Civil and Administrative Tribunal
New South Wales

Case Name:	Hamlin v Moll
Medium Neutral Citation:	[2020] NSWCATCD
Hearing Date(s):	13-14 July 2020
Date of Orders:	25 September 2020
Date of Decision:	25 September 2020
Jurisdiction:	Consumer and Commercial Division
Before:	Graham Ellis SC, Senior Member
Decision:	1 The respondent, Tony Moll, is to pay the applicants, Jamie Hamlin and Elizabeth Saran, $71,161.04 immediately. 2 On or before Friday 9 October 2020 any party wishing to apply for an order for costs is to file and serve the written submissions upon which they rely. 3 On or before Friday 23 October 2020 any written submissions in reply are to be filed and served. 4 Any such submissions are to include submissions on whether the party agrees that costs can be considered on the papers, without the need for a further hearing, pursuant to section 50(3) of the *Civil and Administrative Tribunal Act 2013*.
Catchwords:	BUILDING AND CONSTRUCTION - *Home Building Act 1989* - Statutory warranties - Defects - Damages - Claims for variations and credits - Liability for homeowners' warranty insurance
Legislation Cited:	*Civil and Administrative Tribunal Act 2013* *Evidence Act 1995* *Home Building Act 1989* *Home Building Regulation 2014*
Cases Cited:	*Alexander v Cambridge Credit Corp Ltd* (1979) 9 NSWLR 310

Bellgrove v Eldridge [1954] HCA 36
Brennan Constructions Pty Ltd v Davison [2018] NSWCATAP 210
Brewarrina Shire Council v Beckhaus Pty Ltd [2005] NSWCA 248
Brooks v Gannon Constructions Pty Limited [2017] NSWCATCD 12
Gallagher v Masters Installation Pty Ltd [2017] NSWCATAP 117
Green Apple Global Pty Ltd v La Brasserie Investments Pty Ltd [2018] NSWCATAP 90
Hadley v Baxendale (1854) 9 Ex 341
Haines v Bendall [1971] HCA 15
Hassell v Bagot Shakes & Lewis Ltd (1911) 13 CLR
Karacominakis v Big Country Developments [2000] NSWCA 313
Kurmond Homes Pty Ltd v Marsden [2018] NSWCATAP 23
Leung v Alexis [2018] NSWCATAP 11
Liebe v Molloy (1906) 4 CLR 307
Lumbers v W Cook Builders Pty Ltd (in liq) [2008] HCA 27
Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305
Mann v Paterson Constructions [2019] HCA 32
Nationwide Builders Pty Ltd v Le Roy [2019] NSWCATAP 220
Pacorp Holdings Pty Ltd v Waller [2017] NSWCATAP 167
Pavey & Matthews Pty Ltd v Paul [1987] HCA 5
Pender v Robwenphi Pty Ltd [2008] NSWSC 1144
Petropoulos v CPD Holdings Pty Ltd (No. 2) [2018] NSWCATAP 233
The Owners – Strata Plan 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067
Wheeler v Ecroplot Pty Ltd [2010] NSWCA 61

Category:	Principal judgement
Parties:	Jamie Hamlin and Elizabeth Saran (Applicants) Tony Moll (Respondent)
Representation:	Counsel: Mr J Adamopoulos (Applicants) Ms M Fraser (Respondent) Solicitors: Mr M Birch, Birch Partners (Applicants) Mr A Robinson, Fielding Robinson (Respondent)

File Number(s): HB 19/44398

Publication Restriction: Nil

REASONS FOR DECISION

Outline

1 These proceedings arise from a building contract dated 08 May 2016 between Jamie Hamlin and Elizabeth Saran (the owners) and Tony Moll (the builder) for the construction of single-storey residential premises (the house) on land at Peakhurst (the site). The contract was in the form of a NSW Fair Trading contract for residential work over $20,000 and the contract price was $555,220. There are claims made under a variety of headings, including defects, variations and credits.

Jurisdiction

2 "*Residential building work*" is defined in Schedule 1, clause 2(1)(a) of the *Home Building Act 1989* (the HBA) to include work involved in the construction of a dwelling. Further, since these proceedings relate to carrying out "*residential building work*", the definition of "*building goods or services*" in section 48A of the HBA is satisfied. Thirdly, since these proceedings involve both a claim the payment of a specified sum of money and for the supply of "*building goods or services*", they involve a "*building claim"* within the meaning given to those words by section 48A of the HBA.

3 The upper and lower money limits also need to be considered. Clearly, the claims in these proceedings are above the threshold of $5,000 for a building claim set by Schedule 1 Clause 2(3)(a) of HBA and clause 12 of the *Home Building Regulation 2014* (the Regulations) and are less than the ceiling of $500,000 set out in section 48K of the HBA. As the application suggested the subject building work was completed on 28 August 2017 and the Occupation Certificate was issued on 20 November 2017, when the owners commenced proceedings on 11 July 2018 they were commenced within the time limit imposed by section 18E. Accordingly, the Tribunal has jurisdiction in relation to this application.

Exhibits

4 During the course of the hearing, the following documents became exhibits:

Exhibit	*Description*
A	Paginated bundle of documents, ie tender bundle
B	AS 2047 - 2014
C	AS 1288 - 2006
D	25 March 2020 letter, Fielding Robinson to Birch Partners

Documents marked for identification

5 During and after the hearing, the following documents were marked for identification (MFI):

MFI	*Description*
1	Builder's objections to evidence
2	Builder's opening submissions
3	Owners' opening submissions
4	Owners' closing submissions
5	Builder's submissions in reply
6	Builder's closing submissions
7	Owner's submissions in reply

Witnesses

6 Save for Mr Birch, each of those witnesses identified below was cross-examined:

	Applicant	*Respondent*
Lay	Jamie HAMLIN/SARAN Michael John BIRCH	Tony MOLL Robert SARIC
Expert	Garry ATTWOOD Mario BOURNELIS Anthony GRAMLICK	Anthony CAPALDI

7 The owners have been permitted to rely on the affidavits of Mr Birch dated 07 July 2020 and Mr Hamlin dated 08 July 2020 which were served shortly prior to the commencement of the hearing on 13 July 2020 in reply to evidence that was by the builder shortly prior to the intended hearing on 30 March 2020 which caused that hearing to be adjourned. A consideration of those two affidavits reveals their contents to be in reply, it is noted that both deponents were available for cross-examination and that there was adequate time prior to the hearing for those affidavits to be considered.

Objections

8 Despite the fact that section 38(2) of the Civil and Administrative Tribunal Act 2013 (the CATA) provides that "The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice", 16 pages of objections, containing more than 200 objections to more than 180 portions of the owner's evidence were lodged and the builder's counsel not only sought a ruling on those objections but also requested reasons for such rulings.

9 The Tribunal resists the temptation to disregard those extensive objections on the ground that the Tribunal is not, by statute, bound by the rules of evidence and in view of the extraordinary number of items that are in dispute in these proceedings, including issues in relation to which the collective cost of the solicitors and counsel must outweigh the amount in issue. Instead, an outline of the Tribunal's approach to the evidence follows.

10 In each case, the evidence is allowed since the Tribunal is allowed to "*inform itself on any matter such as it thinks fit*" but with the following caveats so as to contain that breadth within "*the rules of natural justice*". First, the Tribunal accepts that a conclusion by an expert that is not supported by factual basis and adequate reasoning or corroborative evidence should not be accepted. Secondly, only relevant evidence has been taken into consideration and for evidence of marginal relevance it is necessary to consider what weight should be given to such evidence. Thirdly, argumentative evidence, if considered, is

only considered as a submission. Fourth, no reliance has been placed on handwritten annotations unless the author has been identified or evidence to that effect has been provided.

11 Fifth, the objections based on section 136 of the *Evidence Act 1995* are rejected on the ground that the Tribunal is not bound by the rules of evidence. As to the evidence to which those objections related: documents issued by NSW Fair Trading are considered as evidence of their contents; in relation to the 10 July 2017 letter from the owner to the builder, its contents are treated as providing observation evidence but not expert opinions. Sixthly, hearsay evidence is allowed but is subject to a consideration of what weight should be given to it.

12 Next, the fact that evidence is given in relation to a matter that is not now in dispute does not warrant the exclusion of that evidence. Finally, where a lay witness provides evidence of on a matter for expert evidence that evidence is received but not given weight if it is a matter that requires the qualifications or experience of an expert.

Issues

13 The issues between the parties may be gathered under a numbered of headings: (1) repudiation, (2) aluminium windows and doors, (3) other defect claims, (4) variations, (5) asbestos, (6) other claims for credits, (7) other claims, with a resulting need for (8) a quantification of what amount is payable.

Repudiation

14 This issue only arose obliquely in the pleadings. In response to an allegation in the Points of Claim that the builder handed over the works to the owners on or about 28 August 2017 (A9, [8], ie paragraph 8 on page 9 of Exhibit A), the response in the Points of Defence was an allegation that the owners took possession of the works on 23 August 2018 without the builder's prior knowledge or consent (A19, [8]). Even allowing for the Tribunal being obliged

(by section 3(d) of the CATA), to proceed "*with as little formality as possible*", that cannot be considered a satisfactory way to raise an issue as significant as repudiation.

15 It is necessary to consider the evidence relevant to this issue, both the written and oral evidence (ie evidence-in-chief and cross-examination). According to Mr Hamlin:

(1) After locks were installed late in 2016, Mr Moll held a number of keys but did not deal with them in a secure fashion. As a result, although Mr Hamlin was provided with a key, he wished to change the locks instead of retrieving all the keys (A603-604, [24]).

(2) He had a conversation with Mr Moll in mid-August 2017 in which Mr Moll said: "*I'm pretty much finished – there's nothing left for me to do*" and that he had no objection to the owners changing the locks and moving in (A27-28, [15]).

(3) He then made arrangements for the locks to be changed on 28 August 2017 (A28, [16] and A84).

(4) The following day Mr Moll sought access (A28, [17] and A85).

(5) The owners moved into the house on 06 September 2017 (A28, [18]).

(6) The Occupation Certificate was issued on 20 November 2017 (A86).

(7) That certificate was first sought by Mr Hamlin on 09 August 2017 (A604, [25] and A717-719).

16 The cross-examination of Mr Hamlin did not detract from those matters.

17 Relevant to this issue, Mr Moll's evidence was to the following effect:

(1) By August 2017 the work had reached practical completion (A466, [87]).

(2) Although Mr Moll did not issue a Notice of Completion at that time, he conceded during cross-examination that he should have.

(3) He had a conversation early in August 2017 with Mr Hamlin about moving items into the garage (A466, [89-90]).

(4) There was no internal work left to be done by then (A466, [95]).

(5) Mr Hamlin did not need to change the locks: he already had a key (A466, [96]).

