Civil and Administrative Tribunal
New South Wales

Case Name:	Kako v Home Design & Construction (NSW) Pty Ltd
Medium Neutral Citation:	[2023] NSWCATCD
Hearing Date(s):	17 August and 23 August 2023
Date of Orders:	7 September 2023
Date of Decision:	7 September 2023
Jurisdiction:	Consumer and Commercial Division
Before:	L. Wilson, Senior Member
Decision:	1. The case is dismissed. 2. The applicant is to pay the costs of the respondent in these proceedings, namely HB22/37923, such costs to be agreed or assessed on an ordinary basis. 3. The respondent's name is amended to Home Design & Construction (NSW) Pty Ltd. 4. If either party seeks a different costs order to that in Order 2, the following directions apply: (a) The party must file and serve any cost application, including submissions and any evidence in support, by 22 September 2023. (b) The other party (opposing the costs application) is to file and serve any submissions and evidence in reply by 6 October 2023. (c) Any submissions are to include submissions on the issue of whether an order should be made pursuant to s 50(2) of the Civil and Administrative Tribunal Act, dispensing with a hearing of the costs application. 5. In the event an application is made pursuant to Order 4, Order 2 shall cease to have effect.
Catchwords:	Defects – Whether major defect - Whether work order

	Set off – whether permitted in law – where set off exceeds amount in applicant's favour
Legislation Cited:	Home Building Act 1989, ss.18B, 18E, 48MA, 480 Civil and Administrative Tribunal Rules 2014, r.38
Cases Cited:	Antworks Pty Ltd and Brendon Chhong Lee v Shixin (Cindy) Lee [2015] NSWCATAP 53 Bellgrove v Eldridge [1954] HCA 36; 90 CLR 613 Bostik Australia Pty Ltd v Liddiard (No 2) [2009] NSWCA 304 McDonnell & East Ltd v McGregor [1936] 56 CLR 50 Oshlack v Richmond River Council (1998) 193 CLR 72 Palermo Seafoods Pty Ltd v Lunapas Pty Ltd [2014] NSWSC 792 Palm Lake Resort Pty Ltd v King and Metcalfe [2021] NSWCATAP 195 Taylor v Clientel Development Pty Ltd [2020] NSWCATAP 136
Category:	Principal judgment
Parties:	Nader Kako (applicant) Home Design & Construction (NSW) Pty Ltd (respondent)
Representation:	Counsel: N. Li (applicant) Solicitors: Memcorp Lawyers Pty Ltd (applicant) Birch Partners Lawyers (respondent)
File Number:	HB22/37293
Publication Restriction:	Nil

REASONS FOR DECISION

Summary of the claim

1 This is the decision in the homeowner's claim against the builder with whom he had a contract to construct a double storey brick veneer house.

2 Mr Kako (the homeowner) claimed Home Design & Construction (NSW) Pty Ltd (the builder) breached the statutory warranties which will cost $144,012.07 to rectify. The homeowner sought a money order against the builder in the amount of $144,012.07.

3 The builder asked the Tribunal to make a work order, which is the preferred outcome under s.48MA of the Home Building Act (HB Act), but that if a money order is made that it be set off against agreed contractual amounts. When the Tribunal uses the term "agreed" it means that the homeowner agreed that there were $48,364 of variations made which he needed to pay in addition to the contract sum, plus $19,300 still owing under the contract less $3,669 which the builder conceded should have been repaid or credited to the homeowner (total $61,324). What was not agreed is that these amounts are outstanding; the homeowner claimed he paid $60,000 to cover these amounts in cash to the builder's director's father sometime in March or April 2020. The builder denied such a cash payment was made.

4 The builder did not ask the Tribunal to make any findings about whether it was owed any money ($12,738 or otherwise) on the basis of quantum meruit. That is, the builder's set off did not include any amount for variations which were contested and not made in accordance with the HB Act (i.e. quantum meruit).

Hearing

5 The hearing took place over two days; the first on Thursday 17 August, the second on Wednesday 23 August. The homeowner was represented by a barrister (Mr Li) and a solicitor while the builder was represented by a solicitor (Mr Birch).

6 At the end of the two day hearing the parties made oral closing submissions. The homeowner's closing submissions went for approximately 3 hours while the builder relied on an outline of written submissions plus a much shorter amount of oral submissions (approx. 45 mins) because the sound recording finished at 5pm. The builder was content with the submissions it made in the matter, both orally and in writing, and the matter was thereafter reserved.

7 During the hearing the Tribunal ruled that:

(1) Leave to amend the homeowner's claim beyond the $187,000 claimed to date was granted (for the homeowner to claim $215,000); and

(2) The further supplementary report of the homeowner's expert dated and filed the day before the final hearing, namely 16 August 2023 refused to be admitted. That is, leave to file further expert evidence after the joint Scott Schedule (JSS) and outside the dates determined in pervious Tribunal orders, was refused.

8 The Tribunal gave detailed oral reasons for those orders during the hearing.

9 As it turned out the homeowner only made submissions for a money order of $144,012 so the leave to amend issue became otiose.

Evidence

10 The two building experts were cross examined concurrently. Mr Xue was engaged by the homeowner while Mr Melick was engaged by the respondent. Neither party made submissions about the expertise, or lack thereof, of the other party's expert and the Tribunal found both gentlemen to be qualified, fair and reliable witnesses.

11 The lay witnesses who were cross examined were the homeowner, the builder's director (Ms Yousif) and the director's father (Mr Yousif).

