Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Woolley v Johns & Rogers Pty Limited [2016] NSWCATCD 16**
Hearing dates:	12 November 2014 and 2 April 2015
Decision date:	12 February 2016
Jurisdiction:	Consumer and Commercial Division
Before:	T Simon Senior Member
Decision:	1. The respondent is to pay the applicant the sum of $17,496.05 immediately 2. In the event that either party intends to make an application for costs, the applicant is to provide any documents and submissions in relation to costs to the respondent and the Tribunal, either in person or by post by 26 February 2016. 3. The respondent is to provide any documents and submissions in relation to costs to the applicant and the Tribunal, either in person or by post on 18 March 2016. 4. The issue of costs will be decided on the papers. In the event that the parties wish to be heard in person they must advise the Tribunal on or before 26 February 2016.
Catchwords:	Home Building, scope of work, s 18F defence, breach of statutory warranty
Legislation Cited:	Building Services Corporation Legislation Amendment Act 1996 (NSW) Home Building Act 1989 (NSW)
Cases Cited:	Pham v Broadview Windows Pty Ltd & Ors [2009] NSWCTTT 375 The Craftsmen Restoration and Renovations v Thomas Boland; Thomas Boland v The Craftsmen Restoration and Renovations [2008] NSWSC 660
Category:	Principal judgment
Parties:	Pat Woolley (applicant) Johns & Rogers Pty Ltd (respondent)

Representation:	Counsel: D Hand for the respondent Solicitors: A Adams of Mayweathers for the applicant P Adam of Adams Partners Lawyers for the respondent
File Number(s):	HB 14/19858
Publication restriction:	Nil

REASONS FOR DECISION

1 This is application was made by the homeowner on 11 April 2014. The applicant was initially seeking an amount of $77,800.00 for breach of statutory warranties pursuant to s 18B of the *Home Building Act* 1989 (NSW) (HBA). By the time the matter came for hearing the amount claimed by the homeowner was $80,018.70.

Background to the Matter

2 It is not in dispute that the parties contracted in February 2011. The works largely related to replacement of a wooden deck. The contract appears to have been partly in writing (emails and a quote) and partly oral, but in any case, did not comply with the form prescribed by section 7 of *Home Building Act* 1989 (NSW) (the Act).

3 The applicant's claims for breach of statutory warranty relates to the following:

(1) failing to properly advise on and construct a structurally sound facade wall;

(2) failing to properly advise on and select a coating that contained a suitable light reflective valve;

(3) failing to properly construct and waterproof the deck

(4) failing to properly staying concealed internal plywood floors failing to advise on and install an appropriate external bought the area underneath the deck and failing to properly seal the wall coating to prevent and avoid efflorescence.

Jurisdiction of the Tribunal

4 The parties agree that the contract in relation to the works was partly written and partly oral. However, they disagree on the scope of the agreed works. It is not in contention that the parties initially agreed on a quote for the sum of $56,800.00, however the applicant ultimately paid the amount of $118,046.00.

5 The parties agree that the builder sent the homeowner a quotation by email on 9 February 2011 (the quote was dated 20 January 2011). In a reply email dated 9 February 2011 the homeowners stated

> Thanks greg. We will go with you.
>
> Pat and Ted
>
> See you Monday and we will begin schedule now.

6 The quote is not detailed and there is no doubt that oral discussions were had between the parties relating to the details for the scope of works. However, the parties differ in relation to their recollection of the scope of works agreed to.

7 The Tribunal is satisfied that the parties entered into a contract for residential building works as defined in section 3 of the Act in about February 2011. The Tribunal is satisfied that the application involves a building claim as defined by s 48A of the Act. The Tribunal is also satisfied that the claim has been made within time and that it has jurisdiction to determine the building claims pursuant to section 48K of the Act.

