



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Huynh v Devine Building Pty Ltd [2016] NSWCATCD 93</b>
<b>Hearing dates:</b>	11 August 2016
<b>Decision date:</b>	01 December 2016
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	D A C Robertson, Senior Member
<b>Decision:</b>	1. Application dismissed.  2. The applicant is to pay the respondents' costs as agreed or assessed.
<b>Catchwords:</b>	CONTRACTS – Home Building Act – Statutory warranties – time limits – whether complaint to Department of Fair Trading “enforcement” – obtaining work orders from Department of Fair Trading not enforcement of warranties for purposes of s18E Home Building Act – waterproofing not shown to be defective
<b>Legislation Cited:</b>	Home Building Act 1989 (NSW)
<b>Cases Cited:</b>	Honeywood as Executrix of Honeywood v Murray (2006) 67 NSWLR 466 Bardon v Occhiuto Enterprises [2016] NSWCATAP 191
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Fiona Huynh – applicant Mark Devine and Devine Building Pty Ltd - respondents
<b>Representation:</b>	Applicant: in person Respondents: R Sidey, solicitor
<b>File Number(s):</b>	HB 16/01166
<b>Publication restriction:</b>	Nil

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### REASONS FOR DECISION

- 1 This is an application for compensation under the *Home Building Act* 1989 (NSW) (“HBA”) in respect of allegedly defective home building work carried out by one or other

- of the respondents on the applicant's home. The applicant appeared in person. The respondents were represented by Mr Sidey, solicitor.
- 2 The dispute concerns building work carried out on two bathrooms and a laundry within the applicant's house at Greystanes. The work was "residential building work" as defined in the HBA. The claim in relation to the work is a "building claim" as defined in the HBA and, subject to a question addressed below whether the proceedings were commenced within the time limits laid down in the HBA, the Tribunal has jurisdiction to determine the claim pursuant to s48K of the HBA.
  - 3 By her original application the applicant claimed the sum of \$33,106 from the first-named respondent in respect of 22 items set out in a Scott Schedule filed with the application. The application was accompanied by an expert report prepared by Mr Howard Ryan of HK Ryan & Associates, a licensed builder and property and construction consultant. Mr Ryan also prepared the Scott Schedule.
  - 4 The first respondent disputed that he was responsible for the building work. The first respondent asserted that the work was carried out by the second named respondent, a company of which the first respondent is the director.
  - 5 After initially declining to do so when it was suggested at the initial directions hearing, the applicant ultimately applied to have the second named respondent joined as a respondent. Nevertheless, the applicant consistently maintained that she had contracted with the first respondent and not the second respondent.
  - 6 At a directions hearing on 28 June 2016 the applicant was given leave to amend her application "on the basis that the applicant does not propose to lead further evidence in support".
  - 7 By the amended application the applicant increased her claim to \$118,223.16 being the cost of fully renovating both bathrooms and the laundry and the cost of alternative accommodation while that renovation occurs. The full renovation of the bathrooms and laundry was said to be necessary because the "waterproofing membrane is slowly breaking down with continued use in both bathrooms and laundry".
  - 8 The applicant tendered in evidence:
    - (a) A bundle of documents dated 23 April 2016 including an affidavit of the applicant and annexures A to L. Annexures E and J were not attached to the affidavit as filed with the Tribunal but were identified as being the Scott Schedule and expert report filed with the original application. The bundle of documents dated 23 April 2016 became Exhibit A. The Scott Schedule became Exhibit B. Mr Ryan's expert report became Exhibit C;
    - (b) A bundle of documents dated 23 May 2016 which included: a number of documents discussing issues (or alleged issues) with waterproof membranes, in particular polyurethane membranes and osmosis in polyurethane membranes; some photographs of the tiled steps leading from the applicant's laundry which the applicant claimed showed that the waterproof membrane had ruptured through a process of osmosis; a further Scott Schedule, apparently prepared by the applicant herself, listing the cost of replacing various items in the bathrooms and laundry; and quotations from tile and bathroom hardware suppliers supporting the

further Scott Schedule. This bundle became Exhibit D.

