Civil and Administrative Tribunal
New South Wales

Case Name:	**Harenza v Sicewood Pty Limited** **Sicewood Pty Limited v Luke and Mel Harenza**
Medium Neutral Citation:	[2024] NSW CATCD
Hearing Date(s):	13 February 2023 and 31 July 2023 with a timetable for written submissions until 19 January 2024
Date of Orders:	8 August 2024
Date of Decision:	8 August 2024
Jurisdiction:	Consumer and Commercial Division
Before:	S A McDonald, Senior Member
Decision:	In respect of HB 22/27691 (Case No. 2022/00428316), the Tribunal orders that: (1) The respondent, Sicewood Pty Ltd ACN 105 200 940, is to pay to the applicant, Luke Harenza of 18 Allambie Avenue, Northmead NSW 2152, the sum of $55,295.39 on or before 3 September 2024; and (2) The respondent is to pay the applicant's costs of the application on a party/party basis as agreed or assessed. In respect of HB 22/48483 (Case No. 2022/00401752), the Tribunal orders that the applicant, Luke Harenza of 18 Allambie Avenue, Northmead NSW 2152, is to pay the respondent, Sicewood Pty Ltd ACN 105 200 940, the sum of $21,600.61 on or before 3 September 2024.
Catchwords:	BUILDING AND CONSTRUCTION – home building – statutory warranties – defective and incomplete building works – work order or money order – variations – cross application - assessment of damages
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Home Building Act 1989 (NSW)

Cases Cited:	*Kurmond Homes Pty Limited v Marsden* [2018] NSWCATAP 23 *Leung v Alexakis* [2018] NSWCATAP 11 *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 *Leslie v Farrar Construction Limited* [2016] EWCA Civ 1041 *The Owners SP 76674 v. Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067
Category:	Principal judgment
Parties:	Luke Harenza, Applicant in HB 22/27691 (Case No. 2022/00428316) and Luke and Mel Harenza, Respondents in HB 22/48483 (Case No. 2022/00401752) (**Owner**) Sicewood Pty Limited ACN 105 200 940, Respondent in HB 22/27691 (Case No. 2022/00428316) and Applicant in HB 22/48483 (Case No. 2022/00401752) (**Builder**)
Representation:	Birch Partners for the Owner Mr Michael Keene of counsel instructed by Adams & Partners, Lawyers, for the Builder.
File Number(s):	HB 22/27691 (Case No. 2022/00428316) and HB 22/48483 (Case No. 2022/00401752)
Publication Restriction:	Unreserved

REASONS FOR DECISION

Introduction

1 These are two home building applications brought in respect of home building work undertaken at 18 Allambie Avenue, Northmead NSW 2152 (**Property**) pursuant to a contract dated 27 October 2020 in the sum of $320,891.00 inclusive of GST between the Owner and the Builder (**Contract**).

2 The Owner and his wife are the registered proprietors of the Property. The Builder at all material times held a Contractor Licence No. 243386C.

3 The Owner contracted with the Builder for the Builder to design and construct renovations and an addition to the Property. Pursuant to the Contract, the Builder undertook full responsibility for designing the works and ensuring those works would combine neatly with and within the existing structure (**Contract Works**).

4 There is no dispute that the Contract Works were residential building work for the purposes of the *Home Building Act 1989* (**HBA**) and were subject to the warranties prescribed by s. 18B of the HBA. The Contract is in evidence at (118-152).

5 There is no dispute the Contract documents included:

(1) CC plans dated 27 January 2021;

(2) Quotation v4 (quote no. Q1043) dated 22 October 2020; and

(3) Development Application of Parramatta Council BA/133/2022.

6 The Builder served its notice of practical completion on 22 April 2022. The Owner filed his application in the Tribunal on 21 June 2022. The Builder filed its application in the Tribunal on 28 October 2022. Although the Owner disputes that the Builder achieved practical completion on that date, the limitation period for home building defects pursuant to s.18E(1) of the HBA is 6 years for a major

defect or pursuant to s.18E(1)(b) of the HBA is 2 years in any other case. Neither limitation period had expired.

7 The Owner's claims can be summarised broadly in four categories:

(1) Inadequate/defective design by the Builder;

(2) The Builder charging additional amounts for works as a variation when those works were allegedly included in the Builder's original scope of work;

(3) The Builder charging excessive amounts for Builder's margin over and above the agreed rate of 20%; and

(4) The Builder refusing and/or failing to complete the agreed scope of works.

8 In the Builder's home building application, the Builder claims the sum of $21,600.61 for two unpaid invoices under the Contract and in respect of the Contract Works.

Hearing

9 The two home building applications were listed together for hearing in the Tribunal on Monday 13 February 2023 for one hearing day.