12 Each party filed a tender bundle just prior to the hearing commencing. The Tribunal used the builder's bundle as it was double sided and thus fit into one volume. Both bundles contained the same documents. The builder's tender bundle or court book is referred to as BCB then the page number.

13 In addition, the parties tendered during the hearing, without objection:

(1) BCB925-926 statement of Younan Yousif dated 17 August 2023 (the director's father);

(2) BCB927-928 inspection record for an inspection on 22 July 2019;

(3) BCB929 a marked up "first floor plan".

14 The Tribunal took into account the oral and documentary evidence that the parties drew its attention to.

Issues

15 The issues the Tribunal needed to determine in this matter were:

(1) Whether Item 3 is a defect to the extent not agreed:

(a) If yes, which rectification method to use:

(i) Repair box gutter; or

(ii) Replace box gutter with new.

(b) Rear parapet (rectification agreed if found).

(2) Whether item 7 is a major defect:

(a) If yes, what rectification method to use.

(3) Whether the Tribunal should make a work order or money order? If money, what margin or preliminaries to apply?

(4) Whether the builder can set off any money order in the homeowner's favour by amounts owed.

Facts

16 Most of the facts in this matter were agreed. Where they were not agreed the Tribunal will explain in these reasons what were the parties' positions and what findings the Tribunal made.

17 The parties entered into a home building contract on 25 July 2018 for the builder to construct a double storey brick veneer house (BCB30) in accordance with the CDC plans dated 29 May 2018. The contract sum was $599,000 incl GST.

18 On 28 January 2019 the parties entered into a deed of variation replacing sch.2 item 4(b) of the contract. The agreed variations amounted to $48,364 inclusive of GST changing the contract sum to $647,364.

19 The contract works were residential building works and the parties agreed the Tribunal had jurisdiction to hear and determine this matter, but for any limitation period issues dealt with below.

20 The sole director of the builder is Klara Yousif. Her father is Younan Yousif and he worked for the builder by supervising various sites including the homeowner's property. He met with clients, inspected stages liaised with contractors, ordered materials and received materials on-site: para 3 YY statement.

21 The completion date for the purposes of s.3B of the HB Act was 6 April 2020. This application was lodged on 18 August 2022 therefore it was only in time for major defects: s.18E HB Act.

22 On 16 July 2021 the builder's licence was cancelled.

23 Both parties agreed the homeowner paid the builder $579,700 from the first payment on 27 May 2018 to the last agreed payment on 6 March 2020. The first $10,000 payment on 27 May 2018 was a cash deposit, receipted by the builder on the day of payment: see HO opening subs [13] and B closing subs [68].

24 That is, by the end of the contract (April 2020) there was $67,664 owing from the homeowner to the builder.

25 For the first time, in a statement filed on 11 August 2023 (days before the final hearing), the homeowner alleged that sometime in March or April 2020 he handed $60,000 in cash to the father of the builder's director, namely Mr Younan Yousif: BCB 609-612.

26 It is not contested that "sometime in March 2020" the homeowner's brother Salem Kako gave the homeowner $30,000 after this conversation between the brothers (BCB614):

> "HO: They want another $65k and said if I didn't pay them this money they could put a caveat on my house. I know. But at this point, I just want the house finished so we can move in. I don't really have much choice but to pay.
>
> SK: How much have you got?
>
> HO: I have $35k. I need another $30k.
>
> SK: If you need, I can lend you $30k. Just pay them and get it finished quickly…"

27 It is not contested this conversation between brothers took place but it is not agreed that the builder – by its employees – told the homeowner he had to pay it $65,000 or the builder would "put a caveat on [his] house". The brother's statement only establishes the above conversation took place, not the truth of the words spoken in the conversation which are denied by the builder.

28 The Tribunal does not accept that the homeowner made the alleged $60,000 cash payment to the builder for the following reasons.

29 Throughout the building works the homeowner made references to having limited funds available. For example the homeowner stated in his 3 Aug statement (para 7) that in late Jan or early Feb 2020* that he said to Mr Yousif in response to a $4,000 variation “Sorry Younan, I cannot get that extra money and I can’t right now. We need to move in as soon as possible and pay for what needs to be done first”: BCB 610. * was 2022 in statement but corrected to be 2020.

30 Yet the homeowner expected the Tribunal to believe that having had limited money in late January or early February 2020 he does have $35,000 cash on hand which he can give to the builder. This is not plausible for other reasons which I will continue to set out.

31 Firstly there is no corroborating evidence that the meeting in March or April 2020 in which he claimed he handed Mr Yousif a bundle of $60,000 in $50 and $100 notes (oral evidence) even took place. There is no evidence of any text messages arranging the meeting, or emails about arranging the meeting or that the meeting or payment took place, and no receipt or acknowledgment from the builder, as the builder had done in May 2018 when the homeowner paid the initial $10,000 deposit in cash.

32 The homeowner said this in paras 12 and 13 of his August statement:

> “A number of weeks passed [from a meeting in about early March 2020] when I contacted with Mr Yousif so that I could arrange to meet him regarding my home so that I could move in. I ultimately met with Mr Yusuf at my home and gave him $60,000 in cash and had a conversation to the following effect:
>
> NK: Younan, I need my house finished I need my family to move in. I don't want a caveat
>
> YY: OK I need some money
>
> NK: I have the $60,000 in cash for you that is all I have. I borrowed from my brother to pay you
>
> 13. I handed the money to Mr Yousif where he counted the money and confirmed it was correct. Some time passed and her [sic] assured me the house would be ready to move in the following month.”