(6) Mr Moll suggested he applied for the Occupation Certificate (A466, [97]).

(7) He left the site in mid-August 2017 but attended the site the day the balustrades were installed, on 29 August 2017 to look at the water tank and he met with the person who did the driveway crossing (A467, [101-103]).

(8) Mr Moll conceded, in cross-examination, that those aspects involved external work which did not require access to the house.

(9) He also conceded, in cross-examination, that the owners could live in the property without the remaining (external) work being completed.

18 The contemporaneous documents (A717-719) suggest Mr Moll is mistaken in claiming he applied for the Occupation Certificate. That provides a reason for preferring the evidence of Mr Hamlin on this issue. Further, despite Mr Moll denying (A467, [98]) the conversation alleged by Mr Hamlin, the Tribunal prefers the evidence of Mr Hamlin since: (1) Mr Moll conceded the internal work was complete at that time and that he did not require access to the house, and (2) the evidence of Mr Hamlin, not challenged in cross-

examination, was that he and Mrs Hamlin would soon need to move out of the property they were renting (A27, [15]) and (3) the evidence of Mr Hamlin, not disturbed by cross-examination, was that he had concerns about the security of the house due to the manner in which Mr Moll dealt with the keys (603, [24]). Although Mr Moll sought to contest that last issue, he gave a telling answer when he agreed that there were times, after the locks were installed, that he left the house first. Those three numbered matters provide reasons why the owners would wish to move into the house and not just the garage and thus provide support for Mr Hamlin's version of the conversation.

19 In the light of that evidence, the Tribunal makes the following findings of facts relevant to this issue:

(1) On 28 August 2017 Mr Hamlin changed the locks for the house.

(2) At that time the builder had no internal work remaining to be done.

(3) That change of locks occurred following a conversation with Mr Moll.

(4) During that conversation, Mr Moll did not object to changing the locks.

(5) On 06 September 2017 the owners moved into the house.

(6) After the locks were changed, Mr Moll attended the site.

(7) Each of those attendances related to external work.

(8) Mr Moll was never denied access to either the site or the house.

(9) On 09 August 2017 the owners applied for an Occupation Certificate.

(10) An Occupation Certificate was issued on 20 November 2017.

20 In written submissions, the builder's case was put on the basis that (1) in August 2017 the owners changed the locks and moved into the house, (2)

that was without the builder's consent, (3) that was without the builder giving notice of completion under clause 8 of the contract, and (4) the owners did not have an Occupation Certificate until 20 November 2017. In view of the findings of fact set out above, the second of those contentions is rejected. As to the third, the builder conceded he should have issued a Notice of Completion at that time. In relation to the fourth, the builder conceded that the owners could live in the house at the time when they did.

21 Those written submissions made on behalf of the builder suggested that if there was no repudiation by the owners then the contract remained on foot, the owners have not suffered damage and their claim should be dismissed. The judgement of the Court of Appeal in *Brewarrina Shire Council v Beckhaus Pty Ltd* [2005] NSWCA 248 was cited in support of those propositions. However, that was a case where the builder had not reached practical completion and still had possession of the site unlike these proceedings where the builder had reached practical completion and the owners had possession of the site.

22 On this issue of whether there was repudiation by the owners, the Tribunal finds in favour of the owners for a number of reasons:

(1) The conduct of the owners, in changing the locks and moving into the house, cannot be said to indicate any intention to no longer be bound by the contract but was a step taken after ascertaining that the builder had no objection to that conduct.

(2) By reason of clause 19 of the contract (A66), the owners were not required to provide possession of the site to the builder, only access, and access was provided. Indeed, changing the locks and moving into the house did not impact on the builder at all since the internal work was complete and the small amount of remaining work was all external.

(3) There is no evidence that the builder elected to accept the alleged repudiation and treat the contract as having been brought to an end since he elected to continue with the building work.

(4) Even if there was repudiation by the owners and termination by the builder, the owners would still be able to pursue their claim for damages in relation to defective work and the written submissions of both parties did not contend otherwise.

23 In short, the builder's allegation of repudiation by the owners fails on the facts: the owners only acted after consulting the builder and both parties proceeded on the basis that the obligation of the builder to complete the work the subject of the contract continued, unaffected by the conduct of the owners in changing the locks and moving into the house.

Aluminium windows and doors

24 This is a wide-ranging issue that was explored in considerable detail before, during and after the hearing, and now needs to be determined, with supporting reasons. It is necessary to first outline a brief chronology established by the evidence and then consider what defects have been proved before moving to the application of section 48MA of the HBA, ie the question of whether the appropriate remedy is a work order or an award of damages.

25 The builder obtained the windows and doors from Rainbow Aluminium Windows & Door Pty Ltd (Rainbow). From the evidence, the following chronology relevant to this issue emerges:

20 Mar 16	Owners allege discussion of windows with builder (A614)
08 May 16	Builder's tender to owners (A77-80)
11 May 16	Contract signed by the parties (A26, [7])
23 May 16	Building work commenced (A27, [12] and A463, [22])
10 Jul 17	Notice of defects in windows sent to the builder (A100-105)
Jul-Aug 17	Rainbow carried out repair work on two occasions (A34, [43])
03 Aug 17	1st report of Mr Attwood (A132)
28 Aug 17	Owners changed the locks for the house (A28, [16])

06 Sep 17	Owners moved into the house (A28, [18])
19 Sep 17	Rainbow provided letter in relation to windows and doors (A131)
Nov 17	Water leaked through windows during rainstorm (A35, [46])
20 Nov 17	Occupation Certificate issued (A86)
23 Nov 17	Owners refused access to Rainbow until evidence of compliance with AS2047–2014 was provided (A753-754)
16 Mar 18	Rectification order made by NSW Fair Trading (A96-99)
26 Mar 18	1st Azuma test report (A180)
28 Mar 18	2nd Azuma test report (A384)
04 Apr 18	Builder's lawyer said waiting for response from Rainbow (A753)
04 Apr 18	Owners replied, noting Rainbow letter, already provided, referred to AS2047-1999, not 2014, and that they had already provided a report indicating non-compliance (A754)
24 Apr 18	3rd Azuma test report (A201 or A363)
30 Apr 18	4th Azuma test report (A190 or A373)
01 May 18	Those reports were provided by Rainbow to Fair Trading (A361)
11 May 18	Deadline for compliance with Rectification Order (A99)
20 May 18	Azuma reports provided to owners (A610, [43e])
12 Jun 18	2nd report of Mr Attwood (A170)
08 Aug 18	1st report of Mr Bournelis (A216)
26 Nov 18	2nd report of Mr Bournelis (A272)
28 Nov 18	Report of Mr Gramlick (A343)
Jan 20	Report of Mr Capaldi (A398)
27 Feb 20	Meeting of expert witnesses at the house (A446)
16 Mar 20	Joint Report provided by those expert witnesses (A446-460)

26 Section 18B(1) of the HBA contains the following statutory warranties in relation to residential building work and clause 9 of the contract mirrors the wording of those warranties:

> *(a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,*
>
> *(b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,*
>
> *(c) a warranty that the work will be done in accordance with, and will comply with, this and any other law,*
>
> *(d) a warranty that the work will be done with due diligence and within the time stipulated in the contract or, if no time is stipulated, within a reasonable time,*

(e) a warranty that, if the work consists of the construction of a dwelling, the marking or alternations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes know to the holder of the contractor licence or person required to hold a contractor's licence, or another person with express or apparent authority to enter into or vary any contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires that work to achieve, so as to show that the owner relies on the holder's or person's skill or judgment."

27 Further, clause 3(a) of the contract included a requirement that the builder *"comply with all relevant Australian standards*".

28 In order to make a determination in relation to defects in the aluminium windows and doors, it is necessary to first consider the evidence of the relevant witnesses.

29 There are three aspects of the evidence of Mr Moll in this area that need to be noted. First, he said the aluminium windows and doors were supplied by Rainbow and were installed by the bricklayer (A124, [2]). He conceded in cross-examination that he had problems with that bricklayer against whom he commenced proceedings and obtained an order for damages of $66,670.51 (A522).

30 Secondly, Mr Moll sought to suggest that Rainbow "*attended and performed a preliminary service before the rain storm"* (A470, [142]). Such evidence omits the fact that Rainbow's attendance followed a defect notice sent to Mr Moll on 10 July 2017 (A100-105).

31 Thirdly, Mr Moll included the following words in his affidavit in reply (A470, 154):

> *There was toughened 5mm glass in the doors. There was 5mm glass in the windows. I have been dealing with Rainbow for over 30 years. They are a reliable supplier. For many years now, they have supplied 5mm glass. They do not supply products using less than 5mm glass.*

32 That evidence was contradicted by Rainbow's Mr Saric who indicated that the windows W01, W04 and W10 were 4mm standard glass (A586, [9]). Further, the builder's written submissions (MFI 6, [3.17.6]) added that the top panes in windows W07, W08, W09, W13 and W14 were 4mm standard glass. That concession is in contrast with the 01 May 2018 letter of Mr Saric (A361) which, in relation to a suggestion that those five windows contained glass that was only 4mm thick, asserted: *"We do not have anything less than 5mm in fixed panels cut and delivered by our suppliers*". It is convenient to here note that the location of the windows with those references is readily ascertainable from one of the floor plans (A486).

33 As a result of the three matters referred to above, it is clear that the evidence of Mr Moll should be treated with caution to the point that the Tribunal is not prepared to accept his uncorroborated evidence.

34 Mr Saric provided two affidavits (A581 and A585). In the first, he provides hearsay evidence of being refused access by the owners after the Rectification Order was issued in March 2016 (A582, [7]). As was the case with Mr Moll's evidence, Mr Saric did not refer to the unsuccessful rectification work done by Rainbow following the 10 July 2017 notice of defects. He suggested the problems are minor and can be rectified without removing the windows with the result that the existing windows do not need to be replaced and that Rainbow is willing to attend to any issues relating to the windows and doors. In his second affidavit Mr Saric concedes the bathroom windows and windows W1, W4 and W10 were only 4mm thick (A586, [7] and [9]).

35 In cross-examination, Mr Saric indicated that Rainbow is a supplier, not an installer. Although not an independent expert, Mr Saric indicated that he has 25 years' experience in the industry. Despite that experience, he had to admit that his 19 September 2017 letter (A131), which referred to the 1999 version of AS2047, should have referred to the 2014 edition. Further, his 01 May 2018 letter (A361) incorrectly suggested that 4mm thick glass was 5mm thick. Moreover, the evidence (considered below) reveals not insignificant differences between the windows that were installed and those sent to Azuma for testing. The Tribunal considers the evidence of Mr Saric must also be treated with caution.