10 Ultimately a second hearing day on Monday, 31 July 2023 was required.

11 At a directions hearing of the two home building applications on 14 November 2022, the Tribunal ordered that:

(1) The two matters would be heard together in the Tribunal on 13 February 2023 with evidence in one application being evidence in the other application;

(2) At the hearing neither party should be entitled to reply upon any document or evidence that has not been disclosed to the other party without having served it upon the other party in the manner outlined in the Tribunal's directions or orders; and

(3) At the hearing both parties should ensure that their building experts are available for cross examination unless notified in writing by the other party if they were not so required.

12 The substantive hearing of this dispute in the Tribunal proceeded on 13 February 2023 and 31 July 2023. Mr Michael Birch of Birch Partners, Lawyers appeared for the Owner and Mr Michael Keene of counsel appeared for the Builder instructed by Adam & Partners Lawyers of Penrith.

13 There was a single volume, joint tender bundle (**JTB**) of approximately 916 pages (1 folder). References in these reasons to page numbers in the JTB are in round brackets. References to line numbers of the typed transcript, provided to the Tribunal with the written submissions of the parties, are prefixed by the letter 'T'.

14 The Owner in his application also relied upon:

(a) Application dated 21 June 2022;

(b) Owner's points of claim dated 14 November 2022; and

(c) Builder's points of defence dated 28 November 2022.

15 The Builder in its application relied upon:

(a) Application dated 28 October 2022;

(b) Builder's points of claim dated 28 October 2022; and

(c) Owner's points of defence dated 29 November 2022.

16 The lay evidence of the respective parties consisted of:

(1) for the Owner, a statement of Luke Harenza dated 1 December 2022 and exhibit LH-1; and

(2) for the Builder, of a statement of David Wood, director of the Builder, dated 23 June 2023.

17 In respect of expert evidence, the parties relied on upon the following two reports:

(1) for the owner, Mr Gordon Xue of Tyrrells Building Services dated 31 October 2022 (**Xue Report**); and

(2) for the Builder, Mr Stephen Nakhla of SJN Consulting dated 18 June 2023 (**Nakhla Report**).

18 At the commencement of the hearing on 13 February 2023 a joint expert report dated 6 February 2023 (**JER**) was tendered by the parties following a joint conclave of the experts prior to that date. It was signed by Mr Xue but there was no dispute that it contained the consensus of opinion of both experts.

19 Initially, there were approximately 87 defective or incomplete home building issues alleged by the Owner in his application.

20 By the morning of the hearing, the parties through the good work of their lawyers and experts had reduced the number of defects in dispute to approximately 26. This was further reduced on the morning of the hearing by agreements on liability and quantum, if a work order was not made. The Builder accepted liability but preferred to repair the defect itself.

21 During a break on the first morning of the hearing, the experts – Mr Gordon Xue for the Owner and Mr Steven Akhla for the Builder, agreed liability, scope of works and quantum for the following additional 9 of the 26 items:

Defect no.	Description	Amount
#1	Roof gutter installation	$460.00
#5	Column base plate	$115.00
#9	Front door defects – ceiling top and bottom	$337.00
#10	Bedroom doors misaligned	$500.00
#15	Walk-in pantry	$3,850.00
#18	Master bedroom – wall bowing	$1,600.00
#19	Bedroom 3 – popping nails	$717.00
#23	External alfresco area – plasterboard sagging	$618.00
#26	Bathroom basin	$77.00
	TOTAL	**$8,274.00**

22 Relevantly, during 13 February 2023 the experts also agreed that:

(1) item #20, the pantry kitchen door, had been rectified, and

(2) the Owner did not press item #16 – lift-off hinges.

23 By agreement of the parties therefore, no sums were therefore to be attributed to these two items by the Tribunal.

24 In respect of the JER that was handed up on the morning of the hearing and became (901-916), the following 15 items remained in dispute. They are:

(1) Item 2 – garage door;

(2) Item 3 – item missing, stair deck;

(3) Item 4 – excess concrete pads;

(4) Item 6 – incorrect and incomplete stormwater drainage;

(5) Item 7 – subfloor insulation not reinstated;

(6) Item 8 – incomplete work in the garage;

(7) Item 11 – bedroom 3, architrave out of alignment;

(8) Item 12 – bedroom 2, internal corner wall out of plumb;

(9) Item 13 – bedrooms 2 and 4, door head misalignment;

(10) Item 14 – kitchen flooring out of level across the room;

(11) Item 17 – living room wall bowing;

(12) Item 21 – laundry, patching to base of wall;

(13) Item 22 – roof of cavity, electrical wiring;

(14) Item 24 – ensuite bathroom shower wall bowed; and

(15) Item 25 – laundry wall, out of plumb.

Work order or money order

25 Prior to determining these defects in respect of liability and quantum, there was a preliminary point raised by the parties on the first morning of the hearing. The Builder sought a work order to return to the Property and to repair those defects which the Tribunal may find, while the Owner sought a money order so that it may have a third party contractor repair these defects.