33 Mr Yousif said this in his 17 August statement:

> "I refer to paragraphs 12 and 13. I deny Mr Kako or anyone else handed to me $60,000 in cash, that I counted the cash (which I deny) or I confirmed the amount was correct (which I deny)."

34 In cross examination on the first day of the hearing, with the assistance of an Arabic interpreter, Mr Yousif denied all of the contents of the homeowner's August statement. He denied saying he or the builder would lodge a caveat over the homeowner's house. He was asked and answered (oral evidence):

> "You never chased him for any money after the homeowner moved in did you?
>
> No I didn't I don't know if the office did personally I didn't
>
> You never chased homeowner for money because the homeowner did not owe the company any money?
>
> No I don't agree company deals with him for me never discussed this"

35 The director was cross examined about the final invoice the builder issued the homeowner dated 4 February 2020 which the homeowner accepted in cross examination he received in February 2020.

36 This was for the remaining amount of $80,402 comprised of variations and remaining contract sum: BCB608. The director did not give evidence about when or how this invoice was sent to the homeowner but the homeowner accepted it was received by him in about February 2020. The director was cross examined about not including the email which attached the statement at BCB608 in her evidence. She was not, however, asked if she in fact never sent that statement to the homeowner in about February 2020.

37 The director was asked if she created this document later than 4 February 2020 "just to support the case you are bringing?" and she answered "Absolutely not". The Tribunal accepts, largely because the homeowner admitted it, that this 4 February 2020 was created and given to the homeowner in around February 2020.

38 The statement notes, next to the total amount owing $80,402 "15%LPP from 9/2/2020". Much was made of this in cross examination. The director explained it meant that the builder could charge 15% interest on the unpaid amount if it

was not paid from 9 February 2020 and that LPP meant late payment penalty. However, it is an agreed fact no interest was ever charged by the builder to the homeowner (nor claimed as a set off in these proceedings).

39 The director conceded that the last payment the builder received from the homeowner was $89,600 from his bank (ANZ) on 6 March 2020 and that amount was already taken into account on the 4 February 2020 "statement of outstanding balance": BCB608. Her explanation for not including the $89,600 owing from the homeowner to the builder on 4 February 2020, paid by the bank on 6 March 2020, was that the builder knew the ANZ bank was going to pay $539,750 in total as it was a construction loan. This explanation is sound and the Tribunal does not accept BCB608 was concocted by the builder to bolster its claim that money was outstanding at the end of the build. In fact, it is conceded that in February 2020 the homeowner owed the builder about $60,000, the issue was whether the homeowner paid it in cash to the builder in March or April 2020.

40 The director was also asked and answered:

> "Nowhere any written correspondence chased him for payment of $80,402?
>
> Didn't push it
>
> Reason why did not chase HO for payment of amount owing is because he denied the disputed variations and he made payment of $60,000 cash?
>
> Definitely not
>
> Agree that HO did pay you $60k cash in March or April 2020?
>
> No"

41 It is also relevant that on 5 September 2022, just over a fortnight after the homeowner lodged his claim against the builder, the builder lodged a claim against the homeowner. In this claim (which was HB22/40018) the builder clearly set out the claim it is now seeking as a set off, if a money order is made:

> "Breach of non payment to builder by owner Mr Nader Kako - 10 Hickory Pl, St Clair as per total contracted works of $660,102.00 inclusive of all variations to the contract. ($599,000+$61,102 variations)

> Shortfall in approved funds by ANZ bank total approved $539,750
>
> Shortfall of owner's total deposit contribution $29,950.00 plus $10,000.00 towards kitchen variation
>
> Total none [sic] payment owing to builder $80,402.00 plus Builders entitlement of 15% Late Payment Penalties applied as of 9/2/2020.
>
> Breach of Statutory warranties on owners responsibilities in maintaining overflowing box guttering contributing to defects as per owners expert witness report
>
> Breach of owners responsibilities in delaying notifications to builder relating to leaks as none notifications/correspondence received from May 2021 - 29/8/2022"

42 This cross claim (withdrawn on the first day of the hearing) was lodged by the director herself. The homeowner has known since at least 5 September 2022 that the builder wanted him to pay it $80,402. The homeowner's explanation for waiting almost one year - and to just five days before the final hearing - to put on any evidence about the alleged $60,000 cash payment reduces its plausibility. The Tribunal is not persuaded by the homeowner's explanations that the allegation the homeowner has outstanding funds to pay the builder only arose on the builder's cross claim and thus he could wait until replying to the builder's evidence to say anything about the alleged $60,000 payment. By 28 October 2022 when the homeowner filed his first statement he knew the builder was counter suing him for $80,402 unpaid monies yet he said nothing about the $60,000 cash payment he claims to have made several years earlier. This increases the implausibility of his version of events.

43 In the 28 October 2022 statement the homeowner goes into detail about payments made to the builder. In para 16 he recounts that on "23 June 2018 I gave Younan $10,000 in cash and that same day his office emailed me a receipt." A copy of the receipt and email are annexed to the October statement.

44 In paragraphs 38 to 40 the homeowner gave evidence about the contract sum being adjusted for the variations he agreed to ($48,364) and in para 40 he wrote "I understand that the Builder's position is that the total amount payable under the Contract was $599,000 plus $48,364 being a total of $647,364 inc of GST":

BCB323. There was no evidence given in his statement about the alleged cash payment.