Failure to properly advise on and construct a structurally sound façade wall of the deck and failing to properly advise on and select a coating that contained a suitable light reflective valve;

8 This complaint relates to cracking which has appeared to the Hardie-Tex cladding. Photographs do show the cracking. The applicant claims that the cause of the cracking is related to two issues, firstly the lack of control joints as specified by the manufacturer of the product and secondly that the paint colour used has a low light reflective value, also contrary to the manufacturer's specifications. There is no dispute between the parties that over a length of 12 metres, no horizontal control joints and no gaps were used between the sheets of the blue board. The applicant refers to the technical specifications for the product which states that vertical and horizontal control joints must be used.

9 The respondent made submissions that the builder had simply followed Ms Woolley's written instructions in relation to the front wall to be constructed. They refer to an email at page 19 of the exhibits to Ms Woolley's statement which is dated 28 October 2014. The email is dated 18 March 2011 and relevantly states:

> Hi Greg,
>
> Here's our thoughts on the way the west façade could be supported. I can phone you after the weekend and describe it. But this could work.
>
> The arrows at the top are the area where the balustrade runs on west and east façade.

10 The respondent also refers to Ms Woolley's insistence that the wall be created "flush.' Under cross-examination Ms Woolley agreed that the wall was to be created flush. The respondent also refers to telephone conversations and an email dated 21 March 2011in which the applicant's relevantly stated:

> Hi Greg
>
> The photos are superb and I completely understand your concern about the far wall.
>
> However, please keep it as originally designed and see if the cross members along the stairs work. I think it WILL hold.
>
> So don't follow the plan I sent to cut off the side. Keep it tall. We return Sunday 27th.

11 Mr Rogers stated that he had further telephone conversations in which he warned about the walls and the absence of bracing. The Tribunal finds from the email there had been oral conversations between the parties about the walls on or about 21 March 2011 when the project was well underway. Mr Rogers stated that in oral conversations he advised Ms Woolley that she should have expansion joints and that the colour used to paint was too dark.

12 The Tribunal is not persuaded by Mr Rogers on this point. The Tribunal finds that

overall the evidence of Mr Rogers is self-serving. It is difficult to accept that such an experienced builder would fail to put such serious warnings in writing. The Tribunal does finds that some oral conversations were had between the parties in relation to the wall. However the Tribunal does not find that in those conversations respondent has warned the applicant specifically that there should be control joints in the wall or that the colour she had chosen was too dark and would increase the chances of cracking.

13 The respondent made submissions that Ms Woolley was not a credible witness because she was evasive in her responses and was argumentative with the cross examiner. There is no doubt from the emails between Ms Woolley and Mr Rogers that Ms Woolley was very involved in the design and process of the works. At the time that Ms Woolley gave her evidence at hearing, her husband had died of cancer a few weeks earlier and she indicated so during cross examination. The Tribunal does not find that it should simply accept the respondent's evidence because of the demeanour of Ms Woolley. The Tribunal finds that she did appear stressed, but not evasive, aggressive or dishonest. The Tribunal does not accept the respondent's submissions on this point.

14 The Tribunal is not satisfied that even if oral warnings were given by Mr Rogers that it would be a defence for the respondent. The Tribunal finds that for such a defence to succeed it must be in writing.

Section 18F Defence

15 A major issue arising in this case relates to s18F of the HBA. The section as it applied at the time stated:

> In proceedings for a breach of a statutory warranty, it is a defence for the defendant to prove that the deficiencies of which the plaintiff complains arise from instructions given by the person for whom the work was done contrary to the advice in writing of the defendant or person who did the work.

16 It is the respondent's submission s18F does not provide the only defence for a builder. In particular the respondent refers to the decision of *Pham v Broadview Windows Pty Ltd & Ors* [2009] NSWCTTT 375. The respondent refers to the case as authority for the proposition that section 18F is "a defence" not the only defence.

