners Warranty Certificate, contrary to section 92 the HBA; (the certificate was supplied to the owner on 14 March 2014);

(b) The builder was unwilling or unable to complete the work; (the builder was waiting on instructions from the owner as to various items that the owner needed to make a decision on);

(c) The builder suspended the work before completion without reasonable cause; (the builder was waiting on instructions from the owner as to various items that the owner needed to make a decision on);

(d) The builder has failed to proceed diligently with the work (the builder was waiting on instructions from the owner as to various items that the owner needed to make a decision on);

(e) The builder has failed to remedy defective work and remove faulty or unsuitable materials (the builder had yet to be paid in full or in part for progress claims 6 and 7, at the time having been issued 8 months earlier).

(f) The builder advised the owner that the purported notice of default was repudiatory and reserved all its rights in this regard.

139 Even if it were otherwise valid, the Notice does not particularise the alleged defaults with the particularity needed for the builder to be able to respond and remedy the alleged defaults except for the failure to provide the certificate in compliance with section 92 of the HBA. The Tribunal finds that the Notice was unfounded with no proper basis and of no legal consequence.

140 The Termination of the Contract by the owner based on the defective Notice of Default is not valid. The effect is that it is a repudiation of the Contract.

141 The builder contends that the owner was in breach of the Contract and on 28 October

2015 issued a notice under clause 26 of the Contract alleging breaches by the owner.

142 The Tribunal is not satisfied that the builder accepted the alleged repudiation by the owner. It is the builders evidence that some minor works continued to be done by the builder on the site after March 2015..

143 The builder contends that although the owner responded to the notice on 19 November 2015 he did not remedy the defaults. The builder purported to terminate the Contract on 23 November 2015.

144 The Tribunal is satisfied that the Contact was terminated by the builder on 23 November 2015.

145 The effect of the termination of the Contract by the builder based on the owner's repudiation of the Contract is that the owner is not entitled to damages.

Delay and liquidated damages

Owner'sLiquidated Damages and delay Legal Principles

146 It is well established that if a building contract is not completed by the due date then the owner becomes entitled to damages for loss caused by delay. By failing to complete by the due date under the contract the builder is depriving the owner of the use and benefit of the building: *Walton v Illawarra* (2012) 28 BCL 202; [2011] NSWSC 1188.

147 If the Contract provides for payment by the builder if the works are not completed in accordance with the Contract, then liquidated damages may be payable so long as the liquidated damages are a genuine pre-estimate of the loss and not a penalty.

148 The Courts have distinguished between a genuine pre-estimate of loss and a penalty with a test if the amount is "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed the breach": *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 cited with approval by the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656

> …an agreed sum is only characterised as a penalty if it is out of all proportion to damage likely to be suffered as a result of breach…[and] Exceptions from that freedom of contract require good reasons to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed. That is why the law of penalties is, and is expressed to be, an exception from the general rule.

149 If a stipulated sum is penal, it will be enforceable to the extent that it will compensate the owner for loss suffered by the builder's failure to achieve completion by the time specified in the Contract: *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

150 In *Paciocco v Australian and New Zealand Banking Group Ltd* (2014) 309 ALR 249 and as cited with approval *in Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd* (2014) 45 VR 79, Gordon J summarised the position as:

> Put another way, the party harmed by the breach or the failure of the primary stipulation may only enforce the stipulation to the extent of the party's proved loss.

151

An owner may be disentitled from damages for loss caused by a builder's delay in achieving completion if the owner caused or contributed to the delay, sometimes referred to as the "prevention principle". The prevention principle was summarised by Blue J in *Build Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84, as:

> The following principles have been laid down by previous authorities.
>
> (i) A party generally cannot rely upon non-fulfilment of a condition the performance of which has been prevented by that party's own breach of contract. This principle applies to preclude an owner recovering liquidated damages for delay in the completion of the works by the contractor where that delay has been caused by an act or omission of the owner in breach of the contract ("prevention principle"). It is not entirely clear what is the juridical basis of the prevention principle. It may be that it is a term generally implied into contracts requiring cooperation between the parties. It may be that it is part of the principle of avoiding circuity of action otherwise due to damages to which the principal would otherwise have been entitled for breach of the contract being recoverable back by the contractor as damages arising from the principal's own breach of contract. It may be that it is a principle in its own right derived from notions of fairness and justice.
>
> (ii) Where a building contract contains a provision which gives to the contractor a right to an extension of time for delays caused by the principal's breach of contract, the prevention principle has no operation.
>
> (iii) If a contract imposes procedural limitations (such as time limits for seeking an extension of time), the imposition of those procedural limitations does not affect the negation of the prevention principle by the contractual provision entitling the contractor to an extension of time in accordance with Principle Two above.