36 Mr Hamlin's first affidavit (A25) covered the sequence of the July 2017 defects notice, the repairs by Rainbow, the November 2017 rainstorm and the March 2018 Rectification Order. His second affidavit (A592) included evidence (at [8]) that, on or about 20 March 2016 at his then residence in Earlwood, he showed Mr Moll the windows there and indicated that was they quality the owners were seeking. Subsequently, in mid-July 2016 when the windows arrived on site, he said he expressed concern about them. He indicated the repairs or rectification work done by Rainbow on two occasions in August 2017 (at [57]).

37 Combining [58] and the 23 November 2017 emails (A753-754) reveals that the owners' denial of access to Rainbow was based on the poor work done in August 2017, the failure to demonstrate the windows complied with AS2047-2014 and a report they had obtained suggesting non-compliance with that performance standard which was required by the contract. Cross-examination revealed the Azuma reports were not provided to the owners until after the deadline set by the Rectification Order despite being provided to the builder before that deadline.

38 Before going to the evidence of the expert witnesses, the four reports from Azuma (ie Azuma Design Pty Limited) need to be considered. (The locations of those reports in Exhibit A and their dates are included above in the

chronology. The builder's submission (MFI 5 at [15]) that there are only three such reports in evidence is incorrect.)

39 Although the purpose of those reports was to test whether the windows and doors supplied by Rainbow for the owners' house complied with AS2047-2014, the Tribunal is satisfied that there were significant difference between what was tested and what was installed in relation to drainage holes, transom stiffener and mullion stiffener. Mr Saric accepted that interlocks and transom stiffeners were omitted from what was installed (A583, [18]). Secondly, even overlooking the fact that the Azuma tests related to a non-airconditioned environment, the 30 April 2018 report (at A194) revealed *"water leaking over sill into Transom and also from bottom Joints all along Low Lites after 1 minute*". Thirdly, the Joint Report (considered below) contains the words: "*Experts agree that the windows and sliding doors are not what is indicated in the drawings of the Azuma test reports AZT0161.18."* By reason of those three aspects, the Tribunal does not accept that the Azuma reports demonstrate that the installed windows and doors complied with AS2047-2014.

40 The comments appearing in the Joint Report (A450-457) reveal the following matters on which all four experts (Messrs Attwood, Bournelis, Capaldi and Gramlick) agreed:

(1) *"ingress of water occurred within 1-2 minutes to windows tested, regardless of transom stiffeners"*

(2) *"items raised regarding the leaking windows and Laundry sliding door are more than likely due to design and manufacturing issues"*

(3) *"the windows and sliding doors are not performing as expected for new installations"*

(4) *(as noted above) "the windows and sliding doors are not what is indicated in the drawings of the Azuma test reports AZT0161.18*

(5) *"Windows and sliding doors affected include East Elevation, West Elevation and South Elevation. Windows to the front elevation can remain on the assumption that new windows will match."*

41 Despite those areas of agreement, the first day of the hearing was taken in cross-examination of three of those four experts plus Mr Saric. For the sake of completeness, the evidence of each of the four experts is summarised below.

42 In his first report that was dated 03 August 2017 (A132) Mr Attwood, contrary to the builder's submissions, identified a number of defects, including (1) gaps allowing excessive air flow, (2) lightweight componentry, (2) poor manufacturing, (3) unacceptable attempts to modify sliding doors, and (4) glazing not of the required 5mm thickness.

43 Mr Attwood's second report (A170) was dated 12 June 2018. It notes a number of areas of non-compliance indicated in Azuma's 1st, 3rd and 4th reports. He also noted the absence of mandatory labels on the windows and doors which should indicate: (1) the manufacturer's identification mark, (2) the serviceability limit state wind pressure (SLS), (3) the ultimate state wind pressure (ULS) and the water penetration resistance, being labels required by the National Construction Code (NCC) and Australian Standards AS2047-2014 and AS1288-2006. After noting that the tested windows and door differed from what was installed, Mr Attwood expressed the view (A174 [53]) that without those differences the windows would have failed the tests conducted by Azuma.

44 Cross-examination of Mr Attwood revealed that the area which Azuma recorded as leaking after 1 minute should be able to handle water for 15 minutes without leaking and that, based on his experience, adding drain holes may not solve the problems they are intended to address.

45 The matters that have been noted above in relation to Mr Attwood's evidence were not explained away by the builder's submissions and Mr Attwood's resume revealed him to be an Australian Window Association Inspector and Accredited Auditor with 50 years of experience in the field of windows. His evidence is accepted.

46 Mr Bournelis, a building expert with almost 40 years of industry experience, provided two reports. They were dated 08 August 2018 (A216) and 26 November 2018 (A272). In his first report, he expressed the view that the aluminium windows and doors are of substandard finish and allow moisture, wind and vermin to enter the house. He also recorded poorly installed screws, the use of large amounts of silicone and noted that the water ingress breached the requirement of weatherproofing in Section 2, Part 2.2.2 of the NCC. Like Mr Attwood, Mr Bornelis considered the installed windows and doors differed from what was provided for testing by Azuma. His views in relation to labelling and the water leaking after only one minute accord with those of Mr Attwood. He also noted a sliding door that was 10mm (1 cm) out of alignment.

47 In his second report, Mr Bournelis indicated that, when he used a hose at an angle, it took only 30 to 40 seconds for water to enter on the inside of a window and he observed water still sitting in the bottom tracks of the windows 45 minutes later which indicated inadequate drainage. He also observed gaps in the corners or windows and sliding door assembles large enough to "*allow the ingress of bugs*" and a bow in the bottom track of the sliding door to the laundry. Mr Bournelis also observed the absence of mandatory labels on the windows and doors, rendering them non-compliant with AS2047-2014 and the NCC: section 3.6 – Glazing (in Volume 2). Mr Bournelis included in his second report the definitions of ULS and SLS: the former measuring peak design load and the latter the routine/everyday loading.

48 During cross-examination, Mr Bournelis expressed the view that if the windows are to be replaced then new flashings would be needed. The matters raised on behalf of the builder, during that cross-examination and in

the subsequent written submissions, did not overcome his observations and opinions summarised above.

49 Mr Gramlick is an engineer with 40 years of experience who was requested to provide an opinion in relation to the SLS and ULS of sliding doors and windows and the results from his calculations, contained in a report dated 28 November 2018 (A348), revealed (at A397) an SLS result of 265 Pa (ie Pascals, a unit of pressure equivalent to the pressure exerted by 1 kg mass on an area of 1 sqm) for the sliding door and 280 Pa for the transom window, neither of which met the required standard of 400 (increased to 600 for corner windows).

50 Objection was taken to Mr Gramlick's evidence on the basis that he referred to an AWA calculator that was "*not in evidence and is unknown*". He was not requested to be available for cross-examination. If the Tribunal were bound by the laws of evidence, then an application of the observations of Heydon JA in *Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305* might weigh against the admission of the results of Mr Gramlick's calculation.

51 However, Mr Gramlick was calculating the ULS and SLS which are standard measurements used to determine the quality of windows and doors and are required by the NCC and AS2047-2014 to be on mandatory labels. He has disclosed the method he used to obtain his results. The builder used Azuma to obtain test results and Mr Gramlick's calculations were said to have been based on the Azuma test reports.

52 The Tribunal favours the reception of his report and its contents, noting that the report was dated 28 November 2018 with the result that there was ample time for the builder to respond to this report if he so desired. As will presently appear, a rejection of the evidence of Mr Gramlick would not produce a different result in these proceedings. It is convenient to here note that there was lay evidence consistent with what Mr Gramlick's calculation suggests, namely that the windows fail a test of their ability to withstand everyday wind

pressure loads: Mr Hamlin provided unchallenged evidence that "*During medium strength wind the windows and doors rattle*" (A35, [44]).

53 Mr Capaldi is a building expert with 31 years of experience, but he conceded he is not a glazing specialist. His January 2020 report (at A398) suggested: *"In my opinion, none of the windows or doors are defective as alleged in the AWA and Bournelis reports.*" That statement appears to have been overtaken by the conclave which resulted in a Joint Report. He also suggested: *"I am of the opinion that in most instances, the defects in relation to gaps and water ingress can be rectified and addressed in situ" (emphasis added).* The fact that he included the underlined words is telling. He quoted the certification provided by Rainbow in its 19 September 2017 letter but did not note the reference in that letter superseded version of AS2047. Mr Capaldi asserted (A410 at 10): "*From the four reports undertaken by Azuma, there was no failure in the testing for the five major testing regimes"* but did not refer to the failure but did not refer to the water leak, referred to in the 30 April 2018 report, that occurred after 1 minute. Those matters weigh against an unqualified acceptance of Mr Capaldi's evidence.

54 In paragraph 10 of his report (A410), Mr Capaldi concedes that the allegation that the componentry is 'lightweight' may be correct but suggests testing revealed fitness for purpose and satisfaction of Australian Standards. That opinion overlooks the differences between what was tested and what was installed, which he conceded during cross-examination. Further, it is clear that Australian Standards were not met. Although Mr Capaldi indicated there were stickers on the sliding doors (A407, [24]), they were glazing labels and not what was required by AS2047.

55 During his cross-examination, Mr Capaldi made appropriate concessions, such as the need to improve drainage of the windows. It is noted Mr Capaldi's report and cross-examination also provides evidence relevant to the issues of repair or replace and quantum, considered below.

56 Having regard to the evidence, the submissions and, in particular, the matters on which the Joint Report (A450) records all four experts agreed, the Tribunal makes the following findings:

(1) The aluminium windows and doors were not labelled as required by AS2047-2014.

(2) Water ingress occurred within 1 to 2 minutes of testing, regardless of transom stiffeners.

(3) Additional stiffeners to window transoms are unsightly.

(4) The leaking that has occurred is primarily due to design and manufacturing issues.

(5) The windows W01, W04 and W10 contained standard glass 4mm thick.

(6) The glass in the top panes of windows W07, W08, W13 and W14 was 4mm thick.

(7) The ingress that occurs is not confined to water but includes air, dust and vermin.

(8) As a result, the aluminium windows and doors are not performing as it is reasonable to expect them to perform.

(9) A contributing factor is the post-installation work undertaken by or for the builder.

(10) That work reveals sub-standard workmanship which includes the use of excessive amounts of silicone, failing to achieve proper alignment and screw holes which involve damage to powder coated surfaces.

(11) The aluminium windows and doors that are affected are those on the east, west and south elevations of the house.

(12) The aluminium windows and doors installed differ from those tested by Azuma in material respects.

(13) Some of the componentry used was 'lightweight'.

(14) As a result, the aluminium windows and doors are unable to adequately withstand everyday wind pressure loads with the result that the windows and doors rattle during medium strength winds.

