Civil and Administrative Tribunal
New South Wales

Case Name:	Vahora v Clarendon Homes (NSW) Pty Ltd
Medium Neutral Citation:	[2019] NSWCAT
Hearing Date(s):	14,15 November 2018
Date of Orders:	3 July 2019
Date of Decision:	3 July 2019
Jurisdiction:	Consumer and Commercial Division
Before:	F Corsaro SC, Senior Member
Decision:	The Tribunal orders: 1. The Respondent, Clarendon Homes (NSW) Pty Ltd to immediately pay the Applicants, Shoaib Vahora and Sana Shoaib Vahora the total amount of $42,837.08 inclusive of GST (2) on the issue of costs: (a) any application in respect of the costs of the proceedings to be made by written submissions filed and served within 14 days of the date of publication of this decision. Such submissions should address the question whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act; (b) if either party files submissions in accordance with order 6 above the other party may file and serve submissions in response within a further 14 days. Such submissions should address the question whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act.
Catchwords:	Building claim – Consumer Claim – Statutory warranty claims – Alleged misrepresentation - Defects and Incomplete Works –Claim for general damages for breach of the Australian Consumer Law – Unfair contract term – Tribunal jurisdiction

Legislation Cited:	Home Building Act 1989 (NSW) Civil and Administrative Tribunal Act 2013 (NSW) Fair Trading Act 1987 (NSW) The Australian Consumer Law, Schedule 2 of the Competition and Consumer Act 2010 (Cth).
Cases Cited:	Bellgrove v Eldridge (1954) 90 CLR 613 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272 Eye Vision Institute & Anor v Kitchen & Anor [2014] QSC 260 Watson v Foxman (1995) 49 NSWLR 315 Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357 Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 59 Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191. Ellul v Oakes (1972) 3 SASR 377 Oscar Chess Ltd. v. Williams [1957] 1 WLR 370 Dick Bentley Products Ltd. v. Harold Smith (Motors) Ltd [1965] 1 WLR 623 Henville v Walker (2001) 206 CLR 459 Como Investments Ltd (in liq) v Yenald Nominees Pty Ltd (1997) 19 ATPR 41-550 3D Design & Build Pty Ltd v Lynch [2016] NSWCATAP 229
Category:	Principal judgment
Parties:	Shoaib Vahora and Sana Shoaib Vahora (Applicants) Clarendon Homes (NSW) Pty Ltd (Respondent)
Representation:	Mr M Birch of Birch Lawyers (for the applicants) Mr Vernier, counsel instructed by HWL Ebsworths Lawyers (for the respondent)
File Number(s):	HB 17/25706
Publication Restriction:	Nil

INTRODUCTION

1 The present dispute arises out of the construction of a new, single-storey, "*Clarendon Homes Lyndhurst 21*" style home on land in Moorebank, in suburban Sydney (**the Residence**). The respondent builder, Clarendon Homes (NSW) Pty Ltd (**the Builder**), built the Residence for Mr and Mrs Vahora, the applicant homeowners (**the Owners**). Nothing turns on the actual location of the Residence. To preserve the parties' privacy, the address of the Residence does not appear in these reasons.

2 The issues for determination were the subject of formal pleadings. As developed, the Owners filed Amended Points of Claim (**APC**) and the Builder filed Points of Defence to the Amended Points of Claim (**DPC**). The following relatively straightforward contextual background emerges from the APC, the DPC and other uncontentious documents:

(1) the Builder built the Residence under a written, residential building contract incorporating the standard terms of the Housing Industry Association general conditions of contract (**the Contract**);

(2) the parties entered into the Contract on, or about, 29 May 2014: paragraph [15] of the APC, assumed admitted by the DPC;

(3) the Builder agreed to build the Residence for the lump sum price of $278,072.00 (**the Contract Sum**) which reflected prior negotiations which included removing the window shutter supply from the Builder's scope of works, intended to allow the Owners to apply for a first home grant;

(4) the window shutter supplier, Elite Home Improvements of Australia Pty Ltd (**EHI**), supplied the window shutters, and the Owners paid EHI directly for the shutters;

(5) the Builder installed the window shutters, as supplied by EHI;

(6) the parties agreed on a 30 week "contract period", but subject to extension under clause 9 of the Contract: item 12 of Schedule 1 and clause 9 of the Contract;

(7) the contract period commenced on a date determined by clause 8 of the general conditions;

(8) the Builder commenced work on 17 October 2014: paragraph [15] of the APC and paragraph [15] DPC;

(9) on 5 March 2015, the Builder served a notice of practical completion. The Owners disputed the works were practically completed (paragraphs [17] and [18] of the APC and [17] and [18] of the DPC) and, as a result, the Builder carried out more work (paragraph [19] of the APC and [19] DPC) before issuing a second notice of practical completion on 27 October 2015 (**the 27 October Letter**);

(10) by the 27 October Letter, the Builder represented that:

(a) the contract period had commenced on 17 October 2014;

(b) the end of the contract period was 17 July 2015;

(c) the Builder was entitled to twenty-four days' extension of time due to adverse weather;

(d) the Builder would hand over possession of the Residence to the Owners on 4 November 2015; and

(e) the Builder would pay the Owners liquidated damages at the agreed rate of $15.00 a day; a total amount of $1170.00;

(11) the Builder handed over the Residence to the Owners on 11 November 2015: paragraph [21] of the APC and [21] DPC. This was 7 days later than the nominated hand over date. Accepting the accuracy of the

Builder's position as set out in the 27 October Letter, this further delay increased the Builder's liability for liquidated damages by an additional $105.00;

(12) the Owners filed a complaint with Fair Trading NSW (**FTNSW**) claiming the Builder's work to be incomplete and defective;

(13) FTNSW investigated the Owners' complaint, and on 6 March 2017, FTNSW issued the Builder with a rectification order (**the Rectification Order**) under s 48E of the *Home Building Act 1989* (NSW) (**the HB Act**);

(14) the Owners filed Application HB 17/25076 with the Tribunal on 7 June 2017, claiming the amount of $313,500.00 (**the Application**);

(15) the Application gave the following particulars of the amount claimed:

(a) $200,000 for alleged breach by the Builder of the statutory warranties in s 18B of the HB Act (**the Warranties**);

(b) $50,000 for "false information provided for side setback that resulted in [the Residence] being reduced";

(c) $3,500 for an "integrated retaining wall…[which was] not constructed however charged by the [B]uilder";

(d) $50,000 for an "incorrect retaining wall" which allegedly made the Residence prone to being affected by termites;

(e) $10,000 for alleged relocation and business interruption costs during repairs; and

(f) unquantified amounts for "liquidity damage", "remuneration funds" and "temporary office and moving costs";

(16) once the Owners filed the Application, the Rectification Order ceased to have any operation in relation to the same defects which were the subject of the Application: s 48N of the HB Act; and

(17) the Builder continued to carry out the works to which the Rectification Order referred in October 2017.

PROCEDURAL DIRECTIONS AND A JURISDICTIONAL ISSUE EMERGES

3 The Application first came before the Tribunal for directions on 3 August 2017. On that day, the Tribunal ordered the formalisation of the dispute by the service of Points of Claim, Points of Defence and a Scott Schedule. The Owners then informed the Tribunal that the quantum of their claim was $200,000.

4 The Application came before the Tribunal for directions again on 26 October 2017. The Tribunal made further procedural orders. These included orders requiring the Owners to file and serve an Amended Scott Schedule and for the Builder to file a Response.

5 The Application came before the Tribunal next on 1 March 2018. On that occasion, the Tribunal made orders for:

(1) the completion of the evidence; and

(2) a joint conference of the parties' experts to narrow the issues.

6 On 8 May 2018, the Builder informed the Tribunal of a jurisdictional issue, and that it would apply to have the proceedings transferred to the Supreme Court of New South Wales. According to the Builder, as the Owners were claiming that clause 48 of the Contract should be set aside as being an unfair term, by relying on ss 23 and 25 of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**the ACL**), the Tribunal did not have the jurisdiction to deal with that aspect of the dispute.

7 The Application came before the Tribunal again for further directions on 25 July 2018. At that directions hearing, the Owners' counsel informed the Tribunal that the Owners intended to deal with the Builder's jurisdictional challenge in written submissions prior to the hearing.

8 The Builder did not apply to transfer the proceedings to the Supreme Court. The Owners did not press that part of the Application: paragraph [129] of the Owners' Final Submissions.

9 The Tribunal eventually fixed the Application for a two-day hearing commencing on 14 November 2018. The hearing finished within the allocated time.

THE HEARING

10 The Owners and the Builder were both legally represented at the hearing. Mr M Birch of Birch Partners appeared for the Owners. Mr T Vernier, of counsel, appeared for the Builder, instructed by HWL Ebsworths Lawyers.