152 In *Turner Corporation Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd* (1994) 13 BCL 378 Cole J considered whether the prevention principle can apply in relation to a contract that provides the builder with the right to apply for extensions of time for delay said to have been caused by the owner:

> …If the builder, having a right to claim an extension ot time fials to do so, it cannot claim that the act of prevention which would have entitled it to an extension of time for Practical Completion resulted in its inability to complete by that time

153 The builder submits that:

(a) The parties abandoned the formal terms of the Contract with respect to delays and so the formal parts of the Contract have no part to play in assessing liquidated damages. Having done so, the common law resumed including the applicability of the prevention principle.

(b) The owner was the cause of the builder's inability to complete the contractual works and delay damages would give to the owner a benefit from his own breach;

(c) The owner by repudiating the contract, even where that repudiation is not accepted, is not entitled to enforce any claim for delay damages; *Peter Turnbull & Co Pty Limited v Mundus Trading Cop (Australasia) Pty Limited* (1954) 90 CLR 235;

(d) The owner was not at any time lawfully entitled to terminate the Contract for any purported breach by the builder;

(e) Where the Contract is terminated by the builder the owner is not entitled to any delay damages.

154 The Tribunal having found that the builder terminated the Contract no right to damages by the owner arises in respect of liquidated damages for delay either under the Contract or at common law.

Owner's entitlement to damages for delay

Owner

155 The owner contends that in *Toll (FGCT) Pty Ltd v Alpharpharm Pty Ltd* (2004) 219 CLR 165 the High Court set out the principles to determining contractual rights and liabilities,

> What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement.

156 There is no contention that the Contract at clause 5 had a handwritten note that made the effect of the clause to be that the building work must commence on 10 March 2014. Clause 4 required the work to be completed 6 months from the date the work was due to commence. Clause 7 provides the only way for the time for completion to be amended. If the builder seeks to extend the time he must give notice to the owner in writing of the cause and estimated length of the delay within 10 business days of the occurrence of the event or cause of the variation. The word "must" imposes a mandatory or imperative obligation: Dennis v Australian Broadcasting Corporation [2008] NSWCA 37. Clause 9 requires the work to be carried out with due diligence.

157 A Special Condition of the Contract provides that if the builder fails to complete the work in the period allowed under the Contract then the owner will be entitled to $500 per week or part thereof until the works are completed. By agreement between the parties in an email exchange on 19 and 20 March 2014 the amount of damages under the Special Condition was increased to $580.00 per week.

158 The owner contends that he is entitled to liquidated damages from 20 March 2014 at the rate of $580 per week.

159 The owner submits that:

(a) He had a contractual right to the building being completed by 17 September 2014 including the statutory warranty pursuant to section 18B(d). The experts agree that the work is incomplete to date.

(b) He has been deprived of the benefit of the bargain he struck with the builder and deprived of the use of the building since 17 September 2014. As a result, he has had to pay rent for alternative accommodation and is entitled to be compensated for that loss caused by the builder to put himself in the position he would have been in had the builder performed his obligations under the contract: *Williams v Pisano* above.

(c) The Contract provides that if there is a delay by the builder it will pay the owner $580 per week liquidated damages by way of compensation. The owner's evidence is that his actual loss is the rent he is paying in the amount of $550.00 per week.

(d) There is no scope in the circumstances of the owner's application for the operation of the prevention principle. The builder's defence that the acts of the owner held up and delayed the works is denied by the owner. In any case if the builder could establish that it was delayed by events beyond its control this is not a defence, as the builder had a contractual right to extend time under clause 7 of the Contract.

(e) Any acts or omission by the owner of which the builder now complains did not prevent the builder from exercising of the contractual obligations to seek extensions of time: *Turner Corporation* above.