45 Then in paragraph 41 the homeowner gave evidence about a telephone call he had with Mr Yousif “towards lock-up stage” about buying appliances: BCB323. The homeowner wrote that he was told by Mr Yousif “Just pay for all of the items and I will pay you back” then the homeowner bought items from the Good Guys and Tradelink: para 41-42 BCB323. The receipts are on BCB437-438 and dated 19 October 2019 and 26 November 2019 respectively. Yet the homeowner did not give any evidence about a conversation in which Mr Yousif demanded $60,000 from him or evidence about handing over $60,000 in cash to Mr Yousif in March or April 2020.

46 The implausibility is heightened by the fact the homeowner included in his statement filed in October 2022 that he requested a refund for bathroom items in an email he sent on 23 September 2022: para 43 BCB324. This was for an amount of $5,700 and is annexed at page BCB439. The homeowner thought to include evidence about $5,700 he said he was owed, but not $60,000 he claimed he handed over to the builder years earlier, which the builder denied and the homeowner knew the builder was denying by 28 October 2022 when he made his statement because the builder had lodged the cross claim against him on 5 September 2022.

47 It is no explanation that the homeowner was waiting for the builder’s evidence to be finalised before going into evidence about the alleged $60,000 payment, when he had gone into detailed evidence about other payments during the contract period and beyond (e.g. up to 26 September 2022 when he requested a refund, yet did not request recognition of the $60,000 he claimed he had paid in 2020).

48 The payment also does not seem plausible when one considers the timeline of complaints and relations between the two parties. In his October 2022 statement, confirmed in oral evidence given on day 2 under his affirmation, he stated he had a meeting with Mr Yousif in which he discussed “The poor quality

of the Works" in mid January 2020: para 48 BCB324. In that mid January meeting the homeowner also said he discussed "Why the works had been delayed" and he stated Mr Yousif assured him and his wife "That we would soon be able to move in to the Property": para 49 BCB324. The homeowner did not state that a few weeks later, in about March 2020, Mr Yousif actually said they cannot move in until they pay the builder or that Mr Yousif threatened to place a caveat on their home. This omission tends to suggest the later allegations did not happen (that is the threats about the caveat and the demands for the final payment).

49 The next paragraph in the homeowner's October statement, after he stated the assurances by Mr Yousif, speaks of moving into the property on 6 April 2020. Then the homeowner outlined, in paragraphs 51 and 52, concerns and correspondence about "significant defects": BCB325. Emails were sent between the parties in April 2020 about the alleged defects and in July 2020 and August 2020: BCB440 to 495. In these dozens of pages of emails the homeowner does not mention the $60,000 cash payment, yet is fastidious about chasing up aspects of the build he wants addressed. That said, the builder also did not chase up the outstanding $80,402 it claimed to be owed at that point in time (and to date).

50 The point is the homeowner is concerned and unhappy with the quality of the build from January 2020 so it makes sense he withheld the final payment sought by the builder. It does not make sense that he paid, in the midst of his unhappiness about the quality of the build, $60,000 to the builder with no documentation to prove the payment and no evidence that the alleged meeting even took place. Having previously received a receipt the very same day the cash payment had been made, it is implausible he never asked for a receipt or referred at all to the cash payment in any of the dozens of emails sent between the parties around the time of the alleged payment.

51 Another aspect of the implausibility of the $60,000 cash payment is the vagueness of the evidence about it. The homeowner claimed that he was pressured into making the $60,000 payment (despite the builder claiming

$80,402 was owed as at February or March 2020) in March 2020 and that after he received this pressure at a meeting in March 2020 he spoke to his brother 2-3 days later and the brother gave him $30,000 (oral evidence). The homeowner claimed that he had "about $35,000 cash saved at home from various gifts to my family and money I had left from my recent trip to abroad [sic]": para 10 BCB611, August statement.

52 The homeowner's oral evidence was that he had the cash at home at the time of the alleged March 2020 meeting in which Mr Yousif pressured him to pay by threatening a caveat, and that within days he had $30,000 from his brother. Then the homeowner said in his sworn oral evidence that he waited with that $65,000 cash at his home for a month or so to hand it over to Mr Yousif (without any evidence that shows such a meeting was arranged between the two men).

53 It is implausible that the homeowner had $65,000 in his home awaiting handover to the builder, when it was – according to the homeowner – the final payment which would prevent a caveat being lodged and allow the homeowner and his family to move into the new home. All of the evidence confirms that the homeowner was annoyed about the delay in the build and was anxious to move into the new home. It does not make sense he sat with the $65,000 at his house awaiting handover (of $60,000 of that $65,000 allegedly at the homeowner's home).

54 The homeowner's barrister submitted that because the brother's evidence - that he gave the homeowner $30,000 in about March 2020 - was not challenged, it follows that the homeowner gave the builder $60,000. This submission is not accepted. All that is accepted is that in about March 2020 the homeowner's brother gave the homeowner $30,000. That evidence establishes nothing more. It certainly does not prove the homeowner gave any of that $30,000 to the builder.

55 The vagueness of the homeowner's version of events is contrasted with the builder's two witnesses who emphatically repeated they did not receive $60,000 in cash from the homeowner or anyone on behalf of the homeowner. No

submissions were made about the credit of either the director or her father. Both appeared to the Tribunal to be credible witnesses and the homeowner did not make any submissions about their credit to the contrary or at all.

56 The Tribunal does not accept that the fact the homeowner paid the deposit in cash and paid the Good Guys $700 in cash creates a pattern of behaviour by the homeowner that he necessarily would have made an undocumented $60,000 payment to the builder. Both the deposit and the Good Guys $700 payments were documented. This submission is rejected.

57 The director was not cross examined about the cross claim she filed on 5 September 2022 which clearly stated the builder was suing the homeowner for $80,402 that the builder said was still outstanding since the build ended. She was not cross examined about concocting that cross claim because she knew she had received $60,000 in about March or April 2020.