11 The parties relied on a joint, paginated bundle of documents (**the Bundle**) at the hearing. In addition, the documentary material comprised:

(1) the Owners' "Statement of Agreed Facts": Ex 1;

(2) the Builder's tender entitled "Your New Home Tender": Ex 2; and

(3) a handwritten document prepared by the parties' experts following their joint conferral: Ex 3.

12 Mr and Mrs Vahora were called and swore to the truth of their witness statements. Their independent expert, Mr Mario Bournelis, gave oral evidence at the hearing affirming the views he expressed in his written report. The Owners and Mr Bournelis were cross examined by Mr Vernier.

13 Ms Christine Borg, the Builder's Group Manager (Legal), Mr Terry Sofopoulos and Ms Sandra Mullee, who were both tender presenters employed by the Builder, were called and gave evidence as to the truth of their written statements. The Builder's independent expert, Mr Carl Le Brenton, affirmed the opinions he had expressed in writing. Ms Borg, Mr Sofopoulos and Ms Mullee were cross examined by Mr Birch.

14 At the conclusion of the hearing, the Tribunal reserved its decision and made directions for the service of the parties' final written submissions. As a consequence:

(1) the Owners filed, and rely on, written final submissions entitled "*Homeowners' Submissions dated 28 February 2019*" (**the Owners' Submissions**); and

(2) the Builder filed, and relies on, written final submissions entitled the "*Final Submissions for the Respondent*" dated 16 May 2019 (**the Builder's Submissions**).

AGREED OR NO LONGER IN ISSUE

15 By the conclusion of the hearing, the Owners' claim to recover the rectification costs of the allegedly defective and incomplete items of work as identified in the final form of the Scott Schedule (**the Scott Schedule**) had substantially narrowed.

16 Mr Bournelis and Mr Le Brenton jointly agreed that in the period before the hearing the Builder had satisfactorily attended to the following items claimed in the Scott Schedule:

(1) item 1, by which the Owners alleged that the Builder had failed to lay the floor in the bedroom 2 ensuite with sufficient falls, and that there was waterlogging of the mirror;

(2) item 3, which related to an allegation that the Builder had constructed the alfresco floor with inadequate falls;

(3) items 4(i), (ii), (iv) and (v), which concerned allegedly defective plasterboard works;

(4) item 5(i) and 5(ii), which related to incomplete or defective electrical works;

(5) item 7(b), which related to inadequate sealing of the tile edges in the Residence's family room adjacent to the stacker alfresco door;

(6) item 7(c), which alleged defective installation of the island kitchen bench floor tiles;

(7) item 7(d), which alleged that a floor tile had been cracked and required replacement;

(8) item 7(e), which alleged that the Builder did not install a desk which the Builder had agreed to install;

(9) item 7(i), which alleged that the Builder had installed a faulty magnetic door stopper at the front entry door;

(10) item 7(j), which alleged that the Builder had chipped a number of floor tiles;

(11) item 7(l), which related to areas of allegedly defective render, where the Builder had terminated the render short;

(12) item 7(o), which concerned an allegation that the Builder had incorrectly positioned a hanging rod in a built-in robe;

(13) item 7(p), which alleged that the Builder had not properly sealed the Residence's downpipes;

(14) item 7(q), which involved an allegation that the Builder had not installed weep holes;

(15) item 7(r), which concerned the effectiveness of the Residence's termite barrier;

(16) item 7(s), which concerned the Builder's installation of the Residence's letter box;

(17) item 7(w), which involved a complaint that the Builder had not adequately fixed a cornice in the living room and, as a result, the cornice was coming away;

(18) item 7(aa), which involved an allegation of defective painting; and

(19) item 8, which concerned an allegation that the Builder had not properly installed the brick mortar joints.

17 The issues were also narrowed because the Owners did not press their compensation claims for:

(1) Scott Schedule item 7(f), which alleged the Builder was responsible for a fraying carpet in the Residence; and

(2) rent.

18 The outcome of the joint conferral of Mr Bournelis and Mr Le Brenton narrowed the issues further. The experts agreed the Builder was responsible for the following Scott Schedule items, and agreed the rectification costs for each (**the Agreed Items**):

(1) item 4(iii), which related to the rectification of plasterboard work, the agreed quantum being $2,000.00;

(2) item 6, which related to defective work leading to water coming inside the Residence's garage, the reasonable rectification costs agreed in the amount of $1,500.00;

(3) item 7(a), an allegation involving the presence of unsightly gaps in the top of the rear stacker door to the alfresco area, and out of level brickwork, which the experts agreed would reasonably cost $124.00 to repair;

(4) item 7(g), for the rectification of the shutter blinds in bedroom 4, which the experts agreed would cost $200.00 to repair;

(5) item 7(h), which concerned the rectification of the cavity sliding doors to the Residence's media room, which the experts agreed would cost $200.00 to make good;

(6) items 7(k) and 7(z) of the Scott Schedule, which related to the installation of inconsistent corbel render and other defective render works, which the experts agreed would cost $500.00 to repair;

(7) item 7(n), which concerned the installation of redundant taps which the experts agreed would cost $82.00 to rectify; and

(8) item 9, for a defect relating to the Residence's termite barriers which the experts agreed would cost $1,200.00 to fix.

19 On the basis of the experts' agreement, the Tribunal finds the reasonable rectification costs of the Agreed Items to be $5,806.00: The relevant calculation is set out in the table in paragraph [137] of the Owners' Submissions.

REMAINING IN DISPUTE

20 The following Scott Schedule items remained in dispute for determination by the Tribunal:

(1) item 2, which relates to the minimum falls of the main bathroom floor;

(2) item 5(iii), which relates to the repositioning of ceiling lights;

(3) item 7(m), which relates to the finish of the edge slab;

(4) item 7(t), which relates to the difference in the floor levels between the wet areas and the adjoining floors;

(5) item 7(u), which relates to the shower swing of ensuite 2 shower;

(6) item 7(x), which relates to air conditioning noise;

(7) item 10, which relates to a misalignment of the al fresco area roof supporting beam;

(8) item 11, which relates to damaged landscaping works; and

(9) the Owners' claim for general damages for the Builder's misleading conduct in breach of s 18 of the ACL.

JURISDICTION

21 The Tribunal has the jurisdiction and the functions that are conferred by the *Civil and Administrative Tribunal Act 2013* (NSW) (**the NCAT Act**), and any other legislation: section 28 of the NCAT Act. The Tribunal's jurisdiction includes the jurisdiction to hear and determine any "building claim" brought in accordance with Part 3A the HB Act, where the amount claimed does not exceed $500,000 or such other prescribed amount: section 48K of the HB Act.

22 Section 48A(1)(a) of the HB Act defines a "building claim" as including a claim for the payment of a specified sum of money that arises from the supply of building goods or services. The Owners' claim for the cost of making good the allegedly incomplete and defective works referred to in the Scott Schedule (paragraphs [27] and [28] of the APC) is a "building claim" as defined. The

Builder does not submit the contrary. The Builder makes no submission to the contrary. The Tribunal finds that it has the jurisdiction to deal with this aspect of the Application.

23 The Builder submits that the Owners' make claims under Federal law, and that the Tribunal does not have the jurisdiction to determine this aspect of the Application. The Builder submits that the Tribunal does not have jurisdiction to deal with claims under the *Competition and Consumer Act 2010* (Cth), but does acknowledge that the Tribunal has jurisdiction to deal with a claim under the ACL by operation of the FTA: paragraphs [74] and [76] of the Builder's Submissions.

24 The Owners' Submissions submit that the Tribunal does have the jurisdiction to determine these. Part 6A of the gives the Tribunal jurisdiction to hear "consumer claims" as defined in s 79E of the FTA. The ACL applies in NSW through its adoption in the FTA: s 28 of the FTA. The Owners submit that:

(1) as a result of sections 30 and 31 of the *Fair Trading Act 1987* (NSW) (**the FTA**), the ACL applies in NSW; and

(2) s 30(4) of the FTA provides that the Tribunal is a "court" for the purposes of determining an ACL claim under the FTA.

25 Having regard to the Owners' Submissions, the Tribunal is of the view that the Owners rely on the ACL by way of its adoption by the FTA, and accordingly the Tribunal finds that it has the jurisdiction to determine the Owners' claim for damages for breach of s 18 of the ACL.

DISPUTED SCOTT SCHEDULE ITEMS

26 The Warranties are in the following terms:

> 18B warranties as to residential building work
> (1) the following warranties by the holder of a contractor license or a person required to hold a contractor license before entering into a contract, are implied in every contract to do residential building work;

> (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 material 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) warranty that the work will be done in accordance with, and will comply with, this or any other law;
> (d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time;
> (e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling, or the repairing, renovation, decoration or protective treatment of a building, the work will result to the extent of the work conducted, in a building that is reasonably fit for occupation as a dwelling;
> (f) a warranty that the work and any materials used doing the work, will be reasonably fit for a specified purpose or result, if the person from whom the work is done expressly makes known to the holder of the contractor, licenser or person required to hold a contract license or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holders or persons skill and judgement.