(f) Where a contract is terminated by acceptance of the builder's repudiation, the applicable principle is stated in *Brooking on Building Contracts* (5th edition,2014) as follows:

> Where the contract is determined by acceptance of a repudiation, liquidated damages which have become payable up to the time of the determination may be recovered, but thereafter the liability of the contractor for liquidated damages will cease, although the contractor will be liable for unliquidated damages. This is the consequence of the rule that the effect of the acceptance of the repudiation of a contract is to put an end to the contract so far as its future performance is concerned, leaving the repudiating party liable to an action for damages.

(g) The owner contends that he is entitled to damages for the builder's delay in completing the works:

(i) In the agreed amount of $580 per week from 17 September 2014 until 27 March 2015 (when the owner claims the Contract was terminated); and,

(ii) In the amount of $550 per week being the actual loss suffered from 17 September 2014 until the works are completed;

(iii) In the alternative, damages should be assessed at $550 per week being the actual loss suffered from 17 September 2014 until completion.

Builder

160 The builder contends that the owner has failed to take into account the issues:

(a) That the parties abandoned the formal terms of the Contract with respect of delays and so the formal terms play no part;

(b) By abandoning the formal terms, the contractual code for delaying with extensions of time was abandoned and so common law resume, including the applicability of the prevention principle;

(c) Regardless of the prevention principle or otherwise, the owner was the cause of the builder's inability to complete the contractual works as where delay damages were to be awarded, it would have the effect of the owner being entitled to benefit from his own breach ;

(d) The owner by repudiating the Contract in November 2015, even where that repudiation were not accepted (which it was), is not entitled to enforce any claim for delay damages: *Peter Turnbull & Co Pty Limited v Mundus Trading Cop (Australasia) Pty Limited* (1954) 90 CLR 235;

(e) The owner was not at any time entitled to lawfully terminate the Contract for any purported breach by the builder; and

(f) Where the contract was terminated by the builder, the owner is not entitled to delay damages

161 The builder submits that the owner is not entitled to damages for delay under the circumstances.

Tribunal

162 The Tribunal finds in this judgement that the builder terminated the contract on 23

November 2015.

163 It is well established at law that if the builder terminates the Contract then the owner is not entitled to damages for delay either under the Contract or under the common law.

164 The owners claim for delay damages is dismissed.

BUILDER'S CLAIMS

Progress Claims and Interest claim

Builder

165 The builder has made the following progress claims under the Contract. In the table the Tribunal also includes how the builder calculates its alleged entitlement to interest:

Progress Claim	Amount($)	Date claimed	Date paid	Days late for payment	Interest per day ($)	Interest Amount ($)
Deposit	16,500	08/03/14	20/03/14 ($100) 21/03/14 ($16400)	4 days on $100 and 6 days on $16,400	(4x 0.0178) + (6x2.92)	17.59
Demolition	35,000	19/03/14	31/03/14 ($20,000) 11/04/14 ($15,000)	3 days on $20,000 + 12 days on $15,000	(3x3.56) +(12x2.67)	42.72
Concrete	80,000	06/04/14	11/04/14	0		
Framework	35,000	19/05/14	29/05/14	3	(3x18.00)	54.00
Lock up	100,000	19/05/14	29/05/14	3	(3x17.8)	53.40
Rear deck & Fix out	50,000	21/07/14	Unpaid	293@ 02/11/15	293x8.9	2,607.70 and cont.
Variation for rocks	2887.50	06/04/14	Unpaid	393@ 02/11/15	(393x0.51)	201.99 and cont.
Other Variations	28739.50	08/08/14	Unpaid	275@ 02/11/15	(275x5.12)	1406.80 and cont
Totals	$435,377					$4,384.20

166 The builder contends that it is entitled to be paid the unpaid amounts of the claims and interest in respect of late payments of the amounts due under the Contract in the amount of $44,600 ($50,000 less $5,400 allowance being the cost found by Expert Brincat to complete the incomplete works under the progress claims 6 and 7) plus interest.

Owner

167 The owner contends that there are no amounts due to the builder under the Contract.

168 The owner submits that:

(a) Clause 12 of the Contract provided for progress payments upon completion of specified stages if the works. It also provided that a stage was complete when it was finished in accordance with the Contract documents and variations agreed to and was “free from apparent defects”.