- (c) A bundle dated 24 June 2016, which includes a statement from the applicant responding to the respondents' evidence together with photographs of the floor wastes in the bathrooms, which were alleged to show the type of waterproof membrane installed, and some invoices for tiles, lighting and rubbish skips. This bundle became Exhibit E.
- (d) A bundle of documents dated 28 June 2016 which was received by the Tribunal on that date.

9 The respondents objected to the last bundle of documents being received into evidence on the basis that the documents had not been filed in accordance with the directions of the Tribunal.

10 The additional documents had been filed with the Tribunal after the directions hearing on 28 June 2016 and were not received by the respondent's solicitor until 12 July 2016. The additional documents were two fact sheets relating to the products identified on a waterproofing certificate provided by the respondents as being the products utilised in the applicant's premises, and a quotation provided by IBuild Group for the complete renovation of both bathrooms and the laundry.

11 As the respondent had had the documents for nearly a month, I received the bundle dated 28 June 2016 subject to weight, noting that it had not been filed in accordance with the directions of the Tribunal and that the quotes do not contain the detail that might be expected of expert evidence and do not comply with the Tribunal's guidelines for expert evidence. The bundle of documents dated 28 June 2016 became Exhibit F.

12 The respondents' evidence consisted of one bundle which became Exhibit 1. Exhibit 1 included an affidavit by the first-named respondent and a "supplementary bundle" of documents.

13 Each of the applicant and the first-named respondent gave oral evidence and answered questions from the Tribunal.

14 The respondents asserted in response to the applicant's claims:

- (1) That the claims except in respect of waterproofing were out of time;
- (2) That the applicant had enforced the warranty (see s18E(2));
- (3) That no defects had been established;
- (4) That if any defects were established a rectification order would be appropriate pursuant to s48MA of the HBA.

#### **Who was the contract with?**

15 There was no written contract. The respondents' evidence included two quotes on the letterhead of the second respondent, dated 15 July 2012 (for the renovation of the upstairs bathroom) and 25 September 2012 (for the renovation of the "existing bathroom").

16 The applicant denied receiving those quotes. She said that she had only received one quote for the whole of the work. She pointed to invoices for rubbish skips, tiles and bathroom hardware dated early August 2012 as demonstrating that she intended to do

both bathrooms right from the start.

- 17 I do not need to determine whether the contract was constituted by the applicant's acceptance of one or two quotes. The respondents do not rely upon the quotes as establishing the content of the contract. The only issue for which the documents themselves would be relevant is determining which of the respondents contracted to carry out the work on the applicant's premises.
- 18 The applicant acknowledged receiving a quote in respect of the installation of a steel beam. That work was carried out satisfactorily and is not the subject of complaint in these proceedings. However the quote for that work, which the applicant acknowledges receiving, clearly indicated that the builder who provided the quote and who proposed to carry out the work was the second respondent. The applicant also acknowledged that the quote she had received in respect of the bathrooms was in a form similar to a tax invoice she had received in respect of work involved in investigating and repairing a leak. That tax invoice, which was tendered in evidence, also clearly indicated that it was the second respondent that was the contracting party.
- 19 The second respondent was a licensed builder. The first respondent only held a supervisor's licence.
- 20 On the basis of this evidence I find that it was the second respondent which contracted with the applicant and carried out the work and that the first respondent has no liability in respect of the work carried out on the applicant's property.

### **Time limitation**

- 21 Section 18B of the HBA provides:

#### 18B 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) warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,
- (b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
- (c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,
- (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
- (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,
- (f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the 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.

- 22 By virtue of s48K(7) of the HBA the Tribunal has no jurisdiction to determine claims in respect of breaches of statutory warranties if the proceedings were not commenced within the relevant warranty period. The "warranty period" is defined in s18E which relevantly provides:

**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),

...

- (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.