27 Clause 38 of the Contract contained an express term by the Builder to similar effect to the Warranties.

NO FALLS TO MAIN BATHROOM FLOOR

28 Clause 3.3 of AS 3740 – 2010 3.3 (**the Floor Finish Standard**) states:

> Where required, falls in floor finishes shall allow all surface water to drain without ponding except for residual water remaining due to surface tension. For general bathroom floor area, the minimum fall to the waste shall be 1:100.

29 It does not follow that because there is no specific requirement in a code or a standard that a floor waste be installed outside a shower area that a bathroom floor outside the shower area does not have to have minimum falls to stop water ponding on the surface. The everyday use of a bathroom carries the appreciable risk of water being tracked, or simply falling, onto the floor outside the area of the shower. In the Tribunal's view, the Floor Finish Standard

mitigates against that risk. It requires a wet area floor to have sufficient minimum falls for any water on the surface to flow to a discharge point, rather than "ponding". This is to reduce slip risks, or risks to the amenity of the bathroom or its users.

30 The opening words of the Floor Finish Standard are "where required". On a proper construction, the Floor Finish Standard makes it necessary for a floor finish to allow surface water to drain without ponding, where ("where required") the presence of surface water is an appreciable risk. This does not mean that the floor has to have a minimum fall only if there is a building standard which requires the installation of a nearby floor waste.

31 Scott Schedule item 2 involves the allegation that the Builder did not lay the finished floor of the main bathroom floor (**the Floor**) with sufficient minimum falls, and as a result, water ponds on the surface. Mr Bournelis and Mr Le Brenton disagree about that.

32 Mr Le Breton's view is that the Floor is suitable. Part of his reasoning is that there was no standard or code which required the floor waste where the Builder has installed it, and it would not matter whether the Floor had minimum falls, in any event. Mr Le Brenton gave evidence that his observation of the water remaining on the Floor after he poured water onto the Floor, was that it was water due to surface tension, and not ponding. He agreed that there was one area where the water did pond, but it was relatively minor; the size of one tile. Mr Le Brenton's report contained a number of photographs of spirit-level readings, and a photograph that showed Mr Le Brenton used the diameter of a five-cent piece as an objective measure to determine how he came to this opinion.

33 Mr Bournelis disagreed with the suggestion that Mr Le Brenton's photographs showed sufficient falls across the Floor. Mr Bournelis' opinion was that the Floor did not have sufficient falls based on his observations after a "flood test". He considered the residual water as "ponding" but did not give any objective measure by which he arrived at that view. This led to the Builder criticising Mr

Bournelis'. The Builder submitted that Mr Bournelis' omission to refer to any objective measure, and his failure to carry out any spirit-level readings of the floor finishes, diminished the value of Mr Bournelis' opinion, particularly when compared to the evidence of Mr Le Brenton.

34 The Builder is correct in submitting that the Owners have the onus of establishing that the Builder installed the Floor with insufficient falls. The Builder submits that the Owners failed to satisfy that onus because the evidence of Mr Bournelis was unreliable and compromised by the lack of objective factors used by Mr Bournelis to form his opinion.

35 The Tribunal's assessment is that Mr Bournelis and Mr Le Brenton shared the view that proper building practice required any wet area floor to be properly drained to prevent ponding, and that the real issue which separated them was whether the evidence established that the Builder had not achieved the required minimum falls.

36 Mr Bournelis' description of having carried out a "flood test" was enough to convey to the Tribunal that Mr Bournelis' poured water onto the Floor, and then observed the water flow. The Tribunal does not accept the Builder's criticism of Mr Bournelis' evidence because more was required by Mr Bournelis to describe what he did.

37 Although it is correct to say that Mr Bournelis did not provide any quantitative measure of the amount of water that he saw to be "ponding", the Tribunal accepts that his observation of "ponding" was the opinion of an experienced expert giving an objective and independent view by reference to the amount that he saw remaining. It is relevant to note that the Floor Finish Standard does not include any quantitative, objective measurement which results in residual surface water being classified as "ponding", as opposed to water which is left due to surface tension.

38 The Tribunal is not persuaded by the Builder's submission that Mr Bournelis failed to assess the level of the bathroom floor by a spirit-level test. Mr

Bournelis agreed in cross-examination that the only test that he used was the flood test, but Mr Bournelis was being truthful when he told the Tribunal that he also measured the fall of the Floor by spirit-level readings. Mr Bournelis' photographs show that he did spirit-level tests in wet area floors (eg p 806 of the Bundle), and it is logical to believe that he carried through that procedure to the Floor, as Mr Bournelis swore he did.

39 The Tribunal is also not persuaded that the force of Mr Bournelis' evidence is diminished because Mr Bournelis did not provide details of the exact manner and method in which he carried flooded the Floor. The real issue is how much water was left after a time. As already stated, the Tribunal's view is that Mr Bournelis' reference to having carried out a "flood test" was a sufficient description of what Mr Bournelis did.

40 At the time the Residence was built, there was no express requirement in the National Construction Code, or in any applicable Australian standard, which made it necessary for the Builder to install the floor waste in the Floor where it did. The Tribunal considers that the requirement for a floor waste, and the appropriate fall for a bathroom floor when a floor waste is installed, are two separate issues.

41 The Tribunal:

(1) considers that there was nothing more required of Mr Bournelis to explain the manner and method of his approach to the assessment of the adequacy of the main bathroom floor finishes;

(2) accepts Mr Bournelis' observations of ponding as accurate. It had direct evidence that the Floor ponds and does not drain away after the bath and wash basins are used, so much so that the Owners are required to dry the floor with towels. The Tribunal accepts that evidence: paragraph [26] of Mr Vahora's 11 April 2018 statement (Bundle p 346);

(3) finds that:

(a) the Floor was not installed by the Builder with the minimum falls required to comply with the Floor Finish Standard; and

(b) as a result, the Builder's work did not comply with the Warranties and the requirements of the Contract resulting from:

(i) the Tribunal's acceptance of Mr Bournelis' evidence;

(ii) Mr Vahora's direct evidence of ponding after the bathroom and basins are used;

(iii) Mr Le Brenton's evidence as to the presence of ponding in one area; and

(iv) the fact that inadequate falls were a problem for the Builder in other areas, as the Builder's rectification of Scott Schedule item 1 and item 3 indicate.

42 The experts agree the quantum of this claim to be $8,890.00. Subject to the Builder's submission that a rectification order is the appropriate order for the Tribunal to make, the Tribunal accepts the agreed quantum for this Scott Schedule item.

REPOSITIONING OF CEILING FANS

43 Item 5(iii) of the Scott Schedule is about the asymmetric positioning of nine downlights in the family room of the Residence. There is no dispute that the downlights are located eccentrically; 600mm off the western wall and 1000mm off the eastern wall. Mr Bournelis' evidence was that

> "[w]hilst this may not constitute a defect as such it makes for an unslightly finish…"

44 The Builder submits that the asymmetric positioning of the downlights does not constitute a defect at all. This is because it is aesthetic and does not affect the functional or performance requirements of the downlights. The Tribunal rejects that submission. The Builder had the obligation to construct the Residence to comply with the Warranties and the terms of the Contract. It follows that if the Builder installed the downlights contrary to the requirements of the Contract, then the Builder breached both the Contract and the Warranties, and it makes no difference that this shortcoming results in "an unsightly finish" rather than a functional deficiency.

45 An aesthetic defect is nevertheless a defect. Rectification damages are awarded for a breach of a building contract, unless there is good reason to adopt another measure. Another measure may be appropriate if the award of rectification damages is manifestly disproportionate to the benefit of rectifying the work: *Bellgrove v Eldridge* (1954) 90 CLR 613; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272. The fact that a defect is aesthetic, rather than structural or functional, may make it more likely that rectification as a measure may be unreasonable, because the cost of rectification far exceeds the benefit to the amenity achieved by rectification. However, this is an issue going to the quantification of damages, and not a matter going to liability, and not an issue raised by the Builder.

46 The Bundle included copy of the signed electrical plan for the electrical services which the Builder had to install (page 741) (**the Electrical Plan**). The essence of the Owners' case appears in paragraph [36] of the Owners' Submissions. They submit that the Electrical Plan showed downlights to be positioned symmetrically. Mr Bournelis agreed. His opinion was that the Builder did not install the downlights as the Electrical Plan required.

47 The Electrical Plan has no dimensions, and nothing on it to suggest that the downlights were to be positioned in any precise location. The Electrical Plan does not allow any objective assessment by the Tribunal to confirm that Mr Bournelis' opinion that the downlights were not installed as required is correct.

48 The Builder refers to the Note on the Electrical Plan that states:

> Measurements and locations are approximate only, points will be placed as close as possible to location on plan.

49 The Builder submits that even if one were to ignore what appears in the Note, the Electrical Plan gives no indication that the downlights were to be positioned symmetrically, contrary to Mr Bournelis' opinion.