26 The Tribunal considers it is expedient to determine that matter at this point as it will simplify and streamline the consideration of the outstanding, remaining defects for the Tribunal to consider.

27 At paragraph 151 of the Owner's Closing Submissions dated 13 October 2023, the Owner submitted that the Tribunal should make a money order because the Builder:

(1) Has not proven it is ready, willing and able to comply with its obligations pursuant to the Contract;

(2) Has not proven that it can complete the Contract Works to an acceptable standard;

(3) Denies there are defective or incomplete works not withstanding both experts have identified numerous items of defective and incomplete works in their expert reports and in the JER;

(4) The Owner has lost all confidence in the Builder to comply with its obligations pursuant to the Contract and/or the orders of the Tribunal; and

(5) The relationship between the parties has broken down to the point that neither party has trust in the other party. Indeed, the Tribunal notes that terms such as 'aggressive' and 'deteriorating relationship' are used in the Owner's submissions about the Builder.

28 The Builder at paragraphs 163-168 of the Builder's submissions in reply dated 19 January 2024 to the Owner's closing submissions states:

(1) Consistent with s. 48MA of the HBA, a rectification order was the appropriate remedy as it was the '*preferred outcome*' pursuant to s. 48MA of the HBA;

(2) Expressing a rectification order as a '*preferred outcome*' suggested that it operated in the manner of a presumption; and

(3) There was no cogent or probative evidence put forward by the Owner to rebut the presumption.

29 The Builder also quoted the two Appeal Panel cases of *Kurmond Homes Pty Limited v Marsden* [2018] NSWCATAP 23 and *Leung v Alexakis* [2018] NSWCATAP 11, the latter at [139]-[140] where the Appeal Panel noted that the Tribunal would tend to make a rectification order '… *unless the facts of a particular case make it inappropriate to award a rectification of the defective work by the responsible party, an order should be made in terms that give effect to the principle*' [140].

30 The evidentiary matters relied upon by the Owner in seeking a money order are outlined at paragraph 53(a)-(c) of the statement of Luke Harenza dated 1 December 2022 (47-48). They are of their nature conclusionary statements. Breaking them down and in the Owner's evidence of the case, the Owner presses the following matters:

(1) The Contract was dated 27 October 2020 and was supposed to take 20 weeks but had not been completed after 86 weeks (see Owner's application);

(2) The Contract price was $320,891.00 but by the time the Owner's application was filed the Owner had paid the Builder approximately $470,000.00;

(3) The Owner had provided a list of outstanding or defective matters to the Builder which, on several occasions, it had agreed to remedy but had failed to do so;

(4) Despite the original 87 defects itemised in respect of the home building work undertaken by the Builder at the Property, apparently little remedial work was undertaken; and

(5) Currently there remain 15 outstanding issues to resolve between the Owner and the Builder approximately 2.5 years after the Builder claimed practical completion in April 2022.

31 Importantly, s.48MA of the HBA states that a work or rectification order is a '*preferred*' (but not mandatory) outcome. In all the circumstances, the Tribunal considers that a money order and not a work order should be made in respect of the defective items in the Owner's application because of:

(1) First, the deterioration in the relationship between the Owner and the Builder;

(2) Secondly, the opportunities that the Builder has had in the time since practical completion to remedy the defective work, but has failed to do so;

(3) Thirdly, the loss of confidence that the Owner has in the Builder to either recognise the existence of defective work or to remedy it;

(4) Fourthly, the passage of time – over 2 years – since practical completion was reached and the dispute remains unresolved;

(5) Fifthly, the aggression that the Owner alleges the Builder's representative, Mr Wood, has shown towards him; and

(6) Sixthly, Mr Wood refers to the Owner(s) as '*complex, demanding, particular and stressful*' – see para.8 of the Wood affidavit (267).

Defective Building Items in JER

32 The Tribunal shall now examine the remaining 15 live defective items in dispute between the parties and determine the liability and quantum of each claim.

Item #2 – Garage Door

33 The garage door was supplied and installed new by the Builder. Both experts agree that there is a scratch to the garage door and attribute an estimate of loss of $329.00 however both experts acknowledge that in the absence of lay evidence they cannot determine the origin of the scratch.

34 The first mention of this defect in evidence is in a list of issues which the Owner sent the Builder dated 12 April 2022 (164-5). This was approximately a fortnight before the Builder claimed practical completion had been achieved on 29 April 2022.

35 There are three photographs of the garage door in the Xue Report (632-3). The Xue Report contains photograph 12 of a '*dent*' in the garage door and photograph 13 of a '*scratch*' to the garage door being apparently separate defects (632-3). For whatever reason, the dent has not survived or been included in the JER.