17 *Pham v Broadview Windows Pty Ltd & Ors* involved an application by a homeowner who had employed a project manager. The project manager had given instructions on behalf of the homeowner for the respondent window installer to install the windows without flashings. The window installer had never been responsible for installing the flashings. In the case Senior Member Durie relevantly stated in relation to s 18F:

> The first point to notice is that the provision is merely "a defence". It does not say that it is a defence if, and only if, the builder proves that the deficiencies arise from instructions given contrary to written advice. This is in contrast to such provisions as the Act ss. 4, 5, 12, 13 and 94. A comparison with s.94 (prior to the ameliorating effect of s.94A) is useful. A failure to have insurance was a complete defence to a debt recovery action – see e.g. *Australasian Concrete Services v Multiplex Constructions [1999] NSWSC* 1140. It has been said that the result was draconian, but was the result intended by Parliament - *Casa Maria v Trend Properties* [1998] NSWCA 53. Parliament could equally have provided that this defence only operated in instances where the written advice had been given.

> Mr Sirtes seeks to avoid the consequences of such a result by submitting that it ought to have been apparent to Winstall that any installation without a sub-sill flashing would "derogate from the warranties impose by section 18B". This submission, to my mind, overlooks 2 matters. The first is that it was never Winstall's responsibility to install these flashings. The second is, of course, that the submission is circular.

18 Reading paragraph x of the reasons in *Pham v Broadview Windows Pty Ltd & Ors* , the applicant ultimately failed and the case was dismissed, not because the respondent in that case had some defence in that they simply followed instructions given to them by the homeowner, but rather because the flashings were never in their scope of works to begin with.

19 In any case, the respondent in submissions also referred to the explanatory memorandum to the Bill when it was first introduced as part of the *Building Services Corporation Legislation Amendment Act* 1996 (NSW) and in which it was stated:

> Proposed section 18F provides a defence to a breach of statutory warranty if the defendant shows that the relevant deficiencies arose from the instructions of the person for whom the work was done after contrary written advice by the defendant or person who did the work.

20 The applicant has referred in written submissions to a series of cases in relation to section 18F in which it was found that the defence was not made out because it was not in writing. Those cases do not deal with the issue precisely on point. The real issue here is whether s18F is the only defence for breach of statutory warranty available to a builder in circumstances where he has been directed by the homeowner.

21 In the Supreme Court decision of *The Craftsmen Restoration and Renovations v Thomas Boland, Thomas Boland v The Craftsmen Restoration and Renovations* [2008] NSWSC 660, Howie J stated at

> 95 Although it is unnecessary for this Court to decide the issue, it seems to me that there is a legislative intention that the warranties and defences available are to be only those set out in the Act. The builder argued that the defence in s 18F was only one defence available. But I find it impossible to accept that, if the defence provided to a statutory warranty does not apply because the builder has not done what was required to engage the defence, the builder can look to some other non-statutory defence that does not have such a precondition.
>
> 96 The builder argued that he installed the windows at the express instruction of the architect and that it was obliged to comply with that instruction under the contract notwithstanding the builder's view, orally expressed to the architect, that the windows were defective. It was submitted that "contractual compliance with an Architect's instructions in the face of reasonable objection by a Builder is within the contemplation of section 18F ". I do not accept that submission. The builder could, and should, have raised those concerns in writing with the architect. The defence would then have applied. It seems clear to me that the defence is limited in order to avoid the very contest that arose in this case: a dispute as to whether the builder gave advice against the work it was required to carry out. By not giving advice in writing the statutory defence did not apply. There is no justification to read the defence wider than it is stated or to read some other defence into the Act.
>
> 97 In my opinion, if the windows were defective, the builder was in breach of the statutory warranty in respect of them so far as the owners were concerned. The builder would have to look to Trend for any compensation for the breach of any warranty that it gave in selling the windows to the builder.