(b) Stage 6 was described as the “rear deck” and stage 7 was described as the “fix out”.

(c) On 21 July 2014 the builder issued a claim for payment in respect of stage 6 and stage 7 in the amount of $50,000.00.

(d) At the time of progress payment claim being submitted, the builder had not installed the balustrade as required by the approved plans. The balustrade remains uninstalled by the builder or at all.

(e) The experts agree that the rear-deck and fix out are incomplete.

(f) As the works for stage 6 and 7 are not complete the owner is not under a contractual obligation to pay for them.

Tribunal

169 The Tribunal has considered the evidence before it and the submissions of both parties in regard to the obligation to pay progress payments 6 and 7.

170 The evidence of both Expert Connor and Expert Brincat is that the works for both stages is incomplete. Clause 12 of the Contract specifically defines when works are complete and upon the works reaching such a stage of completeness the builder is entitled to issue a progress payment claim for that stage.

171 The Tribunal is satisfied that the claims made by the builder stages 6 and 7 were premature and as such the claims as presented were not due and payable. The Tribunal will consider whether the builder has an entitlement for payment for the works done, but not completed, in respect of the construction of the deck and the fix out as part of the builders quantum meruit claim.

172 The builder has failed to satisfy the Tribunal of an entitlement to an order for unpaid progress payments and interest under this head of claim

Builder’s claim for Variations

173 The builder claims for variations allegedly carried out during the building works. It is noted that the points of claim dated 18 May 2015 and the amended points of claim dated 2 November 2015 filed and served by the builder do not plead a claim for variations.

174 The claim is for $25,999.50 plus margin and GST

175 The builder claims that it was instructed verbally in part and by email in part to carry out the variations listed in the above table. The owner contends that there was only one variation and that was excavation of rock.

176 The owner's evidence is that if he ever asked the builder to carry out other variations he did not do so "not according to the contract, not according to varying the contract, no" or alternatively the owner claims he only ever asked the builder for options to build things differently, that's not a variation". 'Despite those answers in cross examination, the owner admitted on being shown emails from him to the builder that he had instructed the builder to vary the works.

177 The builder says that the parties abandoned the implementation of the formal terms of the contract with respect to notices and instructions.

178 The owner instructed the variations, acquiesced in the builder carrying out the those works, being aware that the builder was incurring costs in carrying out the works and expected to be paid for those works. The owner is unjustly enriched by those works unless the Tribunal awards the value of those works to the builder: *Update Constructions Pty Limited v Rozelle Child Care Centre* (1990) 20 NSWLR 251.

Owner

179 The owner rejects the builders claim for variations as they were not authorised in writing as required by clause 13 of the Contract and submits that the builder has failed to demonstrate that any of the alleged variation work was "costlier to the builder than contractual performance or that the owner received benefit additional in value to that contracted for"; *Trimis v Mina* [1998 NSWCA 140.

180 Clause 13 sets out the procedure for making variations to the Contract. It requires:

(a) Before commencing work on a variation, the builder must provide to the owner a notice in writing:

(b) The notice must contain a "description of the work and the price"; and

(c) The notice has to be signed and dated by both parties to constitute acceptance.

181 Mr Jones in cross examination accepted that with the exception of variation 1, he did not provide a notice under clause 13 in respect of any of the alleged variations.

182 As to the builder's submissions that the parties abandoned the terms of the Contract with respect to notices and instructions, the owner contends that such was:

(a) Not pleaded in the builder's points of claim or case and the owner was not given notice of the contention. A claim cannot be answered until it is known: see *Multigroup Distribution Services Pty Ltd v TNT Australia Pty Ltd* (1996) ATPR 41-522;

(b) Any agreement to vary the Contract other than in writing signed by each party was precluded by clause 1 of the Contract;

(c) Any agreement to vary the Contract other than in writing signed by each party was precluded by sections 6 (1) and 7 of the HBA;

(d) The submission is contrary to evidence. The evidence is that the parties at all times intended to comply with the Contract and its provisions relating to issuing of notices, including:

(i) 6 April 2014, the builder provided the owner with a variation document with work described and price claimed, confirmed by Mr

Jones in cross examination that he understood that was what was required for variations to the Contract;

(ii) 6 April 2014, the builder prepared a notice claiming an extension of time;

(iii) 25 September 2014 the owner's email referring to the requirements of Clause 13 was not answered by the builder denying that the procedural requirements of Clause 13 no longer applied or at all.