50 The Tribunal's assessment of the Electrical Plan is that it shows the downlights located closer to the western side of the room than the eastern side of the room. This is consistent with Mr Bournelis' evidence. In paragraphs [49] and [50] of the Builder's Submissions, the Builder refers to the relevant passages of Mr Bournelis' oral evidence, where Mr Bournelis did accept that the Electrical Plan did not show the downlights as being symmetrically positioned.

51 The downlights were positioned to light up the kitchen area. The Tribunal's view is that the light coverage determined where they were positioned. On the Tribunal's assessment of the Electrical Plan, and the concession made by Mr Bournelis on which the Builder's Submissions rely, the Tribunal is not satisfied that the Builder installed the downlights contrary to the requirements of the Contract, and differently than shown on the Electrical Plan.

52 For these reasons, the Tribunal rejects the Owners' claim for Scott Schedule item 2.

POOR FINISH TO FACE EDGE SLAB

53 The agreed rectification cost for Scott Schedule item 7(m) is $350.00. This item relates to a claim by the Owners that the Builder left visible concrete dags on two exposed slab edges; the Residence's living room and bedroom 1. The Owners say the finish of the slab edges in these two locations is unsightly, and that the Builder should have removed them. The Tribunal agrees.

54 The Builder's denial of any liability relies on the following propositions:

(1) it is normal for concrete dags to remain on the edge of a poured concrete slab, but that slab edges are not normally left exposed and typically covered over by landscaping and adjoining works; and

(2) concrete dags are "aesthetic" only, and do not affect the integrity or performance of a structure.

55 The Builder's submission that aesthetic defects are not defects suffers the same problem as the similar submission made by the Builder in connection with Scott Schedule item 5(iii). The Tribunal rejects it for the same reason it rejected the Builder's submission made there.

56 The Tribunal finds that Owners are entitled to recover the cost of removing the concrete dags in the agreed amount of $350.00. This finding is subject to the Builder's submission that a rectification order is the appropriate order for the Tribunal to make.

FLOORS ALL AT THE SAME LEVEL

57 The evidence establishes that the floors of the Residence were originally all poured at the same level, but with the installation of the tiles and the necessary allowance for the minimum falls for drainage, the wet area floors were built up so that they sit 40mm higher than the surrounding floors. As a result, the entrance to the bathrooms, ensuites and the laundry have 40mm high exposed edges (**the Exposed Edges**). This means that all the floors of the Residence are not at the same level.

58 The evidence establishes that the Builder can, and sometimes does, construct the *Lyndhurst 21* style home with all floors at the same level, with no marked difference between wet areas and adjoining floors: paragraphs [5] and [6] of Mr Vahora's, 10 August 2018 statement at p 607 of the Bundle. This is consistent with Mr Bournelis' evidence that project home builders build by recessing in the wet area slabs. This means that the floor levels are the same

as their adjoining rooms, and there are no exposed edges. Mr Bournelis was unable to say whether it was customary at the time the Residence was built to have bathroom floors recessed in this way.

59 The Owners' claim for Scott Schedule item 7(t) is for the cost of reducing the height of the bathroom, ensuite and laundry floors to remove the Exposed Edges, and to bring the wet area floors down to the same level as all other floors in the Residence.

FLOOR LEVELS AND VASTU SHASTRA

60 Mr and Mrs Vahora described themselves as followers of Vastu Shastra. The principles of Vastu Shastra are grounded in the Hindu faith. The Vastu Shastra rules govern architectural design, and regulate the construction of buildings, the arrangement of building spaces, and the configuration of residences and other building elements.

61 The Owners gave evidence that they wanted the Residence to comply with the Vastu Shastra principles, and they took spiritual advice on what they should do. Their spiritual advisor told them that not all parts of the Residence conformed to the Vastu Shastra principles, but that the negative effect of some of these non-conformities could be overcome by prayers being said. The orientation of the kitchen, the Residence's window spacing, and the location of the garage were mentioned as elements of the Residence that the Owners could tolerate because they would say prayers. They were told that prayers would not overcome the negative effects of a construction where the floor were not all the same level. Accordingly, the Owners wanted to make certain that the Builder was aware of their requirement to have the Residence's floors all built at the same level.

62 It may be thought that the Vastu Shastra principles would not permit a builder to grade a wet area floor with the minimum falls for drainage to outlets. Ms Vahora explained that Vastu Shastra did not operate in that way, and did not prohibit the inclusion of minimum falls in wet area floors (Transcript, day 2, p 15-16):

> MR VERNIER: Mrs Vahora, do the Vastu principles, to your knowledge, and through speaking with your guru, do they require the floor levels to be exactly level with no deviation?
>
> WITNESS (INTERPRETER): Yes, he did say that the floor level should be of the same level. Where the – where in the middle of the drain is – the water has to be drained according – so it – according to that, it should be level, but it should not remain wet, because that would get negativity.
>
> MEMBER CORSARO: So do the principles as you understand them, Mrs Vahora, mean that the floor levels have to be the same so you walk without changing from one room to another, but within the room where there's water, it can go to a drain?
>
> WITNESS (INTERPRETER): Yeah, they didn't explain properly, but yes, it – where there water to be drained, that – in the bathroom, it's all right, but otherwise it should be level – on one level all the time.

63 The Owners claim that as a result of the spiritual guidance received, they told the Builder that all the floor levels were to be the same, and the Builder assured them that they would be. They went ahead with the construction on that basis.

64 There appears to be no dispute that, with the wet area floors being as they are, the Residence does not comply with Vastu Shastra in a way that the Owners can deal with by saying prayers. The strength of the Owners' belief in the Vastu Shastra principles emerged clearly from the evidence of Ms Vahora. She said that because the Residence did not strictly comply with the Vastu Shastra principles this was having negative effects on the Owners' lives. Paragraph [121] of the Builder's Submissions accept that the Owners have received advice that they must either reduce the levels of the wet area floors to remove the Exposed Edges, or to move out of the Residence.

THE ALLEGED REPRESENTATIONS

65 Paragraph [5] of the APC, alleges that the Builder made two representations that the Residence's floors would be built at the same level. The first is an alleged representation made by Mr Sofopoulos; the second an alleged representation made by Ms Mullee:

> As part of the applicants' negotiations with the respondent, they requested the respondent to construct all of the rooms, including wet areas at the same level. During the tender process, Mr Terry [Sofopoulos] on behalf of the respondent represented to Mr Vahora that the respondent would construct the floor level to all rooms, the same (**the Sofos Representation**). Sandra Mullee of the respondent (at the time of the contract presentation) inspected the plans in the presence of Mr Vahora and represented to Mr Vahora that all floor levels for all rooms, laundry, ensuite and main bathroom were the same level (**the Mullee Representation**).

66 In addition, the Owners rely on the following representations, not all of which are referred to in the ASC:

(1) a representation allegedly made by Ms Kelly House that the Builder would prepare amendments to the Residence's plans incorporating amendments as discussed with the Owners (**the House Representation**). This is alleged in paragraphs [8] and [9] of the ASC;

(2) a representation by Ms Kay Kirsten that the floor levels would be constructed at the same level (**the Kirsten Representation**). This is alleged in paragraph [6] of the ASC; and

(3) a written representation that the Builder would construct the Residence with the internal floors having a nominal ceiling height of 2600 mm said to be reflected in the Inclusions Schedule (Bundle, p 613) (**the Schedule**). This allegation first arose in paragraphs [102] to [105] of the Owners' Submissions (**the Express Representation**).

THE CONTRACTUAL SCOPE ALLEGATION

67 The Application refers to the Builder's alleged breach of the Contract by not constructing the wet area floors as required by the building plans. For example, for the floor level of the bedroom 1 ensuite, the Application states:

> Finished floor level is higher than the bedroom floor level and it is not as per the plan. Both floor level (bedroom and en-suit (sic) 1) must be at the same level as per the plan.

68 Paragraph [12] of the ASC alleges:

> [The Builder did] not construc[t] the floors at a single level as represented and agreed and each of the Laundry, Ensuite and Main Bathroom floors have a step up of approximately 40 mm.

69 The Owners must be taken to allege that the contractual requirement to construct all the Residence's floors at the same level comes out of the building plans, as well as being the contractual effect of the Sofos Representation, the Mullee Representation, the House Representation and the Kirsten Representation.

REPRESENTATIONS AS CONTRACTUAL TERMS – THE PRINCIPLES

70 A statement made in negotiations that is reasonably likely to induce and, in fact, does induce, is "prima facie a term of the contract, and the onus is on the representor to displace this inference": see eg *Ellul v Oakes* (1972) 3 SASR 377 at 387. The position was set out in *Oscar Chess Ltd. v. Williams* [1957] 1 WLR 370 and by Lord Denning in *Dick Bentley Products Ltd. v. Harold Smith (Motors) Ltd* [1965] 1 WLR 623 at 627:

> "If a representation is made in the course of dealings from a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon and was in fact acted upon.