22 In the case of *Pastrovic & Co Pty Ltd v Farrington* [2011] NSWDC 94, His Honour stated

> I agree with the submission that, as a party to the contract, **the builder only has the**

> **defence in section 18F (emphasis added)**. This provides that, in proceedings for breach of a statutory warranty, there is defence if the builder proves that the deficiencies about which the owner complains arise from instructions given by the person for whom the work was done and contrary to the advice in writing of the builder who did the work.

23 The Tribunal adopts the approach in those two cases. The HBA regulates residential home building. It also regulates licensing in relation to builders and a builder is on notice that the defence in relation to a breach of statutory warranty is within the contemplation of s18F of the HBA. The Tribunal is not satisfied a defence that the he warned the homeowner orally is open to the builder, even if that is what the homeowner instructed. It is clear from the evidence that the builder did not give any warning in writing about the inadequacy of the wall. The Tribunal is satisfied that the wall itself was within the scope of the works and that if found, the builder is responsible for any breach of statutory warranty. The builder was required pursuant to s 18B of the HBA (as it was at the time) to comply with the following statutory warranties.

> 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 in a proper and workmanlike manner 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.

24 The Tribunal finds that if it is satisfied that the builder has breached any of the warranties then it will not be a satisfactory defence to say that the builder was simply following the instructions of the homeowner in circumstances where he has not warned her in writing.

25 The applicant made submissions that she was advised that the wall should be braced well into the project. Even if it Ms Woolley told the builder that she wanted the walls flush or drew diagrams for the builder, the onus was on the builder to build the walls in a proper and workmanlike manner and using materials that would be fit for the purpose. If the builder knew he was building walls which were going result in cracking then he needed to put the defence in writing as required by s18F of the HBA.

Are the Walls Defective?

26 Even on the respondents own experts evidence the cladding to the walls is defective. In his report dated 11 August 2014, Mr Polombo relevantly states:

> 101. The “HardTex” sheeting has not been provided with movement control joints.
>
> …
>
> 117. Cracking and peaking to the wall sheeting has occurred due to the failure to provide movement control joints.

27 Mr Polombo refers to the email of 21 March 2011 and states that the wall was constructed as instructed by the applicant. As mentioned above, the Tribunal does not find this establishes a defence for the builder as he did not advise the applicant in writing that the lack of control joints or the colour would cause cracking.

28 Further, it is conceded at paragraph 163 of Mr Polombo’s report that

> …the walls need to be repainted in a light colour in accordance with the sheet manufacturer’s recommendations using an elastomeric coating.

29 The Tribunal finds that the builder has breached the statutory warranty to construct the wall in a proper and workmanlike manner and the wall is defective as a result of the builder’s failure to allow for adequate control joints and paint the wall a light colour in accordance with manufacturer’s instructions.

Method of Rectification

30 The applicant relied on an expert report from Mr Gerad Todarello of Precision Inspectors Pty Ltd dated 10 June 2014. The respondent relied on an experts report from Mr Christopher Polombo of Stratclyde Building Consultants dated 11 August 2014. Both experts appeared at hearing and were cross examined. Both experts have declared that they have complied with the expert code conduct. There had been an earlier report which had been obtained by the builder from Rockcote. Both reports have referred to the Rockcote report. The Rockcote report stated that the cracking to the wall had resulted from the lack of control joints and the colour used having too low a light reflection value.

31 There is a variation of opinion in the experts about the adequate method of rectification in relation to the wall.

32 In his report, Mr Todarello has described the defects and provided photographs. However he has not detailed the method or methods of rectification in the body of the report. Instead he has simply included his costing and method of rectification in the Scott’ Schedule.

33 In the Scott Schedule attached to his report, Mr Todarello has stated that the following works need to be completed including:

> Remove all affected wall linings.
>
> ….
>
> Provide Structural repairs to the timer wall frames in order to strengthen the tall staircase wall

> ….
>
> Install new cladding to the walls; install ‘Rockcote’ to walls and paint.
>
> ….