36 The Nakhla Report contains photographs at (795) of the scratch to the garage door but is unable to attribute a cause to it.

37 At paragraph 44(b) of the Owner's statement dated 1 December 2022 (42) he states that '*garage door is damaged and scratched*' but attributes no cause or timeframe to this.

38 At paragraph 41 of the Owner's closing submissions dated 13 October 2023, he submits it is reasonable to find that it is more probable than not (in the absence of direct evidence to the contrary) that the garage door was installed with a scratch or was scratched during installation by the Builder.

39 The Builder refutes this. Mr Wood gave evidence that he does not know how the scratch was caused but says that the Owners occupied the Property during the course of the Works and that the Owners' children occupied the front of the Property and rode their bikes around the front of the Property (277).

40 The Tribunal considers this to be an unlikely cause as the scratch appears from the photographs to be at about shoulder height.

41 The Builder also stated that there was no scratch present on the garage door when the Builder completed installing the garage door (277).

42 In the Builder's reply to the Owner's closing submissions dated 19 January 2024 at paragraphs 57-64, the Builder submits that the Owner is required to establish his case in respect of each defect on the balance of probabilities, the civil onus. The fact that the scratch exists is not a rebuttable presumption that the Builder has to disprove. The Tribunal agrees with this statement of law.

43 In these circumstances, the Tribunal finds that the Owner has failed to prove that it was more probable than not that the scratch was caused by the Builder (and when and in what circumstances the scratch was caused) so its claim in respect of item #2 must fail.

Item #3 – Rear Deck Stairs

44 The parties agree that at least initially the rear stairs were part of the Builder's scope of works but have not been constructed (633-4).

45 The dispute arises as to whether the stairs were removed from the scope of works and, if so, whether an agreed credit variation or reduction in price was given to the Owner.

46 The Builder submits that there was a negative variation in that the rear stairs were omitted from the scope of works in invoice 202146 (207) in which a line item reads '*Credit allowance – Stairs to backyard*' and the sum of $2,048.42 (incl. GST) was allowed as a credit for the stairs that were not built.

47 In cross examination, the Owner agreed that he did not raise any objection in writing to the invoice and that it was paid and the credit was received. Although the Owner stated "not in writing, no" (T2832) about whether any objection to invoices was raised on a number of occasions, the Builder submits that no evidence of any oral objection was included in the Owner's statement, nor was supplementary evidence-in-chief led, nor was this the subject of cross examination to better illuminate this issue.

48 In cross examination the Builder gave evidence, when asked why it did not construct the stairs, that the Owner requested the Builder to lodge a modified development consent with the council for the rear deck which was subsequently approved, but that the Private Certifying Authority would not allow the modification (T10511-10517). The Xue Report estimated the cost to now construct the stairs of $5,529.00 and provided a scope of works for the item. The Nakhla Report provided no cost relying upon the modified consent plans and the Private Certifying Authority not agreeing for the modified deck and stairs to be constructed.

49 In these circumstances, there seems to be sufficient confusion about whether the construction of the rear stairs remained in the scope of works as a result of the modified development consent which the Private Certifying Authority rejected, and that the Contract price to the Owner was reduced by providing a credit in the sum of $2,048.42 to the Owner in Invoice 202146 dated 20 December 2021.

50 In these circumstances the Owner has not established that item #3 is a defect or that, if it is, he has not been satisfactorily compensated for it by the credit in Invoice 202146 (207).

Item #4 – Excess Concrete Pad

51 Two concrete pads were poured by the Builder under the deck of the residence. Both experts agree that the pads were poured in the wrong location (635).

52 The Builder's evidence of Mr Wood at paragraph 63 of his statement (277) is that he says he was instructed to realign the posts to line up with the posts of the deck subsequent to the pouring of the pads. Mr Wood gave evidence that he was instructed by the Owner to move the original base of the posts so that they aligned with the posts of the deck (T10668-10670).

53 The Builder submits that given this realignment, if the pads were subsequently requested to be removed (which is disputed) that would be an additional cost to the Owner, and not the Builder.

54 The Xue Report considers the additional concrete pads should be removed as "there's nothing that's going to grow over concrete" (T6223).

55 This does not resolve whether they are a building defect for the purposes of s.18B of the HBA.

56 The Nakhla Report states that there is no need to remove the concrete pads as there's no consequence to them, just leave them there. Any aesthetics could be dealt with when landscaping is undertaken (T6167-6169) and they're not creating any issues (T6187).

57 The Owner submits that the Builder's failure to remove concrete pads is in breach of s.18B(a) of the HBA in that the construction of the unnecessary pads has been done without due care and skill nor in accordance with the plans set out in the Contract. However that submission does not seem to accommodate the fact that the Owner's instructions appear to have changed in respect of the deck following the pouring of the concrete pads.