57 Although Mr Moll conceded in cross-examination that, prior to signing the contract, the owners probably showed him the windows at the Earlwood property they were living in at that time and said they wanted the same quality, those concessions, coupled with the evidence on that aspect from Mr Hamlin, does not materially add to the basis of the owners' claim in these proceedings. In particular, the evidence is insufficient to warrant a finding that there has been a breach of the statutory warranty provided by section 18B(1)(f) of the HBA.

58 In view of those findings, the Tribunal considers a number of defects have been proved by the owners to involve breaches of section 18B of the HBA.

59 First, contrary to the NCC and section 8.2 of AS2047-2014, none of the aluminium windows or doors contained a label showing the manufacturer's identification mark, the serviceability limit state wind pressure, the ultimate state wind pressure and the water penetration resistance. Since an Australian Standard does not have the force of law, that alone does not constitute a breach of paragraph (c) but it does satisfy the Tribunal there has been a breach of paragraph (a), consistent with what was said in *Wheeler v Ecroplot Pty Ltd* [2010] NSWCA 61 at [10]. However, as the NCC does have the force of law, a breach of its provisions is a breach of paragraph (c). In any event, that labelling failure also constitutes a breach of clause 3(a) of the contract which required the builder *"comply with all relevant Australian standards".*

60 Such labels are not as formality: sub-standard windows would obviously not become satisfactory by the mere affixation of a label. The lack of such labels

carries the suggestion that the requirements of the AS2047-2014 have not been considered during manufacture and installation.

61 Secondly, the ingress of water, air, dust and vermin warrants a finding there has been a breach of not only paragraph (a), as a result of a failure to exercise due care and skill, but also paragraph (b) in that the windows and doors in question are not suitable for purpose.

62 Thirdly, another breach of the same two paragraphs is establish by the windows and doors having been made with 'lightweight' componentry and being unable to adequately withstand everyday wind pressure loads with the result that the windows and doors rattle during medium strength winds.

63 Fourthly, the above finding of sub-standard workmanship involves a breach of paragraph (a) since that is the result of a lack of due care and/or skill.

64 Before proceeding to consider the issue of rectification or replacement and section 48MA of the HBA, the Tribunal considers the allegation that the owners refused the builder and Rainbow access to carry out rectification work. A consideration of this issue is aided by reference to the chronology set out above.

65 After the windows supplied by Rainbow were installed in July 2017, and the evidence suggests that installation was by the builder's bricklayer, Rainbow came to the house to carry out rectification work. That appears to have been late July or very early August since Mr Attwood's 1st report, dated 03 August 2017, refers to matters of workmanship. If that rectification work was not completed by 03 August 2017 then it was completed by 28 August 2017 when the owners changed the locks.

66 Accordingly, by the time the owners moved into the house on 08 September 2017, the question of whether there was compliance with the NCC, AS2047-

2014 and AS1299-2006 had been raised by their expert along with some of the glass not being 5mm thick. On 19 September 2017 Rainbow provided a letter which asserted compliance with "*AS2047-1999*" (sic) and said that "*all doors have been glazed with 5mm clear toughened glass*" but did not refer to windows.

67 Any comfort that letter may have provided to the owners was lost just over a month later when, in November 2017, water leaked through the windows during a rainstorm. On 20 November 2017 an Occupation Certificate was issued. On 23 November 2017 there was an exchange of emails (Rainbow to builder, builder to owners, owners to builder) in which the owners not so much denied access but delayed access by requiring evidence from Rainbow that it had complied with AS2047.

68 The Tribunal considers that reasonable since (1) the initial work in July had required repairs, (2) an expert had advised the owners in August that the work did not comply with AS2047, (3) there were no labels on the windows to suggest compliance with AS2047, (4) the letter from Rainbow in September was not sufficient, and (5) the windows had leaked during a then recent rainstorm.

69 In those circumstances, it is not surprising the owners took the matter to NSW Fair Trading. The result was a Rectification Order dated 16 March 2020 which set a deadline of 11 May 2020. Although the first report from Azuma was dated 26 March 2018, less than two weeks after the Rectification Order, there is no evidence of either why it took more than four months from 23 November 2017 (when the owners made a request for evidence of compliance) to obtain that report or why it was necessary to obtain three further reports.

70 After the second Azuma report dated 28 March 2018, on 04 April 2017 the builder's lawyer said he was waiting on a response from Rainbow. A same

day reply from the owners reminded that they had already provided a report indicating non-compliance. It was not until around three weeks later that the third Azuma report dated 24 April 2018 was issued and that was followed by a fourth report, dated 30 April 2018.

71 The following day, on 01 May 2018, Rainbow provided copies of those reports to Fair Trading under cover of a letter which: (1) suggested "*we address the matters of concern on the rectification order as follows*", (2) went on to say, in relation to no-compliance with AS2047-2014 "*please review your information as it is incorrect*", and (3) claimed, in relation to the suggestion that the glass in windows 7,8,9,13 and 14 is only 4mm thick: *"We do not have any 5mm panels cut and delivered to our suppliers"*.

72 It was not until 20 May 2018, almost three weeks later and more than a week after the deadline set by Fair Trading expired, that copies of the Azuma reports were provided to the owners and the evidence does not contain any explanation why those Azuma reports were not provided to the owners earlier, given that the owners had indicated a willingness to provide access if such reports were provided.

73 A letter dated 25 March 2020 from the builder's solicitors was sent to the owners' solicitor (Exhibit D), suggesting Rainbow was willing to undertake rectification but did not indicate what rectification work was going to be done. That letter was not sent until after the 16 March 2020 Joint Report was available: a report that indicated agreement on a number of aspects and raised the prospect of a not insignificant amount being awarded in damages. Further, that letter did not suggest any willingness on the part of the builder in relation to rectification.

74 Moreover, that letter included an assertion that these proceedings could not proceed by way of telephone hearing which, combined with the belated suggestion of rectification work, gives the impression that the object of the letter was not so much rectification but avoiding the hearing. Indeed, the builder filed five affidavits, three dated 24 March 2020 and two dated 27

March 2020 which caused the hearing scheduled for 30-31 March 2020 to be adjourned.

75 The Tribunal considers the non-acceptance of that offer by the owners to be reasonable in view of matters which include (1) the history of the matter, (2) the differences between what was installed and what was tested by Azuma, (3) the contents of the Joint Report, (4) the offer having the effect of taking the builder "out of the picture", and (5) the fact that the owners would be able to achieve finality through a Tribunal hearing not long after the date of that letter, noting that these proceedings were, at that time, listed for hearing on 30 and 31 March 2020.

76 During the hearing, when it was put to Mr Moll that he did not convey how he was going to rectify the windows, his response was: "*Well, that's up to Rainbow Aluminium*". It would thus appear that Mr Moll left the matter in the hands of Rainbow during the period from 23 November 2017 until 25 March 2020.

77 Far from suggesting the owners acted unreasonably, that sequence of events satisfies the Tribunal that the owners acted reasonably and that the builder acted unreasonably. If the builder had acted reasonably, he would have arranged with Rainbow for a report to be obtained promptly from Azuma so that the barrier to access would be removed and rectification work could be finalised.

78 *Hassell v Bagot Shakes & Lewis Ltd* (1911) 13 CLR 374 at 388 per O'Connor J suggests that the owners are not entitled to recover for losses that are attributable to their own unreasonable conduct. However, that principle has no application on the evidence in these proceedings. The onus is on the builder to establish that the owners acted unreasonably (*Karacominakis v Big Country Developments* [2000] NSWCA 313 at [187] per Giles JA) and the builder has failed to do that.

79 The question of whether owners unreasonably refused a builder's offer to carry out rectification work was considered in *The Owners – Strata Plan 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 (*Di Blasio*). In that case, there had been an earlier attempt to rectify defects by the builder and the owner took the view that the builder should prepare a Scope of Works. It was held that it was reasonable for the owners to no longer have confidence in the builder (at [54]) and that the existence of legal proceedings was a relevant consideration (at 47]). Both those aspects are applicable in this case.

80 Simply stated, it is reasonable, in the context of this case, for the owners to require an indication of either that compliance with the relevant Australian Standard had been achieved or what would be carried out in order to achieve compliance with that standard by reference to a proposed Scope of Works. In circumstances where there had been a previous attempt to rectify following installation of the doors and windows, it is reasonable for the owners to ask questions such as who is going to do what and by when.

81 Next, it is necessary to consider section 48MA of the HBA which provides:

> *A court or tribunal determining a build 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.*

82 Prior decisions which have considered those words assist in its consideration in this case. *Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23 at [32] suggests section 48MA operates as a preference rather than a right and only operates to prevent unreasonable refusal by the owners to prevent the builder from carrying out rectification work.

83 The section neither compels a rectification order instead of an award of damages nor does it operate as a presumption: *Brennan Constructions Pty Ltd v Davison* [2018] NSWCATAP 210 at [17]. Although in *Leung v Alexis* [2018] NSWCATAP 11 at [140] it was suggested that the words "*preferred*

outcome" in section 48MA operate *"in the manner of a presumption*", it is not necessary to resolve those conflicting views since that paragraph in *Leung's case* goes to suggest that the facts of a particular case may make it inappropriate to make a rectification order.

84 Consistent with the view of the Appeal Panel in *Nationwide Builders Pty Ltd v Le Roy* [2019] NSWCATAP 220 at [18], the Tribunal considers relevant what was said by Ball J in *Di Blasio* at [45]:

> *The question of what is reasonable depends on all the circumstances of the particular case. One relevant factor is what attempts the builder has made to repair the defects in the past and whether, in the light of the builder's conduct, the Owner has reasonably lost confidence in the willingness and ability of the builder to do the work …*

85 It is clear that the Tribunal is required to weigh up the factors in each case and make a decision accordingly: *Brooks v Gannon Constructions Pty Limited* [2017] NSWCATCD 12 at [64].

86 After considering the evidence and the submissions, the Tribunal considers the preferred outcome has been displaced in this case and that the opposition of the owners to a work order is not unreasonable, for the following reasons:

(1) The aluminium windows and doors were supplied by Rainbow, installed by the bricklayer (whom the builder has since successfully sued) and repaired by Rainbow with the result that the subject work was undertaken not by the builder but by his sub-contractors.

(2) The evidence establishes that the owner has consistently left questions relating to the aluminium windows and doors to Rainbow.

(3) Rainbow is not a party to these proceedings which could create problems in relation to the enforcement of any work order.

(4) Previous rectification work by Rainbow has been unsuccessful.

(5) The building work carried out by the builder was considerably delayed and there was considerable delay in Rainbow obtaining the Azuma tests.

(6) It is reasonable for the owners to be concerned in relation to the conduct of Rainbow in (a) providing products to Azuma different to what was installed in significant respects, (b) indicating a superseded edition of AS2047, (c) making incorrect assertions as to the thickness of the glass it used, (d) not complying with the Rectification Order, and (e) only indicating a willingness to rectify after the Joint Report of the experts and shortly before the hearing in a letter which sought to avoid that hearing.