34 Mr Todarello has allowed a total cost for rectification of $23,480.00 excluding builder’s margin and GST. No other details are provided in the report in relation to the method of rectification. In particular the reason for needing to strengthen the tall staircase wall is not identified in the body of the report and the report does not detail why that is required for rectification. In the main he adopts the report from Rockcote.

35 Mr Polobmo has detailed the method of rectification in both the body of his report and the Scott Schedule. He has allowed for costing both for the saw cutting of control joints and sealing the wall where appropriate and allowing for the painting of the wall in a lighter colour. The applicant made submissions that this was not a permanent solution and Mr Toderallo described it as “messy” and that it would not provide much difference in costing. Having considered the evidence of both experts, the Tribunal prefers the evidence of Mr Polombo. The method and cost of rectification in the Scott Schedule is consistent with what is described in the body of his report. He has allowed for an amount of $4,555.00 in total. Allowing for the agreed builders margin of 30% and GST of 10%, that totals an amount of $6,513.65. The Tribunal is satisfied that amount should be awarded to the applicant.

What was the scope of the contract and did the parties contract for the builder to carry out waterproofing and tiling of the deck so as to provide a dry storage area underneath?

36 This is a major point of contention between the parties. The applicant states that she advised the builder that she wanted a dry storage area under the deck. The respondent denies that this was agreed between the parties.

37 In her statement dated 28 October 2015 the homeowner gave evidence about a conversation she allegedly had with the builder on 31 January 2011, prior to entering into the contract

> I said: [In relation to the new deck] I would like the stairs to be hidden by a facade wall of equal height to the deck. I would prefer if the stairs could not be seen from the water. Is that possible?
>
> Mr Rogers said: Yes we can do that.
>
> I said: I would like to use the space underneath the deck for storage. The area will need to be dry as I have furniture and other two items which need to be protected. Can that be done?
>
> Mr Rogers said: Yes of course.
>
> I said: I would like the area on top of the dick to be tiled. Can the tiles be laid in a square pattern rather than a brick pattern?
>
> Mr Rogers said: Yes
>
> I said: I would prefer the tiles were flush against the house so the outside deck area is consistent with the design of the internal area which does not have skirting boards. Is this possible?
>
> Mr Rogers said: Yes that's fine.

> I said: At the ground level at the front of the deck I would like you to construct a door so that we can access the storage area underneath. Is that possible?
>
> Mr Rogers sad: Yes
>
> I said: I would prefer at the facade walls could be finished with a smooth cement render. Can that be done?
>
> [at this point during the meeting, I showed Mr Rogers and Jones a jar of red oxide (red oxide jar) which I purchased from the hardware store at Woy Woy.]
>
> I said: I would like the colour of the facade to be similar to this red oxide colour [holding up the red oxide jar]. Is that possible?
>
> Mr Rogers said: Yes. We can do that

38 In her statement Ms Woolley also refers to a handwritten note at the end of the site meeting which she gave to Mr Rogers and also took a photo of on her mobile phone. That note was provided to the Tribunal and has a diagram. In regards to the façade and the decking it relevantly states:

> Replace Deck with Hardi Panel compressed sheets (or similar CSR product) + new steps + 90cm extra + door at ground
>
> Tile over deck 300 x 300 we have found tiles and will order + pay directly
>
> Blueboard *(circled)*
>
> Façade - with Hardi Tex + cement render dark Red Oxide.
>
> Steps at side replace with wider timber
>
> Patch remainder of deck at back and side w/ good left overs

39 The quotation, which formed what appears the basis of the contract, is not explicit about the builder being responsible for a dry storage area. The quotation dated 20 January 2011 stated

> Deck Sheets, LVL beams and joists, hardwood stairs, tiling for deck, waterproofing, façade framing, blue board cement render with access gate - $36,800.00

40 The applicant makes submissions that it was an explicit part of the contract that the area underneath the deck would be used as a dry storage area and that as a result the deck needed to be waterproofed to a standard for internal areas and not external areas.