58 In these circumstances, the Tribunal is unwilling to allow any sum for this item.

Item #6 – Incorrect and Incomplete Stormwater Drainage

59 The Xue Report states that the installed stormwater lines are not in accordance with the approved stormwater drainage plan (636-640) in that they are:

(1) Missing the drainage line to the northern boundary;

(2) Missing the cleaning pit;

(3) Missing the absorption pit;

(4) Not bedded or affixed under the house; and

(5) The silt pit is incorrectly installed.

60 The Xue Report estimates $18,960.00 to rectify these defects.

61 The Nakhla Report agrees that the drainage line has not been installed to the northern boundary but does not necessarily consider this a defect as the drainage line could be running at an alternative location. However, Mr Nakhla agrees that:

(1) Cleaning pit 3 has not been installed;

(2) The absorption pit has not been installed;

(3) The silt pit to the front of the Property has not been installed; and

(4) Considers the stormwater line is an existing stormwater line and not the works completed by the Builder.

62 Mr Nakhla considers any further investigation is outside his expertise and requires a hydraulic engineer or drainage plumber to confirm whether the system requires any modifications or if it is currently functional.

63 The Builder served a report of Mr Ben Carruthers dated 18 March 2023 which was relied upon at the hearing. This report concluded:

(1) The constructed stormwater system general arrangement is consistent with the approved plans. The design intent of the constructed stormwater system (charged line to boundary pit and gravity overflow to street) has been achieved and provides a suitable operable system for the roof drainage;

(2) A maintenance pit has not been constructed as the roof drainage is suspended, a screw cap maintenance point should be installed at low point(s) in the charge system to allow for periodic maintenance of the system;

(3) Surface drainage works such as a grated drain to the northeast corner of the Property had not been undertaken. The absorption trench could not be observed on site and did not appear to have been constructed;

(4) The provided detail on Moshi Structural Engineering Design, struct-12-2020 sheet 1/2 is not in accordance with its condition. The gravel trench detail provided on the plans is not considered suitable or compliant and any additional work should not be undertaken with this detail. The existing drainage system from the grated drain in the driveway are not required to be directed to a new absorption trench and any new (additional) hardstand area would be required to satisfy this condition and should be collected with the surface drainage pits or grates and drain to a suitably sized absorption trench;

(5) Once the absorption trench has been constructed the site will meet the requirements of the development consent and be readily available to gain sign off by the certifying engineer.

64 The Owner did not challenge Mr Carruthers' opinions detailed in this report. The Carruthers report dated 18 March 2023 was served pursuant to order 2 of the Tribunal dated 13 February 2023 seeking a report from the Builder in specific terms.

65 Without forewarning, the Owner then purported to serve a further report of Mr Xue dated 30 June 2023 which was filed and served on 19 July 2023 (T4805) which purported to provide costings in respect of the stormwater work specified by Mr Carruthers in the sum of $19,299.00.

66 On the resumed hearing date, the Builder objected to the tender of the supplementary Xue report dated 30 June 2023 for the following reasons:

(1) It was served on the Builder on Friday, 28 July 2023, the effective business day before the resumed hearing;

(2) It was not part of, or served subject to, the directions made by the Tribunal on the adjourned first hearing date of 15 February 2023;

(3) The Owner adduced no evidence, or no formal evidence, as to the circumstances or reasons why the supplementary Xue report had been held back or delayed in its service until the effective business day before the resumed hearing;

(4) Such late service effectively ambushed the Builder from conferring with its building expert, Mr Nakhla or providing any informed response to Mr Xue's costings;

(5) The supplementary Xue report increased the loss or damage assessed in respect of item 6 from $18,960.00 to $19,299.00; and

(6) The late service of the supplementary Xue report has materially prejudiced the Builder in responding to it whereas such a report could have been served at any time between 13 February 2023 and 31 July 2023 which would have permitted the Builder to obtain Mr Nakhla's report in a timely fashion and respond to the amended quantification of loss.

67 For these reasons at the hearing on 31 July 2023 the Tribunal marked the supplementary Xue report ‘MFI 1’ but refused to allow it to be tendered into evidence.

68 Assessing loss or damages therefore arising from the Carruthers report is not straightforward. The Builder submits that as the Xue supplementary report was rejected there is no reliable evidence upon which the Tribunal can rely to assess that loss and that ‘*justice does not dictate that, in such a case, a figure should be plucked out of the air*’: *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 at [118] – [119].

69 However that is not quite the case here. The Carruthers Report acknowledges some flaws and omissions in the stormwater drainage installed by the Builder. The Xue Report assessed this in the sum of $18,960.00 and the supplementary Xue report (which was not admitted into evidence) in the sum of $19,299.00. No modification or reduction of this sum has been made to accommodate those matters which the Carruthers report states are sufficient, and those matters which the Carruthers report states are insufficient. However, clearly the appropriate sum lies somewhere between $0.00 and $18,960.00.