71 The Sofos Representation, the Mullee Representation, and the House Representation if made, were in the nature of promises; contractual statements which the Tribunal considers as having been made to induce the Owners to accept the Builder's tender and to proceed with the construction of the Residence by entering into the Contract. A reasonable person in the Owners' position would have considered each of the representations as made because the Builder intended to honour them, and because the Builder would assume contractual liability to construct the Residence as represented.

72 The Tribunal's view is that if established, the representations became terms of the Contract requiring the Builder to construct the Residence with all the floors at the same level.

THE SOFOS REPRESENTATION

73 Mr Vahora's written evidence contained no detailed account of the actual discussion said to constitute the Sofos Representation. Mr Vahora gave the following supplementary evidence at the hearing (transcript, day 1, page 27):

> What did you ask [Mr Sofopoulos]?---I ask him I want all floor level at the same, everything including wet areas and all ensuites.
>
> Sorry. I want the floor levels to be the same?---Same. Including all wet areas?---Yes.
>
> And?---And ensuites and bathrooms.
>
> Ensuites?---Yes.
>
> And bathrooms?---Yes.
>
> And did Mr Sofos say anything to you when you asked him that?--Yes.
>
> What did he say?---He said, "Is that you want, I will give it to you, however, you have to accept the tender and you will see in the drawings."
>
> …
>
> What did you ask Mr Sofos about the laundry floor?---The laundry floor must be the same as living room, that's what I ask.
>
> What did Mr Sofos say?---He said yes.

74 Mr Sofopoulos told the Tribunal that he could not recall the specific conversation, and that he was not in a position to directly deny Mr Vahora's account. Mr Sofopoulos did not consider a 40mm difference between a wet area floor and an adjoining floor as resulting in the floor levels being different. Mr Sofopoulos accepted that if Mr Vahora had asked him whether the Residence's floors were all at the same level, he would have told him that they were. This is because he did not see a 40mm build up in the wet area floors as being "different". He considered that the floor levels would have

been at a “different” level if there had been a step of greater than 40mm going from one area to the next: see the passage of Mr Sofopoulos’ evidence referred in paragraphs [89] and [90] of the Owners’ Submissions.

75 The Tribunal finds that as faithful adherents to the principles of Vastu Shastra, and having sought spiritual guidance as to what they should do to comply with those principles, Mr Vahora did tell Mr Sofopoulos that he wanted all floors at the same level, and in order to induce the Owners into accepting the Builder’s tender, Mr Sofopoulos represented that the Builder would give them floors all at the same level, and that this would be provided for in the Residence’s plans. Mr Vahora’s indication to Mr Sofopoulos that the Owners wanted all floors to be at the same level was unremarkable to Mr Sofopoulos and this accounts for him having no recollection of the discussion. There was nothing about the conversation to cause him to remember it, and as he believed that all floors were at the same level, he stated that they were. Because the floor levels were very significant to the Owners, the discussion was much more important, and therefore much easier for Mr Vahora to recall.

76 The Builder says that the Owners did not record the Sofos representation in writing, nor did they ask that the representation be included in the Contract wording. The Builder submits that the Owners did not refer to the any of the representations alleged, or the existence of the Exposed Edges in their defects list, or other documents prepared at about that time. The Builder specifically referred to the omission of any mention of the representations in the letter from the Owners’ lawyers at pages 245 to 253, 517 to 518 and 531 to 539 of the Bundle and in the complaint made to FTNSW. The Application does refer to the Builder’s failure to build the floors at the same level, albeit by indicating that the Builder did not build as per the building plans, rather than the representations made.

77 The Tribunal must weigh up these deficiencies in the documents and measure them against the actual sworn evidence of Mr Vahora, and Mrs Vahora in connection with the Kirsten Representation, and the fact she was informed by her husband about the Sofos Representation and the Mullee Representation.

Either the Owners are mistaken in giving their evidence, or not telling the truth. The possibilities are that the Owners were either mistaken in their recollection, or not telling the truth about what happened.

78 Tribunal had the benefit of observing both of the Owners while they were giving their oral evidence, and the Tribunal's assessment was that they were truthful witnesses who were deeply concerned about the principles of Vastu Shastra, and of ensuring their spiritual advice was properly implemented in the construction of the Residence. The Tribunal is not persuaded that the Owners were mistaken or being untruthful. The Tribunal considers that having obtained spiritual advice about what Vastu Shastra required, the Owners did raise with the Builder's representatives their concerns to ensure the floors would all have the same level.

79 The Builder accepts that the Owners informed Ms House that they requested the toilets be aligned north-south due to their beliefs, but it would make no sense that the Owners would not have made mention of their concern to ensure that the floors were all built at the same level.

THE MULLEE REPRESENTATIONS

80 In paragraph [5] of the ASC, the Owners allege that Ms Mullee made the Mullee Representation during a discussion that took place at a "contract meeting". Ms Mullee accepted that the contract meeting took place but denied that she made the representation alleged.

81 Ms Mullee described a typical "contract meeting" as one where:

(1) the Builder's customers were provided with an overview of their proposed building contract;

(2) she provided "a final overview of the building plans;

(3) variations were properly reflected in a list of variations and included in the building plans; and

(4) the building contract was signed.

82 Mr Vahora's evidence is that Ms Mullee and the Owners went through the building plans. Ms Mullee's evidence about what typically happens is consistent with what Mr Vahora said. In Mr Vahora's statement dated 11 April 2018 (p 343 of the Bundle), Mr Vahora provided only the briefest narrative of what happened. He said that Ms Mullee:

> Inspected the plans and confirmed to [him] that all floor levels for all rooms, laundry, ensuite and main bathroom were the same level.

83 In paragraph [3] of Mr Vahora's statement dated 10 August 2018 (p 606 of the Bundle), Mr Vahora gave evidence that on 26 May 2014 Ms Mullee said:

> All floor levels for all rooms will be constructed at the same level.

84 In cross-examination (Transcript, day 1, page 43, lines 27-30), Mr Vahora was asked:

> What were the words that preceded the words that you have set out in paragraph 3 of that conversation?---When I ask her can you just take this one and she said - she checked the points and said, yes, all levels will be constructed on the same level. That's what she say.

85 The Builder submits that there are differences between these accounts of the conversation between Mr Vahora and Ms Mullee to impact on the reliability of Mr Vahora's version of what happened. The Tribunal does not accept that any differences impact on Mr Vahora's credit, or on his reliability as a witness. Mr Vahora says that he asked whether the building plans showed the floor levels were all the same, and Ms Mullee confirmed that they were and that all the floors would be built at the same level.

86 The Tribunal accepts Mr Vahora's account of the discussion that took place with Ms Mullee, and that Mr Vahora told Mrs Vahora about that conversation. Mr Sofopoulos had informed Mr Vahora that the building plans would show

the floors were at the same level. It makes sense that the Owners would have checked. Ms Mullee went through the building plans at the contract meeting, and the Tribunal considers that this would have been the occasion for the Owners to make sure that what they had been told by Mr Sofopoulos was correct. Ms Mullee's denial of making the statement which Mr Vahora attributes to her was only after her recollection was "jolted" by the Builder's click point data entry records. The Tribunal's sense of Ms Mullee's evidence was that she denied making the representation alleged not as a matter of her direct recollection, but rather because she considered that this is something she would not ordinarily have done.

87 The Tribunal is unpersuaded by the Builder's submission that because the Owners did not record the Mullee representation in writing, nor did they ask that the representation be included in the Contract wording, that it did not occur, for the same reasons it did not accept that submission in connection with the Sofos Representation.

88 The Tribunal is satisfied that the Builder made the Mullee Representation.

THE HOUSE REPRESENTATION

89 The Owners' Submissions deal with House Representation in paragraph [65], but the Owners' Submissions provide no factual or legal analysis as to why the House Representation bears on either the contractual claim for Scott Schedule item 7(t), or the Owners' misrepresentation claim.

90 The Builder submits that the House Representation, if made, related to changes requested by the Owners in the building plans, but the changes were not relevant to the Residence's floor levels. The Tribunal agrees.

91 The Tribunal accepts paragraphs [100] and [101] of the Builder's Submissions. The House Representation, even if made, is not relevant to the Owners' claim for the re-construction of the Residence's wet area floors to remove the differential levels and the Exposed Edges.

THE KIRSTEN REPRESENTATION

92 Paragraph [6] of the ASC alleges that Ms Kirsten represented that "all floor levels would be constructed at the same level". Mr Vahora's evidence was that Ms Kirsten "confirmed" that all floor levels would be constructed at the same level. Despite the broad generality and the form of this statement, the Owners are correct in submitting that Mr Vahora was not cross-examined to suggest the contrary. Mrs Vahora also gave evidence on this issue. She told the Tribunal that, in response to her husband's request of Ms Kirsten to confirm that the floor levels would all be the same, Ms Kirsten "replied that all levels were the same level, but [she] would check again". She then went to an adjoining room, returned and "confirmed that yes, all the floor levels are the same" (Transcript, Day 2, p 15.10-20).