(7) The failure to comply with the Rectification Order issued by Fair Trading.

(8) The conduct of the builder in not providing the Azuma test reports to the owners until after the deadline for the Rectification Order (in circumstances where the owners were not permitting access until such test reports were supplied) which suggests a strategy of not only failing to comply with that order but also seeking to be able to attribute blame for non-compliance on the owners.

(9) The lack of clarity as to who will actually be undertaking the work. For example, in the builder's submissions it was said: "*The builder's subcontractor, Rainbow Windows, are (sic) willing to undertake the following work …*".

(10) There would be a need for work by someone other than Rainbow in order to achieve rectification, the same bricklayer would obviously not be used and there is a lack of indication by the builder that he is willing to do the necessary work other than that which would be carried out.

(11) The limited scope of what Rainbow was willing to undertake, which was expressed as follows in those submissions:

* *install heavier interlocks to the doors,*
* *install transom stiffeners and seals to the sliding windows,*
* *check weepholes and install additional weepholes if required,*
* *adjust the window slots toa void dust entry,*
* *seal the windows,*
* *changes the guides to minimise rattles, and*
* *add drainage holes if needed.*

(12) The absence of anything to indicate how compliance with AS2047 is to be achieved.

(13) The proposed Work Order includes a provision which permits the builder to subcontract the rectification work.

(14) The proposed Work Order does not contain any mechanism for inspection or approval of the proposed rectification work.

(15) The absence of clear evidence that the builder, who is a party to the proceedings, is willing to undertake such work as the Tribunal considers appropriate.

87 While the Scope of Works and the wording of the Work order could be adjusted by the Tribunal, that does not satisfy the Tribunal that there would be a workable outcome in the circumstances of this case and it is not unreasonable for the owners to oppose the making of such a Work Order. Indeed, given the findings of the Tribunal of the extent of the rectification work that is reasonably required (considered below), a Work Order with a Scope of Works that reflects those findings would go beyond what either Rainbow or the builder have indicated a willingness to undertake.

88 In short, for the reasons indicated above, the Tribunal in satisfied that a Work Order, in the circumstances of this case, would be impracticable, unlike the

decision in *Petropoulos v CPD Holdings Pty Ltd (No. 2)* [2018] NSWCATAP 233 at [31] which was obviously based on the circumstances in that case.

89 Before considering what amount should be award by way of damages, it is first necessary to consider the rectification method. In other words, what compensation the owners are entitled to receive depends on what rectification work is reasonably required and only after that has been determined can the Tribunal assess what is a reasonable amount for that work.

90 Although it was the builder's contention that only some windows require rectification, that overlooks the words in the Joint Report *"Windows and sliding doors affected include East Elevation, West Elevation and South Elevation. Windows to the front elevation can remain on the assumption that new windows will match"* (A451).

91 The fact that water testing was carried out on some not all windows does not means that only those windows require rectification since it is a reasonable inference that other windows and sliding doors would, if tested, yield the same result and the Azuma report provides support for a finding that windows and sliding doors supplied by Rainbow do not adequately prevent the ingress of water. Further, so far as water ingress is concerned, drilling additional holes to let water out does not address the problem of too much water getting in too soon.

92 Accordingly, accepting the agreed view of the experts, the Tribunal considers the rectification work should cover 12 windows and two sliding doors but not the two windows on the north elevation which the plans (A486) show are windows in the room described as study: W13 and W14.

93 As to whether the rectification work should involve *in situ* repair, for which Mr Capaldi and the builder contend, or replacement, for which the other experts and the owners contend, the Tribunal prefers the views of the owners' experts, noting that: (1) Mr Attwood had specialist experience, (2) prior in situ repair was unsuccessful, (3) lightweight componentry was used, (4) transom

stiffeners would be unsightly (Mr Capaldi's post-conclave change of opinion is rejected), (5) the finding that the windows and sliding doors that were installed are not fit for their purpose, and (6) the opinion of Mr Attwood, which the Tribunal accepts, that the windows and sliding doors are not compliant with AS2047-2014 and the NCC.

94 The decision in favour of replacement has the necessary consequence that there will be a cost of making good the render and repainting which were respectively listed as items 3 and 4 in the Joint Report (A456).

95 Those findings, in relation to what windows and sliding doors should be taken into consideration and that replacement is warranted, accords with the fundamental principle which applies in cases such as this, as stated by the High Court in *Haines v Bendall* [1971] HCA 15 where Mason CJ, Dawson, Toohey and Gaudron JJ said, in the opening sentence of their joint judgement:

> *The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been if the contract had been performed or the tort had not been committed.*

96 To that principle should be added the qualification that the work must not only be necessary to produce conformity with the contact but also be a reasonable course to adopt: *Bellgrove v Eldridge* [1954] HCA 36. Being satisfied that it is reasonable for the rectification work to cover the replacement of 12 windows and two sliding doors, with a resulting need to make good render and repaint, it is necessary to make an assessment of what amount it is reasonable to allow for such work.

97 In relation to Item 2, the claim in relation to the windows and sliding doors, there is a yawning chasm between the competing amounts: Mr Capaldi, on behalf of the builder, suggesting $34,885.55 in his report (A413) and the owners seeking $128,514 (A456) although the real comparison is between the amounts suggested by those experts, prior to the addition of margins and

GST: $23,491.95 in the case of builder and $77,570 in the case of the owners.

98 The difficulty the Tribunal has in this assessment is that both those estimates appear to be at the opposite ends of the range and the Tribunal's obligation to determine a reasonable amount is not satisfied by choosing between those two figures. In its assessment, the Tribunal has taken the components of the amount suggested for the owners (A450 and A456), considered the corresponding amounts suggested for the builder (A413) and then determined what amount it considers reasonable amount by adjusting the amount claimed by the owners.

99 Ît is well-established that, in circumstances where precision is not possible, the Tribunal must do the best it can on the basis of the evidence that is available: *Gallagher v Masters Installation Pty Ltd* [2017] NSWCATAP 117; *Pacorp Holdings Pty Ltd v Waller* [2017] NSWCATAP 167.

100 An amount of $48,210 was claimed by the owners for the windows and sliding doors. That was calculated as follows:

(1) Removal of all windows and doors, 3 men for 5 days at $65 /hr: $7,800.

(2) Supply of all windows and doors 50m2 x $292 /m2: $14,600.

(3) Replacement of all insect screens: $4,400.

(4) Reinstatement of cavity flashings, 2 men for 3 days at $65 /hr, plus $880 for materials: $4,000.

(5) Installation of windows and doors, 3 men for 5 days at $65 /hr: $7,800.

(6) Protection of all adjacent services, 2 men for 3 days at $65 /hr, plus $380 for materials, $3,500.

(7) Post-installation reinstatement of brick walls, 2 men for 4 days at $65 /hr: $4,160.

(8) Materials: $1,950.

101 First, the claim for the replacement of all insect screens, which was put on the basis that the replacement items might have slightly different measurements and that the colour of the existing inspect screens may not match the replacement items, is rejected as not being reasonably necessary. That reduces $48,210 by $4,400 to $43,810.

102 Secondly, the claim for the protection of adjacent services appears excessive and is reduced from $3,500 to $2,000 thereby further reducing the amount by $1,500, from $43,810 to $42,310.

103 Thirdly, while the other claims for a number of men for a number of days seems generous, rather than attempt to estimate reasonable amounts for each of those items, the Tribunal takes that into consideration when assessing the claim for contingencies.

104 Fourthly, that amount of $42,310 is based on all windows and sliding doors being replaced. However, the Tribunal has found that 12 windows and 2 sliding doors should be replaced but not 2 windows. On the basis that 2 out of 16 windows and sliding doors are not being replaced, a reduction by 1/8th is made, reducing that amount by $5,288 (to the nearest dollar) to $37,022 for Item 2.

105 Item 3 was a claim of $16,300 for consequential rendering. A consideration of the plans and photos for the house suggest a not insignificant amount of work will be required. The reference to this claim in the oral evidence did not persuade the Tribunal that it was unreasonable. However, on the basis that the 2 north elevation windows are not being replaced, the claimed amount is reduced by 1/8th (ie $2,037 to the nearest dollar) to $14,263.

106 Item 4 was a claim for $9,490 for consequential repainting. For the reasons indicated in relation to Item 3, this claim is reduced by 1/8th (ie $1,184 to the nearest dollar) to $8,304.

Other defect claims

107 Item 1 was the only other defect claim. It was a claim for painting in the master bedroom, dining and media rooms for which a cost of rectification of $3,570 was claimed. Both defective work and the cost of rectification were conceded.

108 However, Mr Bournelis conceded, during his oral evidence, that if item 4 in the Scott Schedule is allowed, namely repainting after the installation of replacement doors and windows, then what is covered in this item for repainting (item 1 in the Joint Report which is in the form of a Scott Schedule) would be included in the repainting consequent upon rectification of the windows and doors (item 4 in that document). As a result, no additional amount is allowed for this claim.

109 An additional claim for $14,285 for alternative accommodation was pursued. However, that claim was first raised in an affidavit that was served on 8 July 2020 which gave rise to two matters: first, it was served late in that an order was made for any evidence in reply to be served by 03 July 2020; secondly, that evidence was not in reply but sought to introduce a fresh claim.

110 The claim was put on the basis that Mr Hamlin and his son suffer from health conditions which would expose them to a health and safety risk of they remained in the house during the rectification work. A submission was made that this claim for damages fell within the second limb of *Hadley v Baxendale* (1854) 9 Ex 341, ie that it was reasonably within the contemplation of the parties at the time the contract was formed, noting that it is sufficient for the only kind of loss or damage suffered to be contemplated: *Alexander v Cambridge Credit Corp Ltd* (1979) 9 NSWLR 310 at 365-366 per McHugh JA (as he then was).

111 It is ironic that the owners are pursuing a claim for damages on the basis that it can be said to have been reasonably within the contemplation of the parties at the time the contract was formed yet that claim for damages was not within the contemplation of the owners until it was time for their evidence in reply to be filed and served. In short, this claim should have been made at the time when the claim for damages rather than a work order was made.

112 This claim is rejected, primarily since it would be procedurally unfair to allow such a claim to be pursued after being raised, for the first time, less than a week before the hearing, within evidence in reply. Even if that claim was considered, the Tribunal (1) is not satisfied that it falls within either of the limbs set out in *Hadley v Baxendale*, (2) does not consider the risk sufficient to render it reasonable for this cost to be visited on the builder, (3) finds the period of time (29 days) to be excessive and (4) regards the daily (in the vicinity of $500 per day) to also be unreasonably high.

Summary – defect claims

113 By way of summary, the amounts allowed in respect of the defect claims are as follows:

(1) Item 1 – Panting: no amount allowed as included in Item 4.