70 The Builder's submission is that any assessment of damages is otiose if the Tribunal makes a rectification order. But that submission only acknowledges that there is work to be done and, as stated above, the Tribunal does not propose to make a work order.

71 The Owner submits that the stormwater drainage as installed is in breach of clause 2 of the Contract and is in breach of s.18B(1)(c) and (e) of the HBA in that it:

(1) Was not installed with due care and skill in accordance with the plan;

(2) Does not comply with the development approval; and

(3) Prevents the dwelling from being reasonably fit for occupation as a dwelling and/or obtaining an occupation certificate.

72 In the circumstances, and in the absence of any better evidence, the Tribunal takes a proportionate approach to this item and, doing the best it can, awards the Owner the sum of $12,000.00 for this item.

Item #7 – Sub-floor Insulation not Reinstated

73 Both experts agreed that one area of the sub-floor insulation had been removed and piled up in the sub-floor in one location (641).

74 The Xue Report provided an estimate of loss of $657.00 to reinstate that insulation. The area was approximately 4 m x 2 m.

75 The Builder initially stated that the Owner requested the sub-floor insulation not to be reinstated in the interest of reducing costs but conceded liability during the hearing (T6317-6319).

76 The Tribunal awards the Owner the sum of $657.00 for this item.

Item #8 – Incomplete work to Garage

77 The Xue Report states that the works within the garage have not been completed (642-645) in the following respects:

(1) There is a hole in the ceiling;

(2) A plasterboard wall is missing;

(3) Architrave to a door and a window is missing;

(4) The washing machine plumbing fit-off is incomplete; and

(5) Painting.

78 The Xue Report estimates $5,177.00 for this work. The Nakhla Report states that the hole in the garage ceiling, the missing architrave to the door and window and the missing plasterboard wall are outside the scope of works and are pre-existing conditions. On this basis the Nakhla Report says no rectification is required. Both experts acknowledge these may be matters for lay evidence.

79 Unfortunately, there is little documentary evidence to support what the agreed scope of works was in the garage. There appears to be no dispute however that the work in the garage was an agreed variation. However, there is minimal documentary evidence to support the scope of works of that variation.

80 The Allambie VOC Quotation dated 2 June 2021 (510) of the Builder appears to relate, at least in part, to the garage variation under the broad headings '*Demolition, Carpentry – Structural, Plastering, Painting and Carpentry – Fitout*'. The Builder's evidence appears to be:

(1) Mr Wood said the hole in the garage ceiling was pre-existing (T10785-10787);

(2) Mr Wood says the Builder was engaged to frame and plasterboard only one of the walls in the garage (277); and

(3) The Owner says the Builder put the hole in the ceiling to get into the roof space to install the steel beams (T3849-3850).

81 The Owner submits that '*it beggars belief that the Owner requested the Builder to undertake various works in the garage (including the replacement of a wall), leaving the garage in a state of disrepair*' (evidenced by Mr Xue's photographs) and did not request the Builder to rectify the damage to the manhole if such damage was pre-existing as is alleged by the Builder (which pre-existing damage is denied by the Owner). But concessions are made by the Owner suggesting the Builder made the manhole larger so the Builder could place the beams into the roof space. This however acknowledges impliedly a pre-existing hole of some type in the ceiling, which is supported by photograph 33 at (643).

82 Although the evidence is unsatisfactory, it appears to the Tribunal that at least completing the washing machine plumbing fit-off and painting the garage surfaces would form part of the Builder's scope of work. On this basis, the Tribunal finds in favour of the Owner in respect of two of the five items listed in the Xue Report and awards the Owner an estimated sum of $2,000.00 for those two defects.

Defect #11 – Bedroom 3 - Architrave

83 The Owner states there is no dispute that this work was part of the Builder's scope of works and that the door and the architrave were both newly installed.

84 Mr Xue says the architrave ought to have been installed vertically aligned and Mr Nakhla says the Builder did its best having regard to the fact the door opening was pre-existing and the alleged defective installation of the architrave was only 5 mm out of plumb and cannot be identified by the naked eye without a laser beam (650-652).

85 The Owner submits that the door opening was re-constructed by the Builder '*because the Builder replaced previous framing damage by pre-existing termite damage*'. The Builder was required to construct the door framing vertical and plumb.

86 At paragraph 96 of the Owner's closing submissions, the Owner submits that Mr Wood conceded that the Builder constructed the framing for the door opening (T11083-11101).

87 However on closer examination of Mr Wood's evidence, he denies that he constructed the door opening for Bedroom 3 and says that the Builder only replaced the timbers surrounding the door opening because they were termite-ridden (T11083-11086). The only concession that Mr Wood made was that the Builder may have constructed the stud for the jamb to go against '*but we didn't do the whole opening*'.