41 The respondent made submissions that as a matter of construction, there was no requirement under the contract for the builder to waterproof the decking so as to provide a dry storage area under the deck. They refer to the building code of Australia in which such an area is classed as a Class 10A structure, being a “non-habitable building, private garage, carport, shed or the like”. They make submissions that Part 2.2.2 (a) of the Building Code of Australia in relation waterproofing for internal areas does not apply to this case.

42 While the Tribunal accepts that the contract was partly oral and partly written, it does not accept at the time the parties contracted that they had agreed to a dry storage area underneath, even if it had been discussed earlier. The written evidence including the quote and handwritten note is consistent with the respondent’s evidence that Mrs Woolley wanted a replacement of the decking and that is what they contracted for. Even the certification which states that the waterproofing was done to a standard for

internal areas does not demonstrate what was contracted for between the parties. The Tribunal finds that it was not explicit in the contract that the area should be constructed so as to provide a dry storage area underneath, but simply replacement of the deck with an underneath area.

43 Moreover, the Tribunal is not satisfied that the evidence of the applicant has demonstrated on the balance of probabilities that the work is defective or that the defect is because of the works of the builder. Mr Todarello, the expert for the applicant stated that he observed water penetration to the joints within the dry storage area. He states that the waterproof membrane has failed. He suggests that the proposed rectification method of skirting tile would not solve the issue. He states that there is no waterproof membrane upturn installed at the base of the walls which is one reason why the waterproof membrane has failed. He also states that there is no stagger step down or control joints in relation to the 'Scycon' flooring. His proposed method of rectification is to demolish and remove all floor tiles on the balcony back to the substrate, remove the balustrade, remove the sliding doors and install a new hob and install new 'Sycon' sheeting. He also requires removal of the bottom rows of weatherboard and installation a fiborous cement backing board on the basis that it should not be done on weatherboard as it has. He also seeks installation of a new waterproof membrane to the entire deck including upturns to walls and to the hob. The amount allowed totals $24,150.00 excluding preliminaries, builders margin and GST. Ms Woolley also provided photographs on the second day of hearing which she claims showed rain went into the storage area.

44 In closing submissions the applicant made submissions that the deck had significant defects and that when it rains water leaks from the top of the deck through to the underneath and that

> the defects require a proper long term remediation to ensure the safety of occupants of the property, structural integrity of the deck and to permit the intended contractual use of the area underneath the deck as a dry storage area.

45 Mr Polombo for the respondent found no indications of high moisture when he tested with a protimeter mini 111. However, he did see staining to the underside, but found it to be dry when tested.

46 The respondent submits that the applicant has not discharged her burden of proving that the work was defective. They raise that Mr Todarello did not conduct water testing and his investigations are visual only. They also refer to the areas having large open cavities in the under areas and the fact that balustrades were installed and levelling works were undertaken by the applicant after the works and they may have interfered with the waterproofing.

47 The Tribunal agrees with the respondent that part 2.2.2(a) (Weatherproofing) of the BCA does not apply in this instance because the parties had not contracted for an internal storage area. The Tribunal finds that this is a class 10A storage area. Even if the water proofer has noted waterproofing for an internal area on his certification, the Tribunal is not satisfied that was a requirement under the contract. Generally, the report

of Mr Todarello lacks detail. On the cover page it is headed “preliminary building defects inspection and report’. Under the heading “methodology” at the outset of the report it states that a protimeter was used for the purposes of the inspection to determine the level of moisture, however no readings or references to any such tests were provided in the body of report. No flood testing was done. Even the evidence of water in the photographs provided by Ms Woolley on the second day, does not establish that the water is a result of defects by the builder or a breach of statutory warranty.

48 The Tribunal prefers the evidence of Mr Polombo in relation to this part of the claim. The Tribunal has found that this is a class 10A structure and that Mr Polombo undertook measurements and found no high moisture readings.