58 Finally, the homeowner's explanation for waiting for almost a year from being sued by the builder before raising the $60,000 payment does not make sense. He said that he was asked by Mr Yousif to keep the cash payment private, this is "between them", as it would allow the builder to avoid paying GST. Yet in his August statement he does give evidence about the "private arrangement" but includes nothing about the conversation in which he claims Mr Yousif told him to keep the payment just between the two of them. Surely once the homeowner sued the builder (on 18 August 2022) all such "private arrangements" were off such that the homeowner no longer felt bound to keep any arrangements between them private. The homeowner was, after all, suing the builder for $187,000; surely he could not at the same time be protecting the builder from potentially paying about $5,455 in GST it had avoided paying by accepting an undocumented $60,000 cash payment from the homeowner. The explanation does not add up and is not accepted by the Tribunal.

59 The Tribunal finds that the reason the $60,000 was never referred to in the homeowner's evidence before 11 August 2023 is because the cash payment never happened. It is not supported by any corroborating evidence. The brother

giving the homeowner $30,000 in about March 2020 is not corroborating evidence.

60 The Tribunal does not accept that Mr and Ms Yousif were lying when they repeatedly said they did not receive the $60,000 cash payment from the homeowner. Nor does the Tribunal accept that the builder lodged a claim on 5 September 2022 which they knew to be false because they knew the homeowner had in fact paid them $60,000 and they were fraudulently claiming this money from him again.

61 There is inconsistency with the builder not chasing up the outstanding $80,402 from February 2020 until it lodged its cross claim on 5 September 2022. The Tribunal did question the director about this and consider the inconsistency. The fact that the builder did not chase up the remaining $80,402 it claimed it was owed by the homeowner could give rise to an inference it was only owed $20,000 or even none of that money, but the Tribunal does not draw that inference. While one might find it implausible a company would not chase up $80,402 from a former client, there was a lot of issues raised by the homeowner about defects and delay, and the builder simply admitted in cross examination that she did not chase it up and should have, but just didn't. The director knew the bank loan had all been paid out and the homeowner was unhappy with aspects of the build; it is plausible that the builder did not want to further aggravate an already unhappy client by chasing up the outstanding $80,402 amount, some of which related to contested variations. That explanation is much more plausible than the homeowner's implausible cash payment he first raised some three and a half years after allegedly making the payment.

62 The homeowner's barrister made some submissions about the builder bearing the onus about the cash payment which the Tribunal will very briefly address.

63 The homeowner bears the onus of proving, on the balance of probabilities:

(1) that the builder breached the contract including breaching any statutory warranties implied into the contract; and

(2) what rectification is reasonable and necessary to put the homeowner in the position he would have been in had any breaches not occurred; and

(3) that a money order is the appropriate order despite the preferred outcome.

64 The builder bears the onus of proving, on the balance of probabilities that the homeowner owes it $61,324.

65 The builder has given evidence that it did not receive any payment from, or on behalf of, the homeowner after the 6 March 2020 final payment from the homeowner's ANZ construction loan.

66 If the homeowner then wishes to allege he did make a further payment after 6 March 2020 he bears an evidentiary burden to make good that allegation. The builder denies it; there is no further evidence the builder can give to "prove" the payment did not happen.

67 In any event, the Tribunal is satisfied on the balance of probabilities that the builder did not receive any further payments from or on behalf of the homeowner after 6 March 2020. The Tribunal does not accept the homeowner gave the builder $60,000 cash before or after 6 March 2020 or at all.

68 The homeowner accepts he owed the builder $48,364 for variations and $19,300 as a final payment under the contract. The builder concedes the homeowner should be credited $6,340 for goods purchased by the homeowner. That leaves $61,324 owing to the builder.

Issue 1 – item 3

69 The experts agreed that there were defects to box gutter: JSS on BCB899.

70 In the homeowner's experts June 2022 report he listed defects to the roof including "missing box gutter overflow to rainwater head, insufficient fall within box gutter, dents and damages to box gutter": BCB622.

71 The builder's expert responded to the homeowner's expert about this item at BCB837-839. He agreed "the box gutter rain head is missing an overflow", "dents and damage to the box gutter… however this is not inhibiting the box gutter from operating as designed". He also agreed "laps in the box gutter are not sealed".

72 The homeowner's expert opined that the box gutter should be replaced with "new roofing" which includes a new box gutter. The proposed rectification of removing and replacing with a new box gutter is estimated to be $3,725 on BCB637, confirmed during oral evidence.

73 The builder's expert opined the gutter can be repaired: see initial report BB838-839. The repair scope of works was set out in the JSS on an "if found" basis at BCB899-900 at a cost of $1,545.

74 The measure of damages for a breach of a building contract is the cost of the work required to remedy the defects and give the homeowner the equivalent of a dwelling on their land that is *substantially* in accordance with the contract: *Bellgrove v Eldridge* [1954] HCA 36; 90 CLR 613. The remedial work ordered must be both "necessary" and "reasonable": *Bellgrove v Eldridge*. The Tribunal is not persuaded that it is necessary or reasonable to replace the whole box gutter, which is functional but has some dents on it and needs to be sealed.