**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.

- 23 The work on the applicant's property was completed in March 2013 and these proceedings were commenced in January 2016. To the extent the applicant's claims rely upon the statutory warranties implied into the contract pursuant to s18B of the HBA, pursuant to the provisions of s18E(1)(b) of the HBA these proceedings will have been commenced outside the relevant warranty period except in respect of major defects. [1]

- 24 By virtue of s48K(3) of the HBA, the Tribunal does not have jurisdiction in respect of any other claim in respect of the supply of building services if the claim is lodged more than three years after the services were provided. To the extent the applicant were able to establish any breach of contract by the second respondent, other than breaches of

the warranties implied pursuant to s18B, the proceedings might have been commenced in the three year period within which the Tribunal has jurisdiction.

- 25 However, the applicant did not establish the terms of the contract between the parties beyond an agreement that the second respondent would carry out building work involving the renovation and/or construction of two bathrooms and a laundry.
- 26 The two quotations produced by the respondents, which the applicant denies receiving, would not assist the applicant. They contained no provisions regarding the standard of work required of the second respondent.
- 27 Even if I were prepared to conclude that the contract between the parties included an implied term (independently of s18B) that the second respondent would carry out the work required with due care and skill, Mr Devine's evidence in relation to each of the items in the Scott Schedule (other than those items addressed below) was that they were the result of express instructions from the applicant, arose by reason of the installation of sub-standard products supplied by the applicant for installation by the second respondent, resulted from misuse, or were not the consequence of any work performed by the second respondent.
- 28 I accept Mr Devine's evidence in these respects. Although the applicant cross-examined Mr Devine in relation to the waterproofing she did not seek to challenge any of his evidence concerning other alleged defects.
- 29 I therefore do not find that the second respondent breached the contract between the parties in any respect beyond the implied warranties arising pursuant to s18B.
- 30 Mr Sidey, the solicitor for the respondents, conceded that any defect in the waterproofing of the bathrooms and laundry would be a major defect but maintained that the other defects of which the applicant complained were not major defects. The applicant conceded that all claims other than her claims relating to waterproofing were out of time. Therefore I do not need to consider whether the implied warranties were breached in respect of any items other than items involving alleged defects in relation to waterproofing.
- 31 I would not have taken the applicant's concession, that her claims other than claims relating to waterproofing were out of time, as extending beyond her claims made in reliance upon implied warranties in s18B. However, I have determined that no claims of breach of contract outside the implied warranties arising under s18B have been established.
- 32 Of the 22 items listed in Mr Ryan's Scott Schedule, Items 5 and 6 (which relate to the upper bathroom) and Items 12 and 13 (which relate to the lower bathroom) involve allegations that the showers are leaking. If it were established that the showers were leaking and that that was a consequence of defective waterproofing, those items would, clearly, constitute major defects being defects in waterproofing carried out by the second respondent. The cost of rectification of these items as assessed by Mr Ryan was \$4,310 for each bathroom or \$8,620 for the two bathrooms, plus 20% margin, 5%

contingency and 10% GST, \$11,947 in total.

- 33 There remains an issue between the parties as to which of the remaining items were claims related to waterproofing work.
- 34 There were further items, Items 2, 4, 19 and 20, which involved what was alleged to be staining from water penetration. In respect of those items Mr Ryan assessed a total cost of repair of \$2,880 plus margin, contingency and GST or \$3,997.
- 35 The respondent did not accept that these items constituted (or were part of) any major defect. I will consider each of these alleged defects below, and will resolve the question whether they constituted or were part of a major defect, in that context.

### Enforcement of warranty

- 36 Mr Sidey on behalf of the respondent submitted that, as the applicant's complaints had been the subject of an order for rectification from the Department of Fair Trading, the applicant had previously enforced the statutory implied warranties and was not entitled to bring fresh proceedings to enforce the statutory warranties.
- 37 Section 18E(2) provides:
- (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).
- 38 The applicant disputed that the rectification order made by the Department of Fair Trading had been satisfactorily complied with.
- 39 I do not need to determine whether the rectification order had been satisfactorily complied with.
- 40 Section 18E(2) is directed to limiting the effect of the *res judicata* (that is the prohibition on fresh proceedings raising the same cause of action) that would otherwise arise where a homeowner had brought proceedings in respect of defective work and subsequently sought to bring further proceedings in respect of defects existing at the date of the earlier proceedings (see *Honeywood as Executrix of Honeywood v Murray* (2006) 67 NSWLR 466 at 470 [13]-[18] and *Bardon v Occhiuto Enterprises* [2016] NSWCATAP 191 at [31]-[32]). Section 18E(2) does not purport to expand the circumstances in which such a *res judicata* would arise. No *res judicata* could arise from the making of rectification orders by the Department of Fair Trading.
- 41 Accordingly, in my view, obtaining an order from the Department of Fair Trading for the rectification of home building work is not the enforcement of a warranty for the purposes of s18E(2).