49 The Tribunal is not satisfied on the evidence of the applicant that the builder has breached his statutory warranty in relation to the waterproofing and the underneath area. The evidence certainly does not establish as is submitted by the applicant that the structural integrity or safety of the occupants is compromised. The report simply relies on what appears to be visual analysis in regards to water staining and levels. Moreover the photographs are not evidence of how water has appeared underneath the decking. The Tribunal is not satisfied on the evidence that the applicant has discharged her burden of proof in relation to the waterproofing and decking.

Internal Plywood Flooring

50 The applicant’s expert states the following in relation to the plywood flooring:

> The lime wash stain has not been protected with a coating such as polyurethane and has such deteriorated with only moderate foot traffic. The floor finish is clearly not suitable or fit for the purpose...

51 In the Scott schedule attached to his report, Mr Todarello, states that method of rectification is to re-sand the plywood, apply a new coating of lime wash and then two coats of compatible polyurethane. Photographs have been provided with the report. Mr Polombo also agrees that there is no protective covering on the lime wash paint.

52 The respondent states that the works were simply carried out as Ms Woolley requested and that she had wanted a “rough finish”. They state that the matters complained of are no more than fair wear and tear. Mr Rogers also stated that he offered to coat the lime wash, but that was rejected by the Ms Woolley. The Tribunal again finds that this is simply self-serving evidence given by Mr Rogers and is not satisfied that such an offer was made. In any case as mentioned previously it would not serve as a defence if it is found that there has been a breach of statutory warranty. The respondent also highlighted that the painter had returned to rectify the floor after complaints by Ms Woolley in relation to the finish.

53 Having considered the photographs the Tribunal is satisfied that the wearing that has occurred on the flooring is more than just fair wear and tear or a rough finish. The Tribunal is satisfied that the work was not done in a proper and workmanlike manner and the wearing is excessive, The Tribunal also finds that flooring is defective because

it has not been properly sealed. The parties agree on the cost of the method of rectification as $5,790.00. Allowing for an agreed builders margin of 30% and GST the Tribunal allows a total of $8,279.70 in relation to this part of the claim.

Efflorescence to Deck

54 This ground was not pressed at hearing, however was raised again by the applicant in final submissions. The evidence in relation to this matter from the applicant's expert is that there were leaching stains running down the walls and the applicant's expert suggests that the entire decking has not been installed in accordance with the installation guidelines and the waterproof membrane has failed. The Tribunal has found no breach of statutory warranty in relation to the membrane. Moreover, Mr Polombo has identified the staining as minor and the probably due to watering of plants on the balcony. The Tribunal finds no defect in relation to the minor markings and the Tribunal does not find a breach of statutory warranty in relation to that part of the claim.

External Door to Storage Area

55 The allegation in relation to this defect is that the external wood door which was installed on the underneath area was not suitable for use in areas where there is exposure to the weather. Mr Todarello states that the door has only two hinges where clearly it needed at least three. He also states that a more suitable material should have been used for the exposed conditions. Mr Polombo also found deterioration to the door due to extreme exposure. He noted that the door opened outwards and was exposed to elements.

56 Mr Rogers the builder stated that he had advised the owner that the door should not swing inwards, but his advice was rejected. Again that advice was not in writing and the Tribunal does not find this to be a defence on the part of the builder.

57 The Tribunal finds that the wooden door was not suitable for the weather exposed area and that it was not fit for the purpose. The Tribunal is also satisfied that the door should have been installed to open inwards. The Tribunal finds a breach of statutory warranty. There is a discrepancy between the experts in relation to the cost of replacement of the door. The applicant's expert has quoted based on a galvanised steel door and the Tribunal accepts his costing in relation to the door. The Tribunal finds in favour of the applicant for an amount of $1,890.00 plus a 30% builders margin and GST totalling an amount of $2,702.70.

58 The orders are made accordingly.

T Simon

Senior Member

Civil and Administrative Tribunal of NSW

12 February 2016

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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: 08 April 2016