93 On the one hand, the Tribunal had both Mr Vahora's and Ms Vahora's sworn evidence of the Kirsten Representation and on the other, no cross-examination to suggest the representation was not made by Ms Kirsten, and no evidence to the contrary.

94 The Tribunal has earlier observed its assessment of Mr and Mrs Vahora as reliable witnesses, who were concerned to ensure that their Vastu Shastra issues were attended to in the construction of the Residence. The Tribunal finds the Builder made the Kirsten Representation.

THE EXPRESS REPRESENTATION

95 The Builder opposed the Owners' reliance on the Express Representation on the basis that it was not pleaded in the APC. The part of the Schedule on which the Owners rely said:

> This offer provides a 2600mm nominal ceiling height to home (ground floor only in double storey design) and a 2675mm height to the double garage and I additional tread and floor to staircase where applicable.

96 Although the Schedule was signed by Mr and Mrs Vahora, neither gave evidence that they read or relied on this particular statement. The Owners'

misrepresentation case was not based and argued on their reliance on the Inclusion Schedule, but on the oral representations made by Mr Sofopoulos, Ms Mullee, Ms House and Ms Kirsten. The Owners did not give evidence of their understanding that the floors would all be at same level because they read the Inclusion Schedule as saying that the floors would have a "2600mm nominal height".

97 Although the Owners Submissions' seek to advance the Express Representation as part of the Owners' misrepresentation case, the Owners' written submissions provide no reasoned analysis, or the evidence of reliance, or how the Schedule figured in the Owners' decision to proceed in the light of the later representations made by Mr Sofopoulos, Ms Mullee, Ms House or Ms Kirsten.

98 The Tribunal agrees with the Builder's submissions. The Tribunal does not propose to permit the Owners to raise the Express Representation as part of the Owners' misrepresentation case.

MISLEADING REPRESENTATIONS

99 McLellan CJ's warned as to the difficulties facing an applicant in an oral misrepresentation case in *Watson v Foxman* (1995) 49 NSWLR 315, where his Honour said at 318 – 319 said:

> Where, in civil proceedings, a party alleges that the conduct of another was misleading or deceptive, or likely to mislead or deceive (which I will compendiously described as "misleading") within the meaning of s 52 of the Trade Practices Act 1974 (Cth) (or s 42 of the Fair Trading Act), it is ordinarily necessary for that party to prove to the reasonable satisfaction of the court: (1) what the alleged conduct was; and (2) circumstances which rendered the conduct misleading. Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may have been seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time,

> particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.
>
> Each element of the cause of action must be proved to the reasonable satisfaction of the court, which means that the court "must feel an actual persuasion of its occurrence or existence". Such satisfaction is "not ... attained or established independently of the nature and consequence of the fact or facts to be proved" including the "seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding": Helton v Allen [1940] HCA 20; (1940) 63 CLR 691 at 712.
>
> Considerations of the above kinds can pose serious difficulties of proof for a party relying upon spoken words as the foundation of a cause of action based on s 52 of the Trade Practices Act 1974 (Cth) (or s 42 of the Fair Trading Act), in the absence of some reliable contemporaneous record or other satisfactory corroboration. That is the position in the present case. There is no contemporaneous document in evidence which supports the making of any such promise or representation as is relied on and no other satisfactory corroboration.
>
> …
>
> What I have said above as to the cause of action based on s 52 of the Trade Practices Act 1974 (Cth) (or s 42 of the Fair Trading Act) is equally applicable, mutatis mutandis, to the causes of action based on contract and on equitable estoppel (with the added requirements, in the case of contract that any consensus reached was capable of forming a binding contract and was intended by the parties to be legally binding, and in the case of equitable estoppel that any representation alleged was clear and unequivocal and was relied on to the substantial detriment of the representee).

100 The Builder submits that Mr Sofopoulos was not asked in cross-examination what he understood the Sofos Representation to mean. The Builder also submits that Ms Mullee was not asked in cross-examination what she understood the Mullee Representation to mean. This may be correct, but in the Tribunal's view, irrelevant. The Builder also says that the Owners did not explain to either Mr Sofopoulos nor Ms Mullee that they did not want the Exposed Edges, and that they did not say that they were followers of the principles of Vastu Shastra. Again, this is correct, but again irrelevant.

101 Conduct is misleading if it induces error or is *capable* of inducing error: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191.

Intention to mislead is not an element. It is sufficient if the representations were objectively capable of being understood to mean that the wet area floors and adjoining floors would be at the same level, and this is how the Owners understood the representations.

102 The test as to whether the Sofos Representation and the Mullee Representation were misleading is an objective one. The determining factor is whether a reasonable person in the Owners' position would have understood the Sofos Representation and the Mullee Representation as conveying that the floors of the Residence would be constructed at the same level, rather than indicating that the Residence did not have steps or more than one level. It does not matter that Mr Sofopoulos, Ms Mullee or Ms Kirsten did not intend to convey the representations.

103 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 is an illustration. In that case, French CJ and Kiefel J (who were in agreement with the majority) said at [20]:

> In commercial dealings between individuals or individual entities, characterisation of conduct will be undertaken by reference to its circumstances and context. Silence may be a circumstance to be considered. The knowledge of the person to whom the conduct is directed may be relevant. Also relevant, as in the present case, may be the existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business.

104 In *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [37] Gleeson CJ, Hayne and Heydon JJ said:

> So here, it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known. Indeed, counsel for the purchasers conceded that the mere fact that a person had engaged in the conduct of supplying a document containing misleading information did not mean that that person had engaged in misleading conduct: it was crucial to examine the role of the person in question.

105 In the same case, McHugh J said at [109]:

> The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether a contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct. Thus, where the alleged contravention of s 52 relates primarily to a document, the effect of the document must be examined in the context of the evidence as a whole. The court is not confined to examining the document in isolation. It must have regard to all the conduct of the corporation in relation to the document including the preparation and distribution of the document and any statement, action, silence or inaction in connection with the document.

106 There is no suggestion that at any stage the *Lyndhurst 21* style home was being offered by the Builder as a split-level or multi-level dwelling. Mr Vahora's question to Mr Sofopoulos, and Mr Sofopoulos' confirmation to Mr Vahora, was that all of the floors, with particular reference to the levels of the "wet areas" and "all ensuites" and "the laundry floor" were the same. Mr Vahora's specific reference to the floor levels of the wet areas and ensuites and laundry in his discussion, and Mr Sofopoulos' confirmation that all levels were the same, was objectively capable of being understood as a confirmation that all the floors of the Residence would have the same levels, rather than simply indicating that the Residence was not multi-level, or had no steps, or was only a one level building.

107 The confirmation of Ms Mullee and Ms Kirsten that the Builder would build the Residence with floors at the same level, did not correct the Sofos Representation, but rather conveyed that the Builder's scope of work included the construction of the Residence with floors being at the same level, as understood by the Owners.

RELIANCE

108 The Builder submits in paragraphs [132] to [137] of the Builder's Submissions that:

(1) there was no evidence that Mr Vahora relied on the Sofos Representation because Mr Vahora asked Ms Mullee to check the building plans;

(2) Mr Vahora did not rely on the Mullee Representation because he checked the building plans himself; and

(3) Mr Vahora relied on the building plans to make sure that the Owners were getting what they wanted, and therefore he did not rely on what Ms Mullee said.

109 The building plans were contractual documents: Attachment G to the Contract at p 140 of the Bundle. Except for the floor to ceiling height of the garage, the elevations showed the Residence was to have a consistent floor to ceiling height of 2600mm, with no difference between the wet area floors and any adjoining area floor. This point can be seen by reference to the plans for the ensuite and bathroom in the copy building plan at p 152 of the Bundle, and the details of the laundry provided in the drawing at p 153 of the Bundle.

110 The Builder's Submissions raise the question that as Mr Vahora himself checked the plans, there was no longer any causal connection between the Owners' decision to proceed with the Residence and the Sofos Representation, the Mullee Representation and the Kirsten Representation.

111 On the evidence, the Tribunal finds that:

(1) the Mullee Representation reinforced or confirmed the Sofos Representation;

(2) the information on the building plans, in turn, confirmed or reinforced the earlier Sofos Representation and Mullee Representation and Kirsten Representation; and

(3) contrary to the Builder's Submissions, the Sofos Representation and the Mullee Representation and Kirsten Representation remained materially contributing inducements, or considerations, which did lead the Owners into proceeding with the construction of the Residence.

112 McHugh J in *Henville v Walker* (2001) 206 CLR 459 said at [106]:

> If the defendant's breach had 'materially contributed' to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage.

113 At [107] his Honour said:

> Of particular importance to the present case is the long-standing recognition of the possibility that two or more causes may jointly influence a person to undertake a course of conduct. In separate judgments in *Gould v Vaggelas*, Wilson and Brennan JJ emphasised that a representation need not be the sole inducement in sustaining loss. If 'it plays some part even if only a minor part', in contributing to the course of action taken ... a causal connection will exist."