(2) Item 2 – Windows and sliding doors: $37,022.

(3) Item 3 – Rendering: $14,263.

(4) Item 4 – Painting: $8,304.

(5) The claim for alternative accommodation: rejected.

114 While there is agreement to a 30% margin to cover preliminaries, overheads and profit, the claim for an additional 15% margin for contingencies is contested. The evidence put in support of this by the owners' witnesses included a suggestion that a tile or tiles might be damaged during the

replacement work. That evidence is not considered convincing since adequate allowance has been made for protection of surfaces, both internal and external. The builder's submission that no allowance should be made for contingencies as this is new work is also rejected as this is clearly remedial work.

115 The Tribunal's view is that the number of men, number of days and amounts allowed for materials within Items 2, 3 and 4 are adequate to cater for any contingencies and that it is not reasonable to add a further 15% in this case, recognising that there have been instances where such claims have been allowed, such as in *Di Blasio* for the reasons indicated in that case at [58].

116 The total amount determined for Items 1 to 4 is $59,589. Adding 30% for preliminaries, overheads and profit gives $77,466. With the addition of a further 10% for GST, that amount increases to $85,213. Homeowners Warranty Insurance was claimed at $950 in relation to building claims of $77,570. On the basis of the amount allowed in respect of those claims, namely $59,589, a proportional amount of $730 is allowed for that insurance. As a result, the total amount awarded in respect of the defects claims is $85,943.

Variations

117 On behalf of the builder, written submissions were directed to the entitlement of the builder to claims amounts by way of a set-off against any amount payable by the builder. In other words, the builder contends that any amount recoverable for variations can operate to reduce the amount payable by the owners to the builder without the need for the builder to make a separate application. Reliance was placed on the Appeal Panel decision in *Green Apple Global Pty Ltd v La Brasserie Investments Pty Ltd* [2018] NSWCATAP 90 and the cases considered therein.

118 It is sufficient to state that the Tribunal accepts that the builder can make claims by way of a set-off against any amount he may be found liable to pay to the owners although a cross-application is the preferable course.

119 The written submissions for the owners suggested (1) that the builder failed to comply with the requirements of clause 13 of the contract in relation to variations and (2) that the was nothing in writing contrary to section 10 of the HBA, (3) that the result was that the builder could only claim the disputed amounts on a quantum meruit basis, (4) that the requirements for recovery on that basis have not been proved and (5) that the builder's entitlement to recover is limited to the balance of the contract price (which was said to be $11,286.30), by reason of the decision of the High Court in *Mann v Paterson Constructions* [2019] HCA 32.

120 The decision of the High Court in *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5 makes it clear that the basis for recover on a *quantum meruit* basis is not an implied contract because that would mean that a *quantum meruit* claim would be an indirect means of enforcing a contract. Instead, where there is no agreement between the parties or where any agreement is not enforceable, a remedy can be provided via a *quantum meruit* claim based on unjust enrichment.

121 However, in order for a *quantum meruit* claim to succeed, decisions such as *Lumbers v W Cook Builders Pty Ltd (in liq)* [2008] HCA 27 (*Lumbers*) and *Pender v Robwenphi Pty Ltd* [2008] NSWSC 1144, suggest three elements must be established: (1) the builder has done work, (2) the owner received the benefit of that work, and (3) the owner accepted that work.

122 In relation to the third point, it is clear that establishing the acceptance of a benefit, without a request, is not sufficient: *Lumbers*, at [82] per Gummow, Hayne, Crennan and Kiefel JJ.

123 Usually, the first two of those tests are readily satisfied which is why the third test assumes importance. When all three tests are met, it would be not only just and equitable for the builder to recover but also unconscionable for the owner to have the benefit of the work done by the builder or done by others at the request of the builder. If those three tests are met, the builder is entitled to recover a reasonable amount for the work done and materials supplied but

must still meet a fourth test by providing evidence to prove the amount of that entitlement.

124 In this case, the variations to the contract fall into three categories: those which have been agreed and paid, those which have been agreed but not paid, and those which have not been agreed. The following table, prepared from the written submissions, summarises the position for each contract variation (CV).

	Description	*Paid*	*Unpaid*	*Agreed?*
CV1	Additional insurance premium	451.06		
CV2	Additional cost of bricks	4,103.00		
CV3				
CV4	Replace window and glass	709.50		
CV5	White cement in lieu of grey	1,202.69		
CV6	Relocation of robe	308.00		
CV6	Decorative cornices	315.00		
CV7	Architrave & skirting upgrade	1,168.29		
CV7	Skylight	1,156.10		
CV8	Concrete footing		2,117.50	
CV9	Agricultural drains		513.65	
CV10	Gas point, H&C water, drainage			1,860.00
CV11	Smooth, not standard render			6,160.00
CV12	Driveway crossing		980.10	
CV13	Side mounted fixtures to balustrades and SS railing			607.27
CV14	Additional floor tiling			3,651.01
	Dishwasher & sink basket			1,240.00
	Bevelled edge mirrors		238.00	
Totals		9,413.64	3,849.25	13,518.28

125 CV10 relates to the gas point, hot and cold water service, drainage and vent to the alfresco area of the house. An amount of $1,860 is claimed and an amount of $1,210 is conceded.

126 It is convenient to here note that there were a number of invoices of the builder dated 18 September 2018. However, it is not the case that such invoices were provided to the owners on or shortly after that day. During cross-examination, the builder said he gave the invoices to his lawyer on that day but did not know when they were provided to the owners. The owners maintain they first saw them when the builder's second affidavit, which is dated 24 March 2020, was served.

127 The builder's case was based on an invoice for $1,860 dated 18 September 2018 (A556), prepared at least two years after the quote and more than a year after the owners moved into the house. An additional amount of $750 was sought for additional drainage and the installation of a vent which Mr Moll asserted were found to be required but had not been anticipated when he provided the estimate (A468, [118]). A copy of the 22 November 2016 invoice from the plumber for $3,200 plus GST and proof of payment of that invoice were provided (A563-564).

128 The owners' case was that a 23 September 2016 email sent to the plumber and the builder, which included a photo (A722-723), indicated the location of the waste and that the builder subsequently quoted $1,210 ($1,100 plus GST) in a conversation on or about 27 September 2016 (A605, [34]). During the hearing, Mr Hamlin gave evidence that the vent was by that time already installed on the same side of the house.

129 As this claim is for less than the amount of $5,000 prescribed by clause 5 of the Regulations, section 7AAA of the HBA does not apply to require it to have been in writing. As this is a claim for a variation that has not been documented, it is covered by the decision of the High Court in *Liebe v Molloy* (1906) 4 CLR 307.

130 In that case the High Court considered a claim for unwritten variations in the context of a lump sum, written contract. It was held that a contract to pay for the variations could properly be implied if the evidence and the reasonable inferences that could be drawn from that evidence established that:

(1) the owner had actual knowledge of the extra work as it was being done;

(2) the owner knew the extra work was outside the contract; and

(3) the owner knew the builder expected to be paid an additional amount for that extra work.

131 The Tribunal is satisfied that those three tests are met with the result that there was an oral contract to do the work for $1,210 and the owners are obliged to pay that amount.

132 The balance of $750 is rejected for two reasons. First, because the evidence suggests the builder was made aware of the location of the waste and that the vent was already installed, prior to the provision of that quote. Secondly, there is insufficient evidence in support of the extra amount: only a handwritten note on that invoice which, without any explanation, suggests that $1,860 of the $3,200 related to "*alfresco works*" which, allowing for the quoted amount of $1,100 (plus GST) suggests an additional amount of $750. As a result, the claim for an additional $750 on a quantum meruit basis has not been proved.

133 If the builder discovered that more work was required then he should have gone back to the owners and revise his quote before proceeding if he wanted to avoid the risk that a dispute would arise, as it has, in relation to the additional $750. It is also noted that no explanation appears to have been

provided for why this claim was not made until the 18 September 2018 invoice which appears to have been issued for the purposes of this litigation.

134 CV 11 relates to the application of smooth render instead of standard render on the internal walls. An amount of $6,160 (ie $5,600 plus GST) is claimed and an amount of $2,750 ($2,500 plus GST) is conceded.

135 The builder's case was that the change was requested by the owners (A31 [31]) who now concede the amount he quoted but the builder seeks to recover the amount he paid. His evidence included a 28 October 2016 email he received indicating the cost of $5,600 plus GST (A565) but it is not clear from the wording of that email whether it was sent before was done. That email was sent in reply to an email from the builder the previous day (A565) in which he asked for the cost of the smooth render "*as this is a variation to the client*". In his affidavit (A468, [119) he gave evidence that he paid that amount. Written submissions for the builder appeared to rely on the fact that $6,160 was paid but if the claim is to succeed on a quantum meruit basis then there needs to be evidence that the amount claimed is a reasonable amount for the work done and materials supplied.

136 The owners' case was he requested the variation for smooth rendering and that the quoted amount was "$2,000 to $2,500", being the amount he referred to in an email sent to the builder on 28 November 2016 (A566) which was not dispute by the builder in his next day reply (A737). The affidavit of Mr Hamlin suggested (A606, [35c]) that the 28 October 2016 email from the renderer was sent after the work was done.

137 In view of the fact that the owners' evidence is that they were provided with a range rather than a specific price, it appears they were provided with an estimate rather than a price. The issue which calls for determination is whether the builder should be awarded an additional $3,410 ($6,160 less $2,750). That additional amount has not been proved on a quantum meruit basis since the builder has not provided any evidence to prove what is a

reasonable amount to award for that work in terms of the work done and materials supplied.

138 CV 13 relates to the installation of side-mounted balustrades and a stainless-steel top railing. An amount of $607.27 is claimed. No amount is conceded.

139 The builder's case is that there was a meeting on site with Mrs Saran, reflected in contemporaneous emails (A568). The original quote, upon which the contract was based, was for $3,300 (A567) and the quote, revised in response to Mrs Saran's requests, was $4,298 (A568-569). Although that suggests an additional amount of $998, the builder's affidavit evidence (A468, [120]) explained that the amount now claimed takes into account the cost of components that were no longer required, ie cost savings.

140 The owner's case was based on Mr Hamlin's affidavit evidence that he did not discuss this item with Mr Moll and he was never provided with an invoice or quotation. However, the owners' evidence did not include any evidence from Mrs Saran. It was submitted the builder gave no evidence as to how this variation was agreed.

141 From the contemporaneous documents, it is clear that changes, which involved an additional cost, were requested by Mrs Saran. There is no evidence form her to the contrary. The "before and after" invoices establish that her choices gave rise to an additional cost of $998 but the builder has made allowances for other cost savings in relation to this aspect of the work. It is clear that the work was requested by Mrs Saran and accepted by the owners, that the work has been done by the builder and that the owners have received the benefit of that work. The comparative invoices reveal that the amount now claimed is a fair and reasonable amount for the work done and materials supplied. Accordingly, this claim for $607.27 is determined in favour of the builder.