(e) The reliance by the builder on *Update Constructions* where no authorised variations were in writing as required by the contract does not assist the builder. The Court of Appeal in *Trimis v Mina* considered a builder's claim for variations not authorised in writing. After considering *Update Constructions,* the Court:

> The variations were not authorised in writing. There is no finding that the owners agreed to pay for the variations. That the variations were costlier to the builder than the contractual performance or that the owners received benefit additional in value to that contracted for.

(f) The variations claimed by the builder were not authorised in writing and the builder has not established that any alleged variations were "costlier to the builder than contractual performance, or that the owner received benefit additional in value to that contracted for".

(g) The email communication between the builder and the owner in relation to the variations reveal a pattern of the owner seeking information about the alleged variation work and the builder not being "forthcoming and even evasive with this information". The Tribunal cannot conclude that the owner knew that the alleged variations were outside the Contract and that the owner knew that the builder expected to be paid for the work as extras

183 The owner submits that the Tribunal must reject the builder's claim for variations except for variation 1.

Tribunal

184 There is a common thread woven throughout the evidence. That is, once the Contract was signed the owner and builder proceeded with a degree of informality and disregard for the terms of the Contract. Regardless, the Contract defined the relationship of the owner and the builder. The builder cannot have the benefit of the Contract on the one hand and dismiss its provisions where they contradict its claim on the other.

185 It is expected that a builder who has been granted the privilege of a contractor's licence under the HBA will have the skills in contract management to withstand the action and inaction of a seeming inexperienced home owner. The Contract require a variation of the terms of a Contract to be in writing. Neither party initiated such a variation.

186 The Tribunal is not satisfied that the parties abandoned the terms of the Contract as to notices and instructions. The terms of the Contract, amongst other things, provides a frame work under which variations are to be dealt with. After the first variation, the builder then subsequently chose to ignore the provisions of Clause 13. The claim by the builder that the parties abandoned the terms of the Contract is an argument of

convenience to support its unsustainable claim for variations brought about by the builder failing to comply with the terms of the Contract.

187 The Tribunal notes that the claim for variations was not the subject of either a claim or particulars in the points of claim and appears to have been brought to the hearing as another issue overlooked in making the proceedings ready for hearing.

188 The Tribunal allows the claim for the first variation for rock invoiced on 6 April 2014, but unpaid in the amount of $2887.50 together with interest from the invoice date to the date of this judgement at $0.51 per day for 1067 days being $544.17.

189 The remainder of the claim by the builder for variations is dismissed.

The owner's works; owner's breaches and delay;

Builder

190 The builder submits that the Contract prepared by the owner required that the owner carry out and complete certain works under the Contract including:

(a) Clause 16: works and material to be supplied by the owner: Kitchen: benches, cupboards "are to be supplied and fitted by external contractor at owner expense, applicants to be owner supplied. Fencing, rumpus room and bedroom 3 floor coverings, blinds":

(b) The specifications for the upper level, ground level and plumbing, fittings and fixtures provided for certain works to be completed by third parties;

(c) Other specifications also provided for items to be separately quoted and completed and others remained to be advised at the time of the Contract.

(d) The owner supplied tiles (delayed and contended to be wrong by the builder);

(e) The owner failed to progress the work to fit out the kitchen. The owners evidence is that it was the joint intention of the owner and the builder that the builder would finish the work before the owner installed the kitchen. The builder rejects that evidence as it defies the good building practice in the evidence given by Expert Connor, who stated that the floor should be polished after the installation of the kitchen.

191 The breaches by the owner of his obligations under the Contract were:

(a) Failure to supply the kitchen in a timely manner or at all;

(b) Failure to attend meetings as requested by the builder to give instructions;

(c) In respect of internal door fittings:

(i) Failed to advise the builder of the door fittings to be used;

(ii) At some time before 14 July 2014 specified brushed stainless levers;

(iii) On 14 July 2014, the builder asked for further information on owners preferred door fittings;

(iv) On 17 July 2014, the builder advised the owner that the builder would drill 54mm holes in the doors to allow for door fittings;

(v) On 20 July 2014, the owner wrote to the builder stating that he

required level style door handles, please do not drill large holes;

(vi) On 24 July 2014, the builder advised the owner that it required the door handles to be able to finish the work or the builder would need to move to another job and return to fit the door handles once they were provided;

(vii) On 25 July 2014, the owner wrote to the builder repeating that he required “internal doors- all brushed stainless steel. Lever style for doors other than sliding…if you need more details please let me know near door installation”.