75 The Tribunal accepts the homeowner's submission that s.18B(1)(b) is "all materials supplied by the [builder] 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". The Tribunal accepts that this warranty entitles the homeowner to new materials during the building works but does not find it necessary or reasonable to remove the existing functional box gutter and replace it with a new one. There is no evidence that the box gutter originally installed was not new. The experts inspected some years after completion in April 2020. The homeowner's expert agreed with the builder's expert's methodology or scope of works if the Tribunal determines it does not need replacement. This is what the Tribunal determines. Repair will place the

homeowner in a position whereby the gutter is substantially in accordance with the contract. The Tribunal finds $1,545 to repair the box gutter, added to $257.50 agreed and $9,450 agreed for item 3.

76 Even if the Tribunal is wrong about this, and the box gutter should have been ordered to be replaced instead of repaired, the difference in the two positions ($2,180) makes no practical difference to the outcome in these proceedings for the reasons which follow.

77 Next the rear parapet. The homeowner submitted that the poor workmanship in the front parapet (agreed defect) is the same as the rear parapet. The builder's expert opined that the rear parapet capping does not leak and is therefore functioning.

78 In the homeowner's expert's supplementary (or second) report the expert says the "installation of guttering and roof sheeting" is a major defect: [6.3] at BCB793. This opinion that item 3 is a major defect is not contradicted by the builder's expert.

79 The homeowner's expert "observed the following defects to the roof" (BCB631):

(1) "Missing flashing between Ridge capping and parapet capping

(2) missing downturn to parapet capping

(3) bulged and poor detailing to parapet capping

(4) fixings to parapet capping missing

(5) gaps in parapet capping

(6) incorrect laps in parapet capping

(7) downturn in roof sheeting missing

(8) over tightening of roofing screws

(9) parapet capping are not fixed and can be lifted."

80 The expert referenced photos 20 to 30 which are at BCB631-636. During cross examination photos 26, 27, 28 and 29 were identified as rear parapet with the other photos being the front parapet.

81 The builder's expert set out this list of 9 alleged defects in his report at BCB856 then addressed each in turn, relevantly as follows:

> 1. I disagree there is a missing flashing between the reach and parapet cappings... Further to this I note there is no evidence of any leaks to the area below. Defect not found.
>
> 2. Mr Xue states there is a missing downturn to the parapet flashing.... I thoroughly inspected the upper roof and found no missing down turns to any parapet capping.
>
> 3. I agree there is bulging and poor detailing to parapet capping. It is my opinion the front parapet flashings are causing the leak that is affecting the balcony ceiling below. Defective cappings to be replaced a limited to the area over the front balcony
>
> 4. I agree there are missing fixings to a small 2.2 metre length of parapet capping
>
> 5. I agree there are some gaps in the parapet capping
>
> 6. Mr Xue states there are incorrect laps in the parapet capping... He provides no evidence of this. I can find no measurements or Australian Standard requirements within his report I thoroughly inspected the laps and found night defects
>
> 7. Mr Xue states missing downturn in roof sheeting is noted however I have read the relevant Australian Standard 1562.1 2018 and find no reference to downturn. Vast turning sheets down is considered good practise there is no requirement within the Australian standards for this to be performed. Additionally I note there is no evidence of any leaks below the areas in question. Defect not found
>
> 8. I agree there is a small section of the parapet that is missing fixings this has been addressed in item 4 above. I believe this is a double up in Mr Xues [sic] report.

82 In the JSS the experts' positions were summarised thus:

> Experts disagree on defect to rear parapet capping.
>
> Experts I agree that the recapping is of poor workmanship manner.
>
> MM maintain position that the rear parapet capping does not leak and therefore functioning.
>
> GX maintain position, due to poor workmanship to the rear parapet capping, it is likely that the parapet capping will fail and allow moisture penetration, similar to that of the front parapet capping.
>
> …
>
> Expert agree on an if found basis, replacement cost of the rear parapet to be the same cost of the front parapet [$9,460].

83 In oral evidence the builder's expert gave evidence that the rear parapet showed evidence of having been deliberating lifted. The homeowner's expert's opinion is premised on the likelihood that the capping will fail. It is the case that as at August 2023, three and a half years after completion, the rear parapet demonstrates no evidence of failing.

84 The homeowner submitted that the Tribunal should look at photos 20 to 30 in the homeowner's expert's report and note that the same quality of defect arises in both the front and rear parapet capping, particularly in photo 27 (BCB635).

85 The Tribunal has looked at those photographs, and has considered the written reports and oral evidence of the experts and is not satisfied on the balance of probabilities that the rear parapet is a defect that requires rectification. If the capping had failed, as with the front parapet capping, there would be some sign of this. There is no evidence that establishes that the capping will fail in the near future. The builder is not liable for this aspect of item 3.

Issue 2 – item 7

86 The homeowner contends this is a major defect which the builder denies.

87 The definition of major defect is in s.18E(4) of the HB Act as follows:

> major defect means—

> (a) a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause—
>
> (i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or
>
> (ii) the destruction of the building or any part of the building, or
>
> (iii) a threat of collapse of the building or any part of the building, or
>
> (b) a defect of a kind that is prescribed by the regulations as a major defect

88 It is accepted the roof bracing which is or should be in the roof structure is in a major element of the building.

89 The homeowner's expert opined in [6.7.2] that "the defect is likely to cause the collapse of the building and therefore is a major defect": BCB794 This is a conclusion and is not supported by any facts or investigation or details. The Tribunal cannot accept this bare assertion that item 7 meets the definition of major defect in s.18E of the HB Act. There is no evidence that the absence of roof bracing is likely to cause the collapse of the house, other than that bare assertion. Obviously, the house has not collapsed in past 3.5 years and the homeowner's expert confirmed in cross examination there was no evidence that the roof was sagging or the roof structure failing. Also, there is no evidence that the roof bracing is definitely missing; only an assertion that the experts could not see it so assume it is not there. If the homeowner's expert is correct that no roof bracing would likely cause the building to collapse the fact the building has not collapsed leads one to conclude the roof bracing is installed.