## Defects

42 As the applicant does not suggest that the proceedings were brought within time in respect of any defects arising by reason of failures to comply with the statutory warranties laid down in s18B of the HBA other than those which might be found to relate to waterproofing, I will only address those alleged defects which potentially relate to waterproofing. That is items 2, 4, 5, 6, 12, 13, 19 and 20. Those items as identified in Mr Ryan's Scott Schedule are as follows:

Item 2 - the rear upper level slab edge has water stains evidently caused from water leaking internally under the ground floor bathroom.

Item 4 - the ceiling to the ground floor kitchen is water stained.

Item 5 - the top floor bathroom has a leaking shower [this item includes other items which do not relate to waterproofing and cannot be said to constitute major defects].

Item 6 - evidence of the leaking shower to the top floor bathroom.

Item 12 - the ground floor bathroom has a leaking shower [item 12 also includes other matters which do not relate to waterproofing]

Item 13 - evidence of the leaking shower in the ground floor bathroom.

Item 19 - the floor tiles adjacent to the leaking bathroom are damp and stained and the adjoining wall is damp.

Item 20 - the ground floor bathroom has a stained ceiling which has now come through the ceiling paint finish.

43 Mr Ryan who had provided the expert report filed with the applicant's application (Exhibit C) did not attend the hearing and was not cross examined on his report. Although I received the report in evidence, its weight must be affected by the fact that Mr Ryan did not attend to give evidence and was not exposed to cross-examination.

44 Mr Ryan's report (Exhibit C) was dated 30 November 2015. Mr Ryan's evidence in relation to each of the items identified above was as follows:

45 Item 2 – Mr Ryan identified visible calcium staining on the slab edge face on the rear upper level slab edge. Mr Ryan stated that an invasive inspection is required to determine the actual source of the leaking. Mr Ryan could only assume that it was coming from a leaking shower.

46 Item 4 – Mr Ryan identified that the ceiling to the ground floor kitchen was water stained. Mr Ryan expressed the opinion that it was necessary to remove the affected area and replace, plaster and then repaint. Mr Ryan did not express an opinion as to the source of the water staining.

47 Items 5 and 6 – Mr Ryan expressed the opinion that the top floor bathroom had a leaking shower, he stated:

“The water stop angle is not protruding through the floor tiles as intended and as per the Building Code of Australia requirements.”

48 Mr Ryan identified a high 20% moisture content evident at the base of the bathroom door architraves. Mr Ryan expressed the opinion that:

“the egressing shower dampness under the floor tiles is flowing out to the doorway and causing the door architrave to swell and the paint finish to deteriorate”.

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Mr Ryan included in his report an extract (clause 3.8.1.19) from the Building Code of Australia which provides in relation to “enclosed showers without hobs or set downs”:

“At the extremity of the shower area, a waterstop must be positioned so that its vertical leg finishes –

(a) where a shower screen is to be installed not less than 5mm above the finished floor level.”

The associated diagram (Figure 3.8.1.11) makes it clear that the protruding waterstop is intended to prevent water flowing across the floor from the shower cubicle.

50 Items 12 and 13 – Mr Ryan expressed opinions in relation to the ground floor bathroom in identical terms to the opinions he had expressed in relation to the upstairs bathroom.

51 Item 19 – Mr Ryan expressed the opinion that the floor tiles adjacent to the leaking bathroom downstairs were damp and stained and the adjoining wall was also damp. Mr Ryan stated that it would be necessary to remove and replace the stained floor tiles.

52 Item 20 – Mr Ryan expressed the opinion that the ground floor bathroom had a stained ceiling which had come through the ceiling paint finish. Mr Ryan stated “we were advised by the home owner these were stains caused by the renovation”.