88 There was clear and frequent evidence that the house was 50 years old and that the Builder discussed with the Owner regularly that '*this house is crooked*' (T11132). Also, there is no scope of works asserted by the Owner to support the contention that in replacing timber framework to the door opening in Bedroom 3 that the Builder was required to realign door openings, jambs and architraves, in particular in circumstances where they were not visible to the naked eye.

89 Mr Nakhla also refuted this claim in general terms at T6695-6700 and T7133-7136.

90 For these reasons, the Tribunal declines to make any award in respect of item 11.

Items #12, 13, 14, 17, 24 and 25

91 The above items also relate to walls, door heads and flooring being out of plumb or misaligned in such a way that the parties agreed that if item 11 is found not to be a defect then items 12, 13, 14, 17, 24 and 25 similarly fall away (T7231-7326).

92 In this way as agreed and for formality, the Tribunal finds that the Owner has not established that items #11, 12, 13, 14, 17, 24 and 25 are defects as a result of the Builder's home building work but in all likelihood result from the existing misalignments of a residence built over 50 years ago and that any correction of these misalignments did not form part of the Builder's express or implied scope of works.

Item #21 – Laundry patching to base of wall

93 The Owner submits that '*there is no dispute this wall was constructed by the Builder*'. The Builder's submissions do not engage with that so the Tribunal relies upon that concession.

94 The Xue Report attaches photographs 79 and 80 (666) depicting the poor patching undertaken by the Builder. Both experts however suggest that because the poor patching is hidden by the washing machine and therefore is not visible it is not a defect. Certainly this is Mr Nakhla's opinion although Mr Nakhla did not remove the appliance during his inspection.

95 If, as appears undisputed, the wall was patched by the Builder and it is defective, the fact that the washing machine covers it does not preclude it from being or remaining a defect.

96 The Tribunal wards the sum of $430.00, the estimate of loss in the Xue's Report, to the Owner.

Item #22 – Roof cavity – electrical wiring

97 The issue here is that the electrical wiring has been placed across the ceiling joists (667-668). Mr Xue estimates the loss of $377.00.

98 This issue appears to be one for lay evidence as the two experts have conflicting views in respect of the installation of the electrical wiring. Mr Nakhla inspected the wiring in the roof cavity and considers that it appears that the electrical wiring is pre-existing and did not form part of the Builder's new work therefore does not form part of the scope of works and does not require rectification.

99 Mr Xue says the electrical wiring has been placed across the ceiling joists in contravention of AS3000 (T7433-7438). In that evidence Mr Xue confirmed that the wiring was '*new wiring to the living room area*'. That evidence appears uncontested. Even Mr Wood when cross examined stated he could not determine whether the wiring in photos 81-84 at (667-8) was new or old wiring.

100 The Tribunal therefore accepts Mr Xue's evidence and awards the Owner the sum of $377.00 for this item.

Preliminaries, site supervision and labour, contingency, Builder's margin and GST

101 Both experts agree preliminaries should be applied at the rate of 11%, Builder's margin at 15% and GST is 10%.

102 Mr Xue opines that a component for site supervision and labour should be allowed however Mr Nakhla considers this component is included in the costings and preliminaries. Neither expert was cross examined about these issues in part due to lack of time. Similarly, neither expert was cross examined on the issue of an allowance for contingencies.

103 At paragraph 41 of the Owner's closing submissions, the Owner presses supervision from a properly required person to ensure the works are properly carried out. Mr Xue allowed for 8 weeks for supervision at $3,392.00 per person

per week, a total of $27,136.00 and 8 weeks for labour at $2,332.00 per week a total of $18,656.00 (608).

104 However, the amount awarded by the Tribunal is materially less than that sought by the Owner if its submissions, put at their highest, were accepted.

105 The Tribunal acknowledges that an amount for site supervision and labour should be awarded but reduces this by 50% in acknowledgement of the lesser sum the Tribunal awards based on its findings, the sum therefore of $9,328.00.

106 In respect of the itemised defects 1-26 in the JER therefore, the Tribunal therefore finds in favour of the Owner in the following sum:

Agreed defects	$8,274.00
Item #2 – Garage door	$Nil
Item #3 – Missing stair deck	$Nil
Item #4 – Excess concrete pads	$Nil
Item #6 – Stormwater	$12,000.00
Item #7 – Sub-floor insulation	$657.00
Item #8 – Incomplete work in the garage	$2,000.00

Item #11 – Bedroom 3 architrave	$Nil
Item #12 – Bedroom 2 internal corner	$Nil
Item #13 – Bedrooms 2 and 4 door head heights	$Nil
Item #14 – Living/kitchen flooring out of level	$Nil
Item #17 – Living room wall bowing	$Nil
Item #21 – Laundry – poor patching to wall	$430.00
Item #22 – Roof cavity – electrical wiring	$377.00
Item #24 – Ensuite bathroom wall bowing	$Nil
Item #25 – Laundry wall out of plumb	$Nil
Sub-total	$23,738.00
Preliminaries at 11%	$2,611.18
Site supervision and labour	$9,328.00