114 The Full Federal Court in *Como Investments Ltd (in liq) v Yenald Nominees Pty Ltd* (1997) 19 ATPR 41-550 at 43-619 put the position as follows:

> The law does not consider cause and effect in mathematical or in philosophical terms. The law looks at what influences the actions of the parties. Acknowledging that people are often swayed by several considerations, influencing them to varying extents, the law attributes causality to a single one of those considerations, provided it had some substantial rather than negligible effect."

115 McHugh J referred to that passage with approval and, at [126] of *Henville v Walker* his Honour went on to refer to what Hayne J said in *Chappel v Hart* (1988) 195 CLR 232 at 282:

> ... the search for a causal connection between damage and the breach of a legal norm requires consideration of the events that have happened and what would have happened if there had been no breach.

116 The Tribunal rejects the Builder's Submission and finds that the Owners entered into the Contract in reliance on the Sofos Representation, the Mullee Representation and the Kirsten Representation.

117 The building plans documented the Builder's scope of works as being the construction of the Residence with the wet area floors at the same level as all other floors, except for the garage. The Mullee Representation and the Kirsten Representation were in effect, an endorsement of the earlier Sofos Representation and the building plans were, in effect, an endorsement of each of the oral representations. Accordingly, the Tribunal finds that the Sofos Representation, the Mullee Representation and the Kirsten Representation each played a part in the Owners' decision to proceed with the Contract and the construction of the Residence.

THE EXPRESS REPRESENTATION AND THE CONTRACTUAL REQUIREMENTS

118 The Builder agreed to construct the Residence in accordance with the general conditions, special conditions, the building plans and other contractual documents: clause 2.1 of the Contract and the Warranties (s 18B(1)(a) of the HB Act). It follows that the Builder agreed to construct the Residence with the wet area floors and the adjoining area floors at the same level, as the building plans showed and as Mr Sofopoulos, Ms Mullee and Ms Kirsten each confirmed and represented to the Owners.

119 The evidence establishes that as measured by Mr Vahora, the floors of the wet areas do not have the floor to ceiling heights shown in the building plans. The floor to ceiling heights in the wet areas range from 2560mm at the entry of the laundry and bathroom, to 2555mm for the ensuites. The Builder breached the Contract and the Warranties. It constructed the floors of the wet areas with a floor to ceiling height of the wet area floors at the same height as the adjoining floors as shown in the building plans, namely 2600 mm,

120 For these reasons, the Tribunal finds that the Owners have established their claim for the costs of Scott Schedule item 7(t) in the amount of $17,000, as agreed by Mr Bournelis and Mr Le Brenton. The costs of rectification include the costs associated with Scott Schedule item 2.

DAMAGES FOR MISREPRESENTATION

121 The Owners deal with the question of compensation for the breach of s 18 of the ACL in paragraphs [130] to [135] of the Owners' Submissions. Beyond giving reference to the basic principle by which damages are assessed in this area of the law in paragraph [134], there is no analysis, no reference to the evidence and no indication of the material that they submit the Tribunal should have regard to in assessing the damages arising out of the Sofos Representation, the Mullee Representation and the Kirsten Representation.

122 The Owners' complete submission on this issue appears in paragraph [135] of the Owners' Submissions:

> The [Owners] claim the following damages pursuant to section 236 of the ACL general damages in such amount as the Tribunal considers appropriate for the Builder not constructing all of the floor levels in the [Residence] the same. The [Owners] submit a fair amount would be $40,000.00 being the Tribunal's limit.

123 The Tribunal's jurisdiction to make a compensation order is to compensate for loss and damage resulting from misleading conduct, and this must be established by logically probative material. There is no evidence to support a finding that the Owners' suffered any loss and damage, and nothing to justify the Tribunal making an award to its jurisdictional limit on the basis that it is "a fair amount".

124 The Tribunal rejects this aspect of the Owners' claim.

STACKER DOOR - SCOTT SCHEDULE ITEMS 7(U)

125 The Owners' do not make any submissions about Scott Schedule item 7(u), beyond merely mentioning the existence of the claim itself. Unsurprisingly,

the Builder proceeds on the basis that the Owners do not wish to pursue it. Despite the lack of assistance in the Owners' Submissions, the Owners have not indicated that they abandon the claim, and accordingly the Tribunal has the obligation of deciding the disputed issues based on the material before it.

126 The parties' submissions refer to the comments made by the experts in the Scott Schedule at p 952 and 953 of the Bundle.

127 Mr Vahora's 11 April 2018 statement (p 350 of the Bundle) states:

> The respondent rectified the sill tiles however, the tiled finish floor level inside is now uneven and requires rectification.

128 Paragraph 9.1.7 of Mr Bournelis' 2 August 2017 report (p 786 of the Bundle) states:

> The stacker door finished level in the living area is uneven due to recent tiling works completed at the Alfresco area. Some tiles are at the same level and some appear at a higher level not matching the living area.

129 The Tribunal proceeds on the assumption that the Owners base their claim on this evidence and the evidence of Mr Bournelis, although the Owners' Submissions do not even say as much. At least the Builders' Submissions do indicate that the Builder relies on the evidence of Mr Le Brenton.

130 Mr Le Brenton's report contained a photograph of the area in question: photograph 33 at p 937 of the Bundle. According to Mr Le Brenton, there exists a difference in the tile levels of approximately 2 – 4 mm which he considered as being "within tolerance".

131 The Owners have the onus of establishing the Builder breached the Warranties or the Contract because "the stacker door finished level in the living area is uneven due to recent tiling works completed at the Alfresco area". Absent any reasoning from the Owners or the Builder, the Tribunal cannot be comfortably satisfied that the difference in the levels referred to by

Mr Bournelis are not within tolerance, as Mr Le Brenton states, and that Mr Bournelis' view about this should be preferred to Mr Le Brenton's view.

132 For these reasons, the Tribunal finds that the Owners have not established any claim for Scott Schedule item 7(u).

SHOWER DOOR SWING - SCOTT SCHEDULE ITEMS 7(V)

133 Mr Bournelis and Mr Le Brenton agreed the reasonable rectification costs for this Scott Schedule item as $350.00, but they remained at issue as to the Builder's liability for the defect alleged.

134 As in the case of Scott Schedule item 7(u), the Owners' Written submissions say about this item, beyond merely referring to its existence. The brevity of the Builder's submissions is almost matched by the brevity of the Builders' Submissions, which seem to proceed on the basis that the Builder can simply assume the Owners are not proceeding with the claim, without the Owners having expressly acknowledged that they do not pursue it.

135 The parties refer to the comments made by the experts in the Scott Schedule at 953 of the Bundle, leaving the Tribunal to make the best it can of those comments, unassisted by any reasoning or analysis.

136 The Owners have the onus of establishing the Builder breached the Warranties or the Contract because the shower door swings in the "wrong direction" in ensuite 2. Mr Bournelis' report contains no reasoning for his opinion that the shower door was installed incorrectly (Bundle, p 786), whereas Mr Le Brenton's opinion was that the shower door was installed as shown on the Plans (JB 407).

137 Mr Vahora's 18 April 2018 statement took the matter further. In paragraph [35(v)] at p 350 of the Bundle, Mr Vahora stated:

> The [Builder] has installed the shower door so that it is hinged. The door currently hits against the toilet bowl when it is only half-opened. This means, in order to entry & exit the shower, an occupant must open the door half-way,

> step out of the shower then close the door. This entry and exist (sic) are cumbersome. I requested the [Builder] to install a sliding door and the [Builder] agreed.

138 Mr Vahora referred to email communications in which Mr Vahora canvassed a proposal to change the shower door to a sliding door. In an email from the Builder to Mr Vahora dated 23 December 2016, the Builder stated:

> Bed 2 ensuite – shower door opening. Justin to look at Stegbar changing the way the door opens. Justin to confirm with you 18th January.

139 There is no written indication of what then happened. Mr Vahora's evidence was that he requested a change in the shower door configuration of the shower screen. The Tribunal accepts Mr Vahora's evidence.

140 The Owners have established to the Tribunal's satisfaction that that the shower door in ensuite 2 was incorrectly installed because the Owners requested a variation to a sliding door, and accordingly the Tribunal finds that the Owners have established this part of their claim.

141 The experts agree the quantum of this claim to be $350.00. Subject to the Builder's submission that a rectification order is the appropriate order for the Tribunal to make, the Tribunal accepts the agreed quantum for this Scott Schedule item.

RETURN AIR GRILLE - SCOTT SCHEDULE ITEMS 7(X)

142 The Owners' Submissions say nothing about the Owners' claim for Scott Schedule item 7(x), leaving it to the Tribunal to proceed without any reasoned assistance and to uncover the evidence for itself. The Builder maintains the stance of merely putting forward the briefest submission, referring to the Scott Schedule comments of Mr Le Brenton on the basis that it can simply say the Owners have chosen to abandon the claim, where the Owners have not said that they do.