53 The applicant also sought compensation in respect of the waterproofing in the laundry. That claim was not the subject of evidence from Mr Ryan.

54 The case the applicant presented at the hearing did not rely in any substantial way upon Mr Ryan’s report. The applicant’s case as put in her amended application is that the waterproofing membrane installed in the bathrooms incorporated fibreglass which rendered the membrane too rigid and subjected it to stress cracking due to the building moving and cracking in the concrete floor.

55 The applicant sought to rely upon documents such as an article on osmosis and the blistering of polyurethane waterproofing membranes, a technical bulletin produced by “Envirotech Waterproofing Solutions”, a brochure from a manufacturer of one piece aluminium shower trays, and photographs, of the floor waste, which the applicant said showed the nature of the membrane, and of the laundry steps, which show tiles lifting.

56 The applicant’s case in respect of the laundry waterproofing as set out in Exhibit D was:

“As a result of no drain being put on the laundry floor, the door has been used to remove any water from the washing machine and sink. Over time this has resulted in the tiles lifting. This is due to the water that sits on top of the membrane caused by poor drainage of the surface. Vapour diffusion moves moisture through the membrane. Osmosis begins and small blisters are formed. Blister continues to grow until the membranes ruptures or leaks. These are shown in the pictures below.”

57 The applicant submitted that the only appropriate solution is to completely demolish and reconstruct both bathrooms and the laundry at a total cost exceeding \$90,000. The applicant also sought the cost of accommodation while repairs are carried out and replacement plumbing fixtures.

58 As noted above, the only evidence of the costs of demolishing and reconstructing the bathroom and laundry was the quote from IBuild, included in Exhibit F. That quote provides no explanation of the basis of calculation of each element of the cost, beyond a simple statement of the items of work to be performed. The quote provides a

separate price for the demolition and reconstruction of each room. The quote does not provide any break down within the price given for each room.

- 59 The respondents' response to each of the items outlined above was as follows:
- 60 Item 2 – Mr Devine stated that the staining on the underside of the slab pre-existed any work by the second respondent.
- 61 Item 4 - Mr Devine gave evidence that the water stain on the downstairs ceiling had been there at the time the Department of Fair Trading had inspected the property in relation to issues surrounding the bath in the upstairs bathroom, which had been the subject of the work orders referred to above. The stain had not been repaired because the applicant did not want a snap-in vent installed as she thought it would be “ugly”. The installation of a vent is a requirement under the Building Code of Australia. Mr Devine stated that the Department of Fair Trading inspectors had informed him that it was not necessary to repair the water staining.
- 62 I am not satisfied that this water staining is a defect arising from defective waterproofing. Any complaint in regard to the water staining is therefore out of time and I will not consider it further.
- 63 Items 5, 6, 12 and 13 - the leaking showers – Mr Devine said that the applicant had not permitted him to attend the property in order to investigate the alleged leaks. Mr Devine pointed to an email dated 20 August 2015 sent by him to the applicant in response to a complaint from the applicant that the bathroom was leaking in which Mr Devine had said “I will send out one of my guys who does shower seals and supplies 12 years warranty, if you could give me your phone number he can make an appointment with you”. The applicant had responded rejecting that offer.
- 64 Mr Devine asserted that the appropriate membrane had been applied in both upstairs and downstairs bathrooms and disputed that the membranes had failed.
- 65 Mr Devine denied that the membrane included fibreglass. He pointed to the guarantee provided by the waterproofing contractor which identified the products used as “ARW primer” and “Duromastic P15.”
- 66 The applicant's own evidence, Exhibit F, established that neither of those products contained fibreglass. Duromastic P15 is “a modified acrylic urethane membrane”. ARW primer is “a single component water based primer”.
- 67 Mr Devine speculated that the problem identified by Mr Ryan of dampness in the architraves of the doors to the bathrooms might potentially have been caused by the use of a hose in cleaning the bathrooms. Mr Devine accepted that that was speculation but suggested that, as there is a floor waste between the shower and the door, for water to get to the door, there must have been some other reason than water flowing across the floor by reason of the absence of a water stop.
- 68 Item 19 – the damp floor tiles and the damp wall – Mr Devine stated that he had not been allowed on site to investigate and again speculated that the damage might possibly be due to the misuse and flooding of the bathroom.