(viii) On 8 August 2014, the builder wrote to the owner advising a price for the supply of the door handles and asks for a meeting with the owner.

(ix) On 24 September 2014, the owner wrote to the builder stating that “door handles and locks are your responsibility and are still not installed”.

(d) In respect of the finish to the rear balustrade:

(i) The owner refused to pay the progress claim for the rear balustrade. The balustrade proposed by the owner was inconsistent with the building regulations. The builder proposed a compromise solution according to the owner’s specifications it would be a variation.

(ii) A dispute arose as to whether the owner would accept the compromised solution balustrade in accordance with the owner’s instructions or the balustrade as specified in the Contract, which was at that time being fabricated and waiting to be installed.

192 180. The builder claims that pursuant to Clause 16 of the Contract the builder would be entitled to extensions of time for any delays beyond either its control or for any delays caused by the owner. Further, it was an implied term of the Contract that the owner would cooperate to the extent that it was necessary to make the Contract workable and that the owner would pay any invoices rendered by the builder within five business days of the completion of milestones nominated in the Contract.

The builder contends that the owner breached the Contract by failing to provide instructions to the builder when requested and failed to progress the works that the owner had responsibility for under the Contract. Because of the owners delay the works were delayed by 416 days. The builder was entitled to extend the time for completion of the works until 27 March 2015. Owner

193 The owner denies that he caused all or any delay in the builder completing the works.

194 The time for completion of the Contract was 17 September 2014 on the owner’s submission.

195 Clause 7 of the contract gave the builder a right to claim an extension of time to complete the work if the work was delayed by, amongst other things, any act or omission of the owner”. The builder did not invoke the procedure set out in Clause 7 except for 7 days. The thrust of the builder’s contention as to delay caused by the owner is that it was delayed by 416 working days.

196 The owner cites *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (1994) 13 BCL 378 as authority for the contention that the builder having failed

to claim extension of time under the Contract, the builder cannot now be heard to say that it was delayed in completing the works by the owner. Cole J observed:

> If the builder, having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of time for Practical Completion results in its inability to complete by that time.

197 The owner contends that a chronological review of the relevant events demonstrates that the builder was not delayed by the owner. Importantly there was no mention by the builder of delay on the part of the owner between 18 August 2014 and 8 November 2014. The owner further contends that the reason for any delay was that the builder believed that he was entitled to its progress payments 6 and 7, which the owner contended were incomplete. It was only after these proceedings commenced that the builder raised the claim that the owner had delayed the completion of the works.

198 The owner submits that the evidence does not support the builders claim that the owner delayed the completion of the works. The builder failed to progress the works after 17 August 2014. Progress claims 6 and 7 had not been paid as the owner contended that the works were not complete. The owner contends that the builders claim for this head of claim should be dismissed.

Tribunal

199 The Tribunal is not satisfied on the evidence that the builder has complied with the contract in regard to seeking an extension of time to complete the building works under section 7 of the Contract. Although it invoked Clause 7 on one occasion it did not so again after it fell into dispute with the owner.

200 By invoking Clause 7 on one occasion the builder demonstrated that it was aware of the need to seek an extension of time under the Contract where circumstances were such that it was entitled to seek an extension and be granted it. If it then failed to follow the procedure under Clause 7 in regard to the owner's alleged defaults under the Contract it cannot claim an extension of time without compliance with Clause 7. The time for completion of the works was in accordance with the Contract, which is 17 September 2014.