90 The plans do not indicate where the roof bracing was to be installed or should be located. Neither expert did invasive testing to open the ceiling area to ascertain if the bracing had been installed: see [6.7.4] BCB872.

91 BCB927-928 are an inspection report that records that the framing structures including the roof have been satisfactorily constructed.

92 The Tribunal cannot be satisfied that the builder did not install roof bracing as opined by the homeowner's expert. This is not a proved defect. Nor is the Tribunal satisfied it would have been a major defect if it had been proved.

Issue 3 – money order and margin

93 The Tribunal can make a work order against an unlicenced builder and is aware that a work order is the preferred outcome, but in this case declines to do so.

94 Relations between the parties have broken down, including that in these proceedings both parties have doubted the other. That is to say the builder said it was not true the homeowner paid it $60,000 while the homeowner said it was not true the builder did not take $60,000 from him. They have been involved in litigation against each other for more than one year. But much more important than that is that the builder is not licenced and when asked about insurance for the rectification work (which it cannot obtain) it doubted the need for insurance if different contractors were used that each did work under $20,000. The homeowner should be able to choose the tradespeople he wishes to use, including choosing one licenced builder who will perform all of the works and will be insured. The Tribunal does not find it suitable to order an unlicenced builder to arrange for the rectification works to be done for a homeowner with the history between these parties.

95 The homeowner's margins were based on actual costs of preliminaries for all defects, many of which are no longer pressed and some have not been found by the Tribunal. It is impossible for the Tribunal to determine which preliminaries continue to apply to the agreed defects.

96 Furthermore, the Tribunal accepts the builder's expert's position that a 25% builder's margin is sufficient to cover the preliminaries. The homeowner's expert's additions of preliminaries and site supervision and labour added a further 50% to the rectification costs. That is excessive. Once 2% insurance (agreed) and 10% GST is added the homeowner's expert almost doubled the rectification costs; that is excessive. The homeowner's expert, to his credit, did not dispute that his margins were excessive and said he would "take that on

board". The builder's expert's rationale for the 25% builder's margin is sound. Also the rectification costs themselves included labour, and site supervision is included in the builder's margin and rectification costs too. Therefore 25% will be applied to the rectification costs plus 2% insurance plus 10% GST.

Issue 4 – set off

97 The Tribunal is not persuaded by the homeowner's submissions that it lacks the power to set off the homeowner's money order against contract sums. The two cases referred to by the homeowner are not binding authorities for the proposition that the Tribunal cannot set off money orders:

(1) *McDonnell & East Ltd v McGregor* [1936] 56 CLR 50 was an appeal from the Supreme Court of Queensland after a jury determined damages then the Judge set off those damages. It has no bearing on a home building claim in the Tribunal in 2023.

(2) The observations of Young AJA in *Palermo Seafoods Pty Ltd v Lunapas* Pty Ltd [2014] NSWSC 792 were obiter dicta only.

98 The Appeal Panel explained the role of set off in home building disputes in the Tribunal in *Antworks Pty Ltd and Brendon Chhong Lee v Shixin (Cindy) Lee* [2015] NSWCATAP 53 at [39]:

> Generally, where residential building works are incomplete, but not paid for, then there should be no award in favour of the home owner unless the home owner can adduce evidence that the cost of completing the incomplete works is greater than the amount that was payable to the builder. On the other hand, where the residential building works in question are defective, the position is that the cost of rectification is payable by the builder to the home owner, except to the extent of any amounts unpaid under the contract which are set off against those costs.

99 Setting off an amount that is outstanding under the contract is consistent with principles concerning the assessment of damages for breach which the homeowner's counsel referred to during the hearing. That is, the homeowner is to be put into the same position as he would have been in but for the breaches of contract (including statutory warranties). He is not entitled to be placed in a

superior position than he would have been in had the contract been performed. If he is compensated for the cost of rectifying any defects, the building work would be performed in accordance with the contract (including the statutory warranties which are implied into the contract). However if he does not pay the contract sums he will have the work performed according to the contract (after he uses the money order to engage tradespersons to rectify any defects) but would not have paid the amounts owed under the contract. This would not be in substantially the same position as he would have been had the breaches not occurred, this would be a superior position in which he saves over $60,000 in amounts owed under the contract.

100 The defence of set off is available in home building claims in the Tribunal, either by a homeowner setting off a builder's claim by the cost of rectification of defects (as in *Taylor v Clientel Development Pty Ltd* [2020] NSWCATAP 136) or setting off the homeowner's costs of rectification by outstanding contract sums owed to the builder as in this case: *Mohammed Affan v Fabiani Constructions Pty Ltd; Fabiani Constructions Pty Ltd v Mohammed Affan* [2014] NSWCATCD 192 at [112] which cited *AWA v Exicom* (1990) 19 NSWLR 705;

101 The amount owed to the builder under the contract was conceded by the homeowner in the amount $61,324 (but the homeowner said he paid all but $1,324 of it in cash and submitted set off was not available in home building claims in the Tribunal).

Conclusions

102 The homeowner is entitled to rectification costs in the amount of $53,019.41, before any set off owing to the builder, made up of the following amounts:

(1) For Item 3 the amounts agreed and allowed were $1,545 + $9,460 + $275 = $11,280.

(2) Item 5 was agreed at $7,039.50.

(3) Item 6 was agreed at $18,664.