69 Item 20 - the stained ceiling on the ground floor bathroom – Mr Devine again suggested it was a consequence of the absence of a snap-in vent which the applicant had refused to have installed.

70 The laundry - Mr Devine gave evidence that as the laundry was an external laundry, there was no requirement for a floor waste. Mr Devine gave evidence that the fall across the laundry floor towards the door was appropriate and adequate to ensure the dispersal of water falling onto the floor.

### Consideration

71 The onus of establishing the existence of major defects, within the meaning of Section 18E of the HBA, lies upon the applicant, on the balance of probabilities.

72 In circumstances where Mr Ryan was not available for cross examination I am unable to accept there were waterproofing defects as he has alleged. Mr Devine did give evidence and suggested that the evidence, on the basis of which Mr Ryan had concluded that there was a water penetration problem in the bathrooms, may have been the result of other causes.

73 Mr Ryan did not identify any potential issue with the water proofing in the bathrooms other than the fact the water stop angle did not protrude above the surface of the tiles. Mr Ryan asserted that this was permitting shower dampness to egress under the floor tiles. Mr Ryan was not available to explain how that occurred. It is clear from the extract from the BCA included in Mr Ryan's report and in particular from figure 3.8.1.11 that the function of the water stop is to prevent water flowing out of the shower over the tiled floor. I do not consider that the absence of a protruding water stop could be described as a defect in waterproofing. Moreover, as Mr Devine pointed out, the floor waste should have prevented most water reaching the doorway and there were other potential causes for the dampness around the door architraves.

74 In the absence of evidence from any person with appropriate expertise or qualifications that there has been any failure in the waterproof membranes I am unable on the basis of the photographs and other evidence produced by the applicant to draw any conclusions concerning the state of waterproofing in the bathrooms and laundry.

75 I am not persuaded on the evidence before me that the waterproofing is defective. The applicant did not permit the respondent access to inspect or repair the waterproofing. The applicant tendered no expert evidence to establish any defect in the waterproofing membrane. The applicant has been provided with a seven year warranty and remains able to enforce that warranty against the installers of the waterproofing membrane.

76 Section 48MA of the HBA provides:

48MA Rectification of defective work is preferred outcome in proceedings

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

77 By reason of the existence of the warranty, and having regard to the preferred outcome

laid down by s48MA of the HBA, if I had found that there was any defective work I would have ordered that the second respondent rectify the defective work rather than awarding compensation.

- 78 I am not satisfied on the evidence before me that the applicant has established the existence of any major defect in the building work performed by the second respondent. I am also not satisfied on the evidence before me that the applicant has established any breach of contract not involving the implied warranties under s18B of the HBA. As the proceedings were brought outside the time limitation laid down in s18E of the HBA for the commencement of claims for breach of the implied warranties under the HBA in respect of defects other than major defects, the Tribunal has no jurisdiction to determine the applicant's claims for breach of the implied warranties in respect of defects other than major defects. It follows that the application must be dismissed.
- 79 As the amount claimed by the applicant in these proceedings exceeded \$30,000, pursuant to Rule 38 of the Civil and Administrative Tribunal Rules, I need not find special circumstances before I may make an award of costs. The applicant's claim has wholly failed. There is no reason why the usual rule that costs follow the event should not apply. I order the applicant to pay the respondents' costs as agreed or assessed.

**DAC Robertson**  
**Senior Member**  
**Civil and Administrative Tribunal of NSW**  
**1 December 2016**

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### Endnote

1. By reason of the transitional provisions in clause 121 of Schedule 4 to the HBA, although the contract between the parties was entered into before the commencement of the Home Building Amendment Act 2014 (NSW) on 15 January 2015, as the proceedings were not commenced prior to that date, the Tribunal's jurisdiction in respect of the claim is governed by the HBA as amended by that Act.

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

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Decision last updated: 18 January 2017