201 For these reasons the builders claim for delay costs is dismissed.

Interest on overdue payments

202 The builder's claim for interest on overdue payments is considered and determined in respect of each head of claim.

Quantum meruit claim

Builder

203 The builder claims that as the owner repudiated and/ or unlawfully terminated the Contract, the builder is entitled to seek damages on the quantum meruit: (1992) 26 NSWLR 234; *Brooks Robinson Pty Limited v Rothfield* [1951] VLR 405; *Iezzi*

Constructions Pty Limited v Watkins Pacific (Qld) Pty Limited [1995] 2 Qd R 350; *Ettridge v Vermin Board of the District of Murray Bay* [1928] SASR 124.

204 The measure of what is appropriate on an assessment of a builder's entitlement to a quantum meruit is not limited to the contract price of the works: *Renard Constructions*; and takes into account all of the circumstances of the case; *ABB Constructions Pty Limited v Abigroup Contractors Pty Limited* [2003] NSWCS 665.

205 The builder submits that in this case before the Tribunal:

(a) The builder was retained by the owner to renovate the house on a contract and specifications prepared by the owner;

(b) The owner on his own evidence, made a conscious effort to only seek "options" in correspondence with the builder which would plainly, by any reasonable person, be interpreted as a variation request;

(c) That the owner variously repudiated and/ or unlawfully terminated the contract through his conduct; and

(d) The quantum meruit claim of the builder is based on the invoices and costs he has actually incurred in carrying out works on the project

206 It is the builder's submission that it's office administration expenses were reviewed by Expert Brincat to assess if the margin it sought to apply to office expenses was fair. Expert Brincat includes those expenses to reflect his view that the builder's administrative expenses are at the lower end of the range.

207 As to the cost of items not fully consumed by the works, the builder contends that Expert Connor conceded that it is appropriate for a builder to recover the cost of reusable supplies on each job according to the life expectancy of the goods. The builder does not press all of such a claim, reducing it by $2,680.69.

208 The builder claims damages in the amount of $213,660.43 being the sum of the actual invoices and costs incurred by the builder in carrying the works, less the payments made by the owner

Owner

209 The owner contends that the builder cannot seek damages on a quantum meruit claim.

210 The builder cannot avail itself of the principle in *Renard Constructions* as:

211 The owner further contends that there was no repudiatory default by the owner. The owner promptly provided the builder with instructions and materials as requested by the builder. The failure of the builder to progress the works stemmed from the owner's refusal to pay the progress claims 6 and 7 and the alleged variations.

212 The owner submits that even if there was repudiatory default by the owner, there was no acceptance by the builder prior to the owner's termination of the Contract on 27 March 2015.

213 Even if the Tribunal concludes that the owner was not justified in terminating the Contract on 27 March 2015, the builder is still unable to make out a claim on the quantum meruit. The builder cannot be characterised as an innocent party within the

Renard Constructions principle as:

(a) The builder's work was defective and incomplete;

(b) The builder failed to complete the works by the contractual time for completion of 17 September 2014;

(c) The builder insisted on payment for stages 6 and 7 in circumstances where the stages were not complete;

(d) The builders conduct was repudiatory for the reason previously set in in consideration of the issue of termination of the contract.

214 The owner contends that the builder's quantum meruit claim is misconceived because:

(a) The assessment of the builders claim is not done in accordance with legal principle;

(b) Expert Brincat's assessment of the quantum meruit claim is based on the costs incurred by the builder in carrying out the works. This approach is erroneous. In *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd* [2004] NSWSC 273, Barrett J said:

> The real question in such a case goes to quantification of what Deane J described in Pavey & Matthews Ltd v Paul (above) at p 257 as "a reasonable remuneration or compensation for a benefit actually or constructively accepted". Regard must therefore be had to the work actually done and to its quality. A plaintiff's task in such a situation was described by O'Bryan and Martin JJ in Riverside Motors Pty Ltd v Abrahams [1945] VLR at p53:
>
> Moreover when the claim is not for an agreed price but upon a quantum meruit, in order to establish the value of the work done and the consequent reward to which he is entitled, the plaintiff must prove the exact nature of the work he has done. If he does not satisfy the Court that there have been no omissions from the work he has requested or he contracted to do, and that his work was in all respects skilfully done-how can he establish that the fair value of the work is what he claims? If, eg, at the end of this case the plaintiff failed to satisfy the learned trial judge that the bearings were in parallel and in alignment, or that they were so little out that no ill consequences would ensue, how can the value of its work be assessed? It is part of the plaintiff's proof on a quantum meruit to establish the value of the work.
>
> The quality of the work and matters such as its correspondence with specification and fitness for its intended purpose are thus elements of the process of valuation of work for quantum meruit purposes.