(4) No amount was awarded for Item 7 as it was found not to be a defect and not to be a major defect.

(5) Item 8 was agreed at $820.

(6) The total rectification costs is therefore $37,803.50.

(7) To this is added 25% builder's margin as above, bringing the total to $47,254.375.

(8) Added to this is insurance at 2% binging the total to $48,199.46.

(9) To this must be added GST bringing the total to $53,019.41.

103 This amount must be set off by the amount owing to the builder under the contract, less credits conceded by the builder in the homeowner's favour. The total set off is $61,324.

104 The homeowner's money order is entirely set off by the amount owing to the builder.

105 The builder is not entitled to a money order in its favour in these proceedings as set off was raised as a defence to the homeowner's claim only. To be clear, the builder never sought a money order in its favour in this application brought by the homeowner; it only raised the defence of set off.

106 The only order which can be made in the circumstances is that the homeowner's claim is dismissed, as no money order can be made in his favour and no money order can be made in the builder's favour.

Costs

107 The homeowner sought a money order from the Tribunal that was more than $30,000, namely $187,000 subsequently amended to $215,000 and ultimately $144,000. Rule 38 of the NCAT Rules therefore applies.

108 Rule 38 essentially means costs will follow the event. The event is which party was successful in the proceedings. In *Palm Lake Resort Pty Ltd v King and Metcalfe* [2021] NSWCATAP 195 the Appeal Panel explained at [86] and [87]:

> The starting point for exercise of costs discretion on the usual principles is that costs follow the event. "The event" is usually the overall outcome of the proceedings – did the successful party have to go to the Tribunal (in this case) to get what it achieved, rather than being offered at least that relief. If there are distinct issues on which the party seeking relief did not succeed, that may be taken into account in the exercise of costs discretion. Appeal Panel decisions have made no order as to costs (to the intent that each party paid its or their own costs of the appeal) where there has been a measure of success on both sides: Johnson t/as One Tree Constructions v Lukeman [2017] NSWCATAP 45 at [25]-[29]; applied in Oppidan Homes PL v Yang [2017] NSWCATAP 67.

> For an award of costs on other than the ordinary basis, a party's conduct of the proceedings themselves, or the nature of the proceedings themselves (for instance, misconceived), or an outcome less favourable than an offer, are considered. The principles are explored in Latoudis v Casey (1990) 170 CLR 534, Oshlack v Richmond River Council (1998) 193 CLR 72 and in this Tribunal in Thompson v Chapman [2016] NSWCATAP 6 and Bonita v Shen [2016] NSWCATAP 159, citing earlier consistent authority. The principles have resonance with at least some of the "special circumstances" in CATA s 63 [sic – should be 60] that are required to justify a costs order when rule 38A does not apply.

109 The Appeal Panel referred to *Oshlack* which includes, at [67]:

> The expression the 'usual order as to costs' embodies the important principle that, subject to certain limited exceptions, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.

110 In *Bostik Australia Pty Ltd v Liddiard (No 2)* [2009] NSWCA 304 the relevant principles to apply were summarised at [38] in the joint judgment of Beazley, Ipp and Basten JJA. In that passage their Honours said:

> "The principles governing the making of an order as to costs so as to reflect the time taken in dealing with a particular issue in which the successful party in the proceedings or on the appeal did not succeed were reviewed by this court in Elite Protective Personnel Pty Ltd v Salmon (No 2) [2007] NSWCA 373. Those principles may be summarised as follows:
>
> • Where there are multiple issues in a case the Court generally does not attempt to differentiate between the issues on which a party was successful and those on which it failed. Unless a particular issue or group of issues is clearly dominant or separable it will ordinarily be appropriate to award the costs of the proceedings to the successful party without attempting to differentiate between those particular issues on which it was successful and those on which it failed: Waters v P C Henderson (Aust) Pty Ltd (Court of Appeal, 6 July 1994, unreported) .
>
> • In relation to trials it has been said that it may be appropriate to deprive a successful party of costs or a portion of the costs if the matters upon which that party was unsuccessful took up a significant part of the trial, either by way of evidence or argument: Sabah Yazgi v Permanent Custodians Ltd (No 2) [2007] NSWCA 306 at [24]. A similar approach is adopted on appeal.
>
> • …
>
> • Whether an order contrary to the general rule that costs follow the event should be made depends on the circumstances of the case viewed against the wide discretionary powers of the court, which powers should be liberally construed: New South Wales v Stanley [2007] NSWCA 330 at [18] per Hislop J (with whom Beazley and Tobias JJA agreed).
>
> • A separable issue can relate to "any disputed question of fact or law" before a court on which a party fails, notwithstanding that they are otherwise successful in terms of the ultimate outcome of the matter: James v Surf Road Nominees Pty Ltd (No 2) [2005] NSWCA 296 at [34].
>
> • Where there is a mixed outcome in proceedings, the question of apportionment is very much a matter of discretion and mathematical precision is illusory. The exercise of the discretion depends upon matters of impression and evaluation: James v Surf Road Nominees Pty Ltd (No 2), citing Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd (1993) 26 IPR 261 at 272."

111 The homeowner has not been successful in this application. His claim has been dismissed. Therefore he must pay the builder's legal costs unless there are reasons not to make such an order.

112 Order 2 will be set aside if either party makes an application for a different cost order, on or before 22 September 2023. If either party makes a cost application, the other party must, on or before 6 October 2023, provide written submissions about the cost application.

113 Both parties must, in any cost application or cost submissions, express their attitude to the Tribunal dispensing with a hearing on costs, that is to say, determining the cost application on the papers.

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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