143 This Scott Schedule item is about unacceptable noise from the air conditioning.

144 According to Mr Bournelis (p 641 of the Bundle):

> There is excessive noise due to air pressure on doors while the air conditioning is switched on. The return air grille appears to be located in the incorrect position currently in the hallway outside the main bathroom. This should be relocated to the living area near laundry. The option given of louvre grills on the door does not solve the problem.

145 Paragraph [35(x)] of Mr Vahora's evidence (p 350 of the Bundle) states:

> The [Builder] offered to install a grille into the corridor door. The [Builder] assured me this would rectify the problem. Relying upon the [Builder's] assurance, I agreed with this option. However, the noise has simply transferred from the grille in the ceiling to the door area. The problem continues to exist.

146 Mr Vahora's evidence apparently referred back to item 14 of the Rectification Order (p 555 of the Bundle).

147 Although Mr Bournelis said that the air conditioning system sounded subjectively noisy, he accepted that:

(1) he did not check the manuals to check the levels of noise; and

(2) that there were no objective acoustic tests done to confirm Mr Bournelis' view.

148 Mr Bournelis' evidence was that he would not have expected the noise from the Residence's air conditioning system to have been as loud as it was to him. He agreed that he made no attempt to obtain any technical information about the system, because there was no acoustic testing done.

149 Mr Le Brenton did not say that in his opinion there was no defect, having made his own acoustic assessment of the air conditioning, by listening to the system while in operation, or otherwise.

150 The Tribunal accepts Mr Bournelis' subjective opinion, as an experience and independent expert, and Mr Vahora's evidence as to the noise he heard as persuasive evidence that the air conditioning system, as installed, is too loud, and requires rectification.

151 The experts agree the quantum of this claim to be $1500. Subject to the Builder's submission that a rectification order is the appropriate order for the Tribunal to make, the Tribunal accepts the agreed quantum for this Scott Schedule item.

ALFRESCO BEAM - SCOTT SCHEDULE ITEM 10

152 Scott Schedule item 10 is another item which the Tribunal is required to determine without any analysis or reasoned submission by the Owners, and with the Builder adopting the same approach of only referring to the comments of Mr Le Brenton, and stating that it had assumed that the Owners were not pursuing the claim. Again, in the absence of any direct statement by the Owners that they were not pursuing this claim, the Tribunal must proceed on the basis that it remained a disputed item for determination.

153 This issue relates to the work carried out by the Builder in the alfresco supporting structure, as shown in photograph 5 at page 663 of the Bundle. This photograph, marked up with the comments of Mr Bournelis, establishes that the bulkhead at the rear of the alfresco area of the Residence is 35 mm out of alignment. There is no issue about that.

154 Mr Bournelis' report (page 643 of the Bundle) states:

> The Builder has erected a beam across the rear fence of the alfresco area however the boxed in beam appears out of level as the finished underside is 3 brick courses down on the left and 4 brick courses down on the right leaving an unsightly finish.

155 Mr Le Brenton's position was that the discrepancy in the alignment of the supporting beam occurred because the builder wanted to avoid having to use a half-brick to throw the regularity of the brickwork line out. Mr Bournelis'

considered it simply bad building practice. Mr Bournelis' view was that the alfresco supporting beam should have been correctly aligned, with the inclusion of a half-brick if necessary.

156 The Tribunal accepts Mr Bournelis' evidence based on its own assessment of the photograph 16 in Appendix C of Mr Bournelis' report (page 669 of the Bundle). The fact that the defect relates to an "unsightly" aesthetic matter does not mean that it is not a defect and does not mean that Owners have not suffered loss and damage.

157 Mr Bournelis and Mr Le Brenton agreed the reasonable rectification costs of this item to be $1,950.00, and the Tribunal finds the Builder liable to the Owners in the agreed amount for this item.

DAMAGED LANDSCAPE - SCOTT SCHEDULE ITEM 11

158 Mr Bournelis and Mr Le Brenton agreed the quantum of Scott Schedule item 11 to be $420.00. This is another item where:

(1) beyond a confirmation that the claim is pursued (paragraph [26(i)] of the Owners' Submissions), the Owners' Submissions otherwise do not mention it; and

(2) the Builder's submissions deal with it in a cursory way, again maintaining that the Owners were not pursuing it.

159 Schedule item 11 appears at p 955 of the Bundle. The comments say:

> The [Owners] directed [Mr Le Brenton] towards the southeast corner of property as example of alleged damage. Newer turf rolls are visible along east boundary, indicating possible location of damage and completed repair by [Builder] Photo 44 – 46. Some turf edges have died off, which appears consistent with other areas of lawn including neighbouring properties.
>
> [Mr Bournelis] has not identified condition of lawn prior to, or exact location of now alleged damage.
>
> No further loss identified.

160 The evidence of Mr Bournelis on this issue appears in paragraph [9.1.11] of his report (Bundle p 788). This states:

> At the time of my inspection I observed undulations to the front grassed yard of the property. I am instructed that the builder's trades damaged the turf to the front yard during recent rectification works.

161 This assumption is made good by the evidence of Mr Vahora (p 351 of the Bundle):

> When the [Builder] attended my property for rectification of the work in April 2017, the [Builder] place (sic) various, heavy, building items on my front lawn and excavated a part of the lawn and soil to construct a letter box. The result was my lawn has been damaged and severely indented. This area requires reinstatement.

162 Reference to photographs 44 to 46 of Mr Le Brenton's report (Bundle pages 942 and 943) show areas of the Residence's lawns. On the Tribunal's assessment, the damage to the lawn shown in the photographs appears to be consistent with the deterioration in the turf, but there is nothing which satisfies the Tribunal that this was the cause of the Builder's rectification works, rather than natural environmental conditions.

163 The Owners have the onus of establishing the Builder breached the Warranties or the Contract and the Tribunal is not satisfied that the evidence satisfies that onus. The Tribunal is not persuaded by Mr Vahora's evidence, and accordingly rejects the Owners' claim for this Scott Schedule item.

RECTIFICATION ORDER

164 Under s 48MA of the HB Act, the Tribunal must have regard to the principle that rectification of defective work by the responsible party is the preferred outcome. An owner must rebut the presumption that a rectification order should be made.

165 In *3D Design & Build Pty Ltd v Lynch* [2016] NSWCATAP 229, the Appeal Panel set out the factors that it considered were suggestive of an impediment to an order being made pursuant to s 48MA as including:

(1) the builder not having a licence to complete the work;

(2) the builder having a financial inability to complete the work;

(3) the relationship between the homeowner and the builder having broken down;

(4) where there is no acknowledgement by the builder that work is sub-standard; and

(5) where the builder appears incapable of completing the work with due care and skill.

166 Paragraph [136] of the Owners' Submissions deal with this issue. The Owners put forward various matters that they say make a work order inappropriate. work order. The Tribunal accepts the Owners' Submissions particularly where the Builder has neither addressed those submissions, nor formally apply for a work order.

CONCLUSION

167 The quantum amounts agreed by the experts do not include profit and overheads and GST.

168 Mr Bournelis maintains that the appropriate allowance for builder's profit and overheads is 30%. Mr Le Brenton's view is that 10% is more appropriate because:

> The [Builder] is a licenced builder able to rectify alleged defects in building work, using licenced and experienced contractors and materials from reputable suppliers.

169 Mr Le Brenton's comment is not persuasive, and Mr Bournelis provides no reasoning for his opinion. Both are experienced experts, but the Tribunal prefers Mr Bournelis' opinion to the opinion of Mr Le Brenton. Firstly, an allowance of 30% for builder's profit and overhead is more in line with the Tribunal's own experience of the appropriate figure. Secondly, Mr Le Brenton's opinion appears to have been formulated on the basis that the Builder would be carrying out the rectification works.

170 There is no dispute that 10% GST should be added to the overall rectification costs, as found.

171 In summary, the Tribunal orders:

(1) The Respondent, Clarendon Homes (NSW) Pty Ltd to immediately pay the Applicants, Shoaib Vahora and Sana Shoaib Vahora the total amount of $42,837.08 inclusive of GST $5806 for the Agreed Items;

(a) $350.00 for Scott Schedule item 7(m);

(b) $17,000.00 for Scott Schedule item 7(t);

(c) $350.00 for Scott Schedule item 7(v);

(d) $1500.00 for Scott Schedule item 7(x);

(e) $1950 for Scott Schedule item 10;

(f) $8,986.80 as a 30% added allowance for builder's profit and overhead; and

(g) $3,894.28 for GST.

(2) on the issue of costs:

(a) any application in respect of the costs of the proceedings to be made by written submissions filed and served within 14 days of the date of publication of this decision. Such submissions should address the question whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act;

(b) if either party files submissions in accordance with order 6 above the other party may file and serve submissions in response within a further 14 days. Such submissions should address the question whether the application for costs can be dealt with on the papers and without a hearing pursuant to s 50(2) of the Civil and Administrative Tribunal Act.

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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