142 CV 14 relates to additional tiling work in the family room. An amount of $3,651.01 is claimed and an amount of $1,781.01 is conceded.

143 The builder's case is that this amount relates to the cost of tiling the family room which is not shown as tiled on the plans (A487). Email evidence was provided that the owners raised that matter, saying they were "*considering tiling the rear family living area*" (A570) and that the quote, referred to in an email from Mrs Saran to the builder, was for $14,000 plus GST plus a $1,400 builder's margin on a "*family rates"* basis (A571). The invoice from the builder to the owners for this additional tiling (A559) does provide the area of the room, the rate per square metre for the tiles and the labour component, which combine to give $3,319.10 or $3,651.01 when GST is added. However, that invoice was not issued shortly after the work was done and the Tribunal is satisfied it was prepared for the purpose of this litigation.

144 The owners' case is that the tiling sub-contractor was changed to a person recommended by the owners who agreed to do the job at "*family rates*". It was submitted that the quote included the family room. That is not apparent from the email which referred to that quote. Although it was suggested that the email in which the owners expressed a desire to have the family room (15 September 2016) preceded the quote for the tiling (28 September 2016) it is noted that the earlier email only indicated they were considering that matter, not that a decision had been made. No email was provided to support a decision being made prior to the quote being given by the tiler.

145 While there is a basis provided for the amount claimed, since the builder's invoice contained the relevant details, that invoice lacks weight as it was prepared for the purpose of this litigation. Unfortunately, the quoted amount is only referred to in an email from the owners to the builder which suggested *"This includes the laying of all internal and external tiles and the sealing of wet areas"*. However, by reference to the plan showing floor finishes (A487), it is difficult to see how an amount of $3,651.01 is reasonable for the family room if $14,000 plus GST plus a $1,400 margin.

146 There are clear gaps in evidence in relation to this claim. The actual quote from the tiler was not provided. No evidence was provided from the tiler. The builder did not provide any evidence as to payment. Without such evidence,

the Tribunal is left to determine this claim on the basis of the evidence that has been led, bearing in mind that the builder bears the onus of proof since he is the party making the claim. The Tribunal is not satisfied this claim has been proved since the builder's invoice appears to have been prepared for the purpose of litigation and there is some evidence to suggest that the family room was included in the quote. However, it is noted that the owners have conceded $1,781.01 in relation to this claim (MFI 4, table C). That amount is awarded.

147 The final variation in dispute relates to the provision of a dishwasher and a sink basket. Am amount of $1,240 is claimed. No amount is conceded.

148 The builder's case is that these items were not part of the contract and reference was made to an invoice revealing the cost of those items (A572). In his affidavit, Mr Moll asserted that he paid for those items (A468, [123]).

149 The case for the owners is that the invoice alone, which is addressed to the owners, does not indicate that the builder paid for those items. In his affidavit, Mr Hamlin asserted that he and his wife paid for those items (A607, [39]).

150 Given the competing evidence of Mr Moll and Mr Hamlin, the fact that the invoice is made out to the owners and the lack of evidence from the builder of his having paid the amount, bearing in mind that the builder bears the onus of proof, this claim has not been established to the Tribunal's satisfaction. As a result, no amount is allowed in relation to this claim.

Summary – variations

151 The total of the amount determined for the five disputed variations is $6,348.28 (ie the total of $1,210, $2,750, $607.27, $1,781.01 and nil). Adding the amount referable to the variations which are not in dispute and have not been paid, namely $3,849.25, gives $10,197.53. Accordingly, so far as the claims for variations are concerned, the result is that an amount of $10,197.53 is payable by the owners to the builder.

Asbestos

152 The owners sought a refund of $26,800 paid to the builder in relation to excavated material on the basis that it was not contaminated with asbestos as alleged by the builder.

153 Evidence relevant to this claim may be summarised as follows. In October 2015 the former house on the site was removed for the owners by Site Demolitions Pty Ltd (SD) who issued a clearance certificate (A89). On 23 May 2016 Mr Moll had a conversation with Mr Hamlin during which an estimate of $16,000 was provided for the cost of removal. On 26 May 2016 a photo showing fibro pieces was sent by the builder to the email address of the owners (A91). A 30 May 2016 email from Bomans (A90) indicates that the work was carried out between 23 May 2016 and 30 June 2016 and an invoice from Bomans was also in evidence (A499).

154 The following paragraphs in the certificate from SD were referred to in evidence:

> *All fibro bonded asbestos from residence and structure has been removed safely …*
> *Please note Site Demolition Pty Ltd have cleared the asbestos from the house, if your soil is contaminated with asbestos fragments and Site Demolition has brought this to your attention and advised of ways to remediate and you have made the choice not to remediate the site, this is not the responsibility of Site Demolition Pty Ltd.*
>
> *Inspection results*
>
> *It is the opinion of Site Demolition Pty Ltd that as far as reasonably practical, all visible and accessible hazardous material has been removed. Further visual investigation of the surface soil and surrounding areas from where the asbestos was removed has produced no evidence of asbestos fibers remaining in the ground, leaving the site clear.*

155 There was a dispute as to who was present on 23 May 2016: the builder suggesting both owners were present along with two men from Bomans while the owners contend that conversation was between Mr Moll and Mr Hamlin. The owners did not provide any evidence from Mrs Saran and the builder did not provide evidence from either of the men from Bomans. Mr Hamlin

contended that Mr Moll agreed to provide a report with photos so that he could take up the matter with SD and that no such report was ever provided.

156 In the contract, clause 13, so far as is presently relevant, provided:

> *The work to be done … under this contract may be varied*
> *…*
> *Due to such other matters that could not be reasonably be expected to be foreseen by an experienced, competent and skilled contractor for the completion of the work at the date of the contract …*

157 The effect of clause 19 of the contract was to make the builder liable for the cost of "the removal and disposal from the site of rubbish, surplus material, excavated material, vegetation and demolished or dismantled structures."

158 For the owners, reliance was placed on the certificate issued by SD and Mr Hamlin's evidence that SD never told him there was asbestos remaining in the ground in support of the proposition that the fill was not contaminated with the result that the cost was a matter for the builder to bear. It was also submitted that the builder did not follow the procedure for variations set out in the contract.

159 There was also a submission that neither the builder nor Bomans had a licence to remove asbestos and that Mr Moll's evidence rose no higher than that the fill was treated as being contaminated. Reference was also made to the fact that no testing was undertaken and that it was unclear how many fragments were contained in the 8.5 double bogie loads in respect of which the amount of $26,800 was paid.

160 The builder's oral evidence that he removed asbestos fragments, wrapped them in plastic and took them to a tip at Wyong was criticised as not having been mentioned in any of his three affidavits. Despite agreeing that the tip at Wyong issued receipts, no such receipts were produced.

161 On behalf of the builder, it was submitted that what happened was that the builder found asbestos in the fill during excavation, consulted with the owners then, with their agreement, arranged for the disposal of asbestos contaminated fill and that the owners agreed to pay and did pay the additional cost of disposal.

162 The builder's case was that the asbestos could not be foreseen because of the grass cover and because of the geotechnical report that was provided. It was submitted that what the builder did was reasonable. Reference was made to the affidavit evidence of Mr Moll who said that he saw fragments of fibro during the excavation and to the fact that some of the material, which was not contaminated was disposed of without additional cost.

163 This claim depends on the facts. The Tribunal prefers placing weight in contemporaneous documents rather than recollections of those who are now endeavouring to recall matters in the context of litigation. There is photographic evidence that asbestos was found (A91) and that was sent to the owners on 26 May 2016. Further, a consideration of the email from Bomans (A90) and the associated invoice (A499) reveals (1) the dates on which the loads were taken from the site, (2) that there was consideration given to whether that material was contaminated, (3) that $4,000 was charged for each load of contaminated material, and (4) what total amount the builder was charged.

164 The handwritten annotation on that email (A90) reveals that 8.5 loads of contaminated material was removed from the site. The invoice (A499) reveals that the disposal of contaminated waste cost $4,000 per load. The affidavit of Mr Moll (A465, [51]) explains that an allowance (of $5,200) was made for the cost of uncontaminated fill so that only the additional cost, calculated as $26,800, was charged by the builder to the owners. There is no dispute that such an amount was paid.

165 While the belated evidence of Mr Moll in relation to taking material to Wyong raises the question of why that evidence was not provided earlier, the Tribunal finds (1) that there was asbestos in the material that had to be removed from the site, (2) that there was an agreement between Mr Moll and Mr Hamlin for that material to be removed, (3) that an estimated cost of $16,000 was provided by Mr Moll to Mr Hamlin, and (4) that the amount of $26,800 that was sought and obtained was reasonable.

166 If that amount had not been paid, given that the variation procedure set out in the contract was not followed, the builder would have need to make a quantum meruit claim in relation to this amount. Had that been the case, the evidence would have satisfied the Tribunal that the claim, based on work done and materials supplied, was reasonable. However, as this is a claim by the owners for a refund of $26,800 that was paid by them, it is sufficient for the Tribunal to record a finding that it not satisfied that the owners have established an entitlement to a refund of what was paid by them.

Other claims for credits

167 The builder' submissions were 38 pages long in chief with a 6-page reply while the owners' submissions took up 33 pages in chief and 5 pages in reply. It has been necessary to comb those pages to find the remaining matters which the parties wished to agitate in these proceedings. In an attempt to finalise every matter raised by the parties, the Tribunal has first trawled through the builder's submissions to identify the remaining areas of dispute and then scoured the owners' submissions for any residual matters, a task made more difficult by the inclusion of submissions in relation to a number of matters that was followed by an indication that they were not in dispute.

168 There were a number of claims by the owners for amounts to be credited, ie to operate as a reduction of any amount they may otherwise owe to the builder. Three items were disputed. First, in relation to render beads, the owners claim a credit of $3,080. The builder disputes this claim.

169 The case for the owners is that in August 2017 they paid $3,080 ($2,800 plus GST) to Ross Ginardo Cement Rendering to replace incorrect render beads and repair window reveals (A39, [65] and A114). A credit for that amount is sought by the owners on the basis that they paid for defect rectification work for which the builder bore responsibility.

170 As to the render beads, according to Mr Hamlin, the renderers were required to return in relation to the windows in three of the bedrooms because there were "*mismatched vertical render beads on opposite sides of the windows and the sills on both awning windows were bowed*" (A613, [53a]). A letter dated 27 July 2017 from the owners raised this matter (and other matters) with the builder (A741). Mr Hamlin suggested Mr Moll told him he could not get the render beads fixed because the job was too small (A613, [53c]).