(c) In *Eddy Lau Constructions* Barrett J said further that the onus is on the person claiming a quantum meruit sum to prove the value of the work done.

(d) The experts agree that there are extensive defects and omissions in the builder's work. The Tribunal cannot be satisfied there are no defects or omissions in the builders work. Expert Brincat has made no allowance for the defects and incomplete works agreed by the experts and accordingly the builder cannot establish the fair value of the work done.

(e) The builder's quantum meruit claim should be rejected.

Tribunal

215 The Tribunal has considered the evidence and the submissions of both parties in respect to the builders claim on the quantum meruit.

216 The builder claims that the owner has received the value of work supplied by the builder in the amount of $482,841.12 while the owner has paid $266,500 of the

Contract price of $330,000. The builder claims $216,341.12 on the quantum meruit claim less the amount not pressed of $2,680.69. The total claim being $213,660.43.

217 The builders claim is misconceived. The Tribunal has found that the owner repudiated the Contract and the builder terminated. Notwithstanding that, the builders contention and reliance on *Renard Constructions* is misplaced.

218 The reliance on the actual cost of the building work by the builder less the progress payments by the owner is not a proper basis upon which to press a quantum meruit claim.

219 The builder was under a Contractual obligation to carry out the building works in accordance with the plans and specifications for the price of $330,000 including GST. The building works are incomplete and defective.

220 In *Eddy Lau Constructions* the Court made it quite clear that the principle is the real question in such a case goes to quantification of what is a reasonable remuneration or compensation for a benefit actually or constructively accepted having regard to the work actually done and to its quality.

221 The builder's only entitlement to a quantum meruit claim is in respect of the unpaid progress claims 6 and 7 issued prematurely before the works were complete.

222 Expert Brincat assesses the value of the incomplete works as $5,400. If deducted from the claims of $50,000 that amount is $44,600.00.

223 QS Taylor has prepared a costing based on information and the reports prepared by Expert Connor, but do not separately value the incomplete works with regard to the deck or fit out.

224 The Tribunal relies on Expert Brincat's evidence of the value of the incomplete works.

225 For the owner to have the benefit of $44,600 of materials and labour would unjustly enrich the owner.

226 The Tribunal allows the builder's claim for the value of the works included in progress claims 6 and 7 in the amount of $44,600.00 plus interest from 21 July 2014 until 6 March 2017, 961 days at $6.10 per day (5%) equalling $5,862.10.

227 The remainder of the builder's claim for damages under the quantum meruit claim is misconceived and the Tribunal dismisses the remainder of that claim.

Conclusion

228 In respect of the owners claim HB14/60367 the Tribunal orders in respect of each claim:

(a) The owner's entitlement to damages for delay and completion of the works is dismissed;

(b) The effective date of termination of the Contract was 23 November 2015.

(c) The builder must pay to the owner the amount of $5269.00 being the amount of damages in respect to the defects

229 In respect of the builder's claim HB 15/33869 the Tribunal orders in respect of each

claim:

(a) The claim for variations is dismissed except for the first variation for rock and the owner is to pay to the builder the amount of $2887.50 together with interest of $544.17.

(b) In respect of the quantum meruit claim the owner must pay to the builder the amount of $44,600.00 plus interest of $5,862.10.

(c) The claim for delay costs is dismissed;

Costs

230 Any application for costs by a party is to be supported by evidence and submissions of no more than 3 pages in length and is to be filed with the Tribunal and served on the other party on or before 7 April 2017.

231 If there is no application made for costs by 7 April 2017 there will be no order as to costs.

232 Any evidence and submissions in response to an application for costs from the party opposing the application for costs is to be filed with the Tribunal and served on the other party on or before 5 May 2017.

233 The parties are to advise the Tribunal in their respective submission if they consent to the issue of costs being determined dealt with on the papers.

234 Alternatively the parties are to make submissions as to why such an order should not be made pursuant to section 50 of the *Civil and Administrative Tribunal Act* 2013.

P. Boyce

Senior Member

NSW Civil and Administrative Tribunal

14 March 2017

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

Decision last updated: 09 May 2017