171 As to the window reveals, the windows in question were W13 and W14, being the two north-facing windows, which were replaced. Mr Hamlin suggested the rectification of the render itself required rectification. As a result, the owners claim a credit for $3,080 on the basis that they paid for defect rectification work for which the builder was responsible.

172 The case for the builder was that, after the windows were replaced, the render was rectified but the owners then engaged another contractor to re-do the work. Mr Moll's evidence (A471-472, [176-178]) was that such work was "*up to standard*".

173 There is no expert evidence in relation to this claim. As to the contest between Mr Hamlin's evidence that the work was required and Mr Moll's evidence that it was not required the Tribunal prefers the evidence of Mr Hamlin by reason of the contemporaneous document (A741) which confirms that the owners complained about these matters at the time. That document favours the owners' case as it is unlikely that the owner would raise matters that did not appear to be defective at that time and since there is no evidence

of any response from the building contending that the work was not defective. No submission was made that the amount claimed was unreasonable and the Tribunal is satisfied that the claim claimed amount of $3,080 should be allowed as a credit.

174 Secondly, the words “Straighten fence” were used to denote another area of difference between the parties. Both parties suggested part of a dividing fence collapsed during construction and that the builder undertook repairs. However, the owners claimed that fence posts were not left straight when that work was done, an allegation which the builder does not accept. The builder contends that the claim should be rejected as it is not supported by expert evidence. The owners contend that a defect notice was sent on 27 July 2017 (A742). For the reasons indicated in relation to the previous item, this claim for a credit of $900 is allowed.

175 Thirdly, waterproofing was an issue raised by the owners who claim a credit of $4,400 which the builder disputes.

176 The owners’ case was put on the basis that they “arranged for a new tiler which resulted in a credit for waterproofing” (MFI 4, [121f]) but no further explanation was provided. It was submitted there was an agreement, based on Mr Hamlin’s affidavit (A37, [56]), a 26 November 2016 email (A106) which did no more than claim $4,400 for “*Tiling/waterproofing allowance”*, a 29 November 2016 email in response from the builder (A737) which did not refer to that claim.

177 The builder’s case is that waterproofing was not an allowance under the contract with the result that the question of whether the builder spent more or less on waterproofing is not any concern of the owners. The suggested evidence of an agreement was the failure to respond to that claim made by the owners. Further, that in the builder’s 29 November 2016 reply to the

owners' 26 November 2016 email in which a number of claims were made, there were other claims which were agreed.

178 The Tribunal is not satisfied that the owners' evidence establishes that there was an agreement, as alleged. Far from satisfying the Tribunal that the failure to refer to waterproofing in the builder's 29 November 2016 email indicates he was agreeing to this claim, the fact that he agreed to other claims in that email suggests he was not agreeing to this claim. Further, the owners have not adequately explained either the basis for the claim or the basis for the amount claimed. This claim is rejected.

179 Items for which the owners claimed a credit that were not in dispute were:

Description	*Amount*
Garage door	1,565.00
Linen cupboard	262.50
Master wardrobe	253.00
Media room doors	286.00
Wardrobes	1,960.00
Screens	577.27
Re-credit bricks	4,103.27
Re-credit white cement	1,202.69
Colourist service	220.00
Rent	22,942.86
Prime cost credits	9,826.98
Total	43,199.57

Summary – claims for credits

180 The claims in relation to the asbestos having been rejected, the total of the amounts determined above for the three disputed items is $3,980 (ie $3,080, $900 and nil). Adding the total of the agreed items is $43,199.57 gives a total for items in respect of which the owners are entitled to a credit of $47,179.57.

Other claims

181 There are two remaining matters that require consideration. The first is a claim addressed in the written submissions in relation to external render.

182 Defective bricklaying resulted in a choice of removing and relaying bricks or rendering the existing bricks and they opted for latter which was a quicker solution for them and a cheaper solution for the builder. A quote numbered 153 and dated 27 February 2017 for $37,950 was obtained (A658). The renderer wanted to enter into a contract with the owners and that was done in March 2017 (A663). The contract amount of $37,950 ($34,500 plus GST) was paid by the builder who, in his affidavit (A466, [72]) seeks a refund of $3,175 on the basis that he paid more than the quote and $3,250 on the basis that it relates to an extra amount for decorative beads, a total of $6,425. In the builder's submissions (MFI 6, [7.1.1] and page 32) this claim was said to be $6,490.

183 The builder's case was that the quote (A516) was for $34,430 ($31,300 plus GST). On the copy of that quote he provided, a handwritten note suggests the builder paid $37,604, $3,174 more than the quote. Adding $3,200 for the decorative beads gives $6,374. In the written submissions of the builder, it is suggested the owners proposed to contract with the renderer (MFI6, 7.1.1). However, the documents (A661) reveal that it was the renderer who insisted that the contract be with the owners, not the builder, and understandably so since that would make the rendered a contractor, not a sub-contractor. It was conceded that the builder sued the bricklayer and included a claim for the full amount of $37,950 and was awarded that sum (A522). However, as he was

unable to achieve recovery, it was submitted *"he should not be out of pocket for extras that were not part of the rectification work he agreed to*".

184 The owner's case was that the builder approved the full amount of $37,950, that the builder claimed that full amount when suing the bricklayer and that the cost of the render was a cost saving for the builder because it was cheaper than removing and relaying the bricks. It was suggested the builder was referred to a quote that was superseded.

185 The Tribunal notes there are two quotes, both numbered 153 and both dated 27 February 2017: one for $34,430 (A516) and one for $37,950 (A658). A comparison of those quotes reveals that the higher amount was the result of selecting two optional items, decorative beads ($1,200) and gapping ($2,000), which, after the addition of GST, increased the invoice amount by $3,520. However, the contract was for the higher amount of $37,950 (A667).

186 There was an exchange of three relevant emails in March 2017 (all on A662). First, on 21 March 2017, the owners emailed the builder, saying "*Please find attached the contract …"*. There was a follow-up email the following day which included the words "*Please confirm by reply email that you are ok for us to execute the agreement?"* A day later, on 23 March 2017, the builder replied: *"This is to confirm my agreement for you to execute the agreement with* [the renderer]". By reason of that last email the Tribunal rejects the claim now made by the builder in relation to the external render.

187 The second of the remaining matters relates to what was raised by the builder under the heading "*Payments outside the Contract*". This involved question of whether Home Warranty Insurance (HWI) was payable by the builder or the owners. The amount in issue is $3,740.88 which was the subject of an invoice dated 11 May 2016 that was issued by the builder to the owners (A532).

188 The builder's contentions were that the contract does not specify the cost of HWI was either an inclusion or an exclusion to the contract but that clause 22

sets out the types of insurance the builder must obtain. It was submitted that the words "*all necessary insurance"* in clause 22 referred to insurance in the nature of contract works insurance, types of insurance that indemnify the builder against his liability for damages but not HWI which it was submitted "*is obtained solely for the benefit of the owners*". On that basis, it was asserted that the payment made by the owners for HWI fell outside the contract, was a matter for the owners and should not be applied as a reduction of the amount payable by the owners to the builder.

189 The owners noted that a handwritten note of the builder that was added to the invoice for the deposit dated 11 May 2016 (A534) was in contrast to the builder's 14 February 2017 email (A653) which suggested the deposit had been fully paid. Reference was made to item 1 in the quote dated 08 May 2016 (A77) which became part of the contract. That item read: *"All necessary building insurance and private certifier only*". It was submitted there is no basis for the builder to assert that HWI falls outside the contract.

190 The Tribunal notes that clause 22 of the contract (A67) provides:

The contractor must effect and maintain the following insurances until the completion of the work:

- *public liability insurance …*
- *property damage insurance ,,,*
- *employer's liability and worker's compensation insurance*

191 While it is correct to say that clause 22 of the contract does not include HWI, it must be observed that the explanatory wording, which appears in the margin to the left of clause 22, provides as follows:

> *Explanation: This clause is not concerned with insurance under the Home Building Compensation Fund (covering defective work or breach of contract). Contact Fair Trading for information on that subject.*
>
> *Note: A certificate of insurance under the Home Building Compensation Fund, covering the work against defective work or breach of contract is required by the Home Building Act to be given to the owner before work commences or a deposit is paid. The validity of certificates can be checked at www.hbcf.nsw.gov.au*

192 The Tribunal finds in favour of the owners on this issue since clause 22 (A67) cannot be read as making the cost of HWI a matter for the owners, having regard to the explanatory wording, and since Item 1 in the quote (A77) indicated that the contract included: "*All necessary building insurance …"* thereby making the cost of HWI a matter for the builder. The fact that section 92 of the HBA requires the building work the subject of the contract to be insured makes such insurance necessary insurance with the result that it fell within the contract price by reason of Item 1 in the quote.

193 As a result of the owners having paid that amount, in effect on behalf of the builder, they are entitled to have that amount included in the payments they made to the builder.

Summary – other claims

194 The owners are entitled to have an amount of $3,740.88 included as a payment they made towards the contract price.

Quantification of amount payable

195 The submissions of the builder and the owner included reconciliation schedules. Set out below a calculation of the net amount payable in both formats.

196 First, following the format of the owners:

Contract price	555,220.00	Not in dispute
Add variations		
- Paid	9,413.64	Not in dispute
- Agreed, not paid	3,849.25	Not in dispute
- Disputed	6,348.28	As determined
Adjusted contract price	574,831.17	
Less owners payments	503,438.00	No HWI reduction
Less variation paid	9,413.64	Not in dispute
Sub-total	61,979.53	
Less credits	47,197.57	As determined
Net amount payable	14,781.96	

197 Secondly, following the format of the builder:

Contract sum	555,220.00	Not in dispute
Variations		
- Agreed, not paid	3,849.25	Not in dispute
- Disputed	6,348.28	As determined
Sub-total	565,417.53	
Credits	47,197.57	As determined
Sub-total	518,219.96	
Less progress payments	503,438.00	No HWI reduction
Net amount payable	14,781.96	

198 Either way, the net result is that an amount of $14,781.96 is payable by the owners to the builder. To that outcome must be added the amount the Tribunal has determined to be payable by the builder to the owner in damages for defects, namely $85,943. That gives an amount payable by the builder to the owners of $71,161.04.

Orders

199 Combining that outcome with enabling written submissions to be made in relation to costs, the following orders are made:

(1) The respondent, Tony Moll, is to pay the applicants, Jamie Hamlin and Elizabeth Saran, $71,161.04 immediately.

(2) On or before Friday 9 October 2020 any party wishing to apply for an order for costs is to file and serve the written submissions upon which they rely.

(3) On or before Friday 23 October 2020 any written submissions in reply are to be filed and served.

(4) Any such submissions are to include submissions on whether the party agrees that costs can be considered on the papers, without the need for a further hearing, pursuant to section 50(3) of the Civil and Administrative Tribunal Act 2013.

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

Registrar