Sub-total (2)	$35,677.18
Contingency at 10%	$3,567.72
Builder's margin at 15%	$ 5,351.58
Sub-total (3)	$44,596.48
GST at 10%	$4,459.60
Home Warranty Insurance @ 2.5%	$1,226.40
Total	$50,282.48

Alleged Overpayments by the Owner

107 At paragraphs 144-150 of the Owner's closing submissions the Owner submits that it has paid approximately $470,000.00 against a contract sum of $320,891.00 including GST resulting in an excess of $149,109.00 against the contract price.

108 The Owner acknowledges that some of this difference relates to agreed variations but states '*the balance relates to the Builder claiming additional sums for work that was in the Builder's original scope of works and should not have been additionally claimed by the Builder'*.

109 The Owner states that it has made payments to the Builder totalling $84,951.35 to which he was invoiced by the Builder and paid '*to keep the project moving*

forward to completion'. These are outlined in the Owner's Statement dated 1 December 2022 at paragraphs [51] and [57]: see (45-48).

110 In support of this submission, the Owner refers to clause 17.6(a) in the Contract (140) and submits that all payments made by the Owner to the Builder during the construction period are made on account only and that the parties are to effectively undertake a final accounting at the completion of the construction when the Owner makes the final progress claim payment.

111 At paragraphs 148 and 149 of his closing submissions, the Owner provides two examples of this. First, the Contract provided for a margin of 20% which could be claimed by the Builder for variations and excess amounts over the stated allowance paid for provisional sums and prime cost items – see Schedule 1, Item 13 (123). The Owner claims that the Builder regularly charged the Owner in excess of the agreed margin rate and sometimes as high as 35% - see paragraph 51 of the Owner's statement (51).

112 In a second example the Owner submits that the Builder claimed $4,950.00 in Invoice 202146 dated 20 December 2021 but claims the Builder did not perform any of the works referred to therein or supply any of the stated materials (46).

113 The Owner submits therefore that the Builder is required to provide to the Owner a credit in the amount of $84,951.35 as particularised in the Owner's statement.

114 The Builder responds to the Owner seeking the return of overpayments on its invoices at paragraphs 26-54 of the Builder's closing submissions in reply dated 19 January 2024.

115 The Builder denies and refutes the totality of the Owner's claim for '*overpayment*'.

116 The Owner and the Builder agreed that the formal process for written variations under clause 18 of the Contract was not followed. In this respect therefore there

is no paper record of what constituted variations, the seeking of the Owner's consent to it and at what price, and then adding that sum to the Contract price.

117 All of the invoices listed in paragraph 51 of the Owner's statement (45-46) relate to invoices rendered by the Builder to the Owner which the Owner paid in full in 2021-2. The Owner's discontent now seems to arise because of the 'overpayments' he made to the Builder above the Contract price which the Owner now seeks to review - not so much challenging the validity of a variation but rather asserting that the subject matter of the variation had already been allowed for in the Contract and to classify that work again as a variation resulted in some double payment by the Owner to the Builder.

118 In other words, in respect of the Contract price of $320,891.31 including GST the Owner paid the sum of $470,000.00 but alleges that of the approximate $150,000.00 paid over and above the Contract price that $84,951.35 of that relates in effect either to double payment for work which was listed as a variation (although the Owner believes it was in the original scope of works) and/or an upgraded margin from 20% in the Contract to 35% in the invoices.

119 Where such an overpayment is alleged, the burden of proof sits with the Owner seeking to recover the money to demonstrate that the Builder was paid money that was not due or had already been accounted for.

120 The evidence and comments in paragraph 51 of the Owner's statement (45-46) are no more than assertions by the Owner. The 20 invoices contained in paragraph 51 of the Owner's statement total $126,881.61. The 5 invoices contained in paragraph 52 of the Owner's statement total $24,972.38.

121 In respect of the invoices in paragraph 51 of the Owner's statement, the Owner seeks recovery of all but $22,767.63 of the total amount of those invoices, or the sum of $104,113.98.

122 However, the Owner's evidence-in-chief does not clearly summarise, either in a spreadsheet or otherwise:

(1) The amount allowed for each item in the scope of works;

(2) Any variation that was agreed with the Builder (orally or in writing), the amount and description of such variation and how such variation reduces any particular invoice;

(3) Why, if there were divergences of opinion between the Owner and the Builder about whether the work was done or whether the work was a variation, the invoices were paid by the Owner in full at the relevant time and without question; and

(4) Why only now and in the context of these proceedings for defective or incomplete home building work some 2 years later, the Owner now seeks to recover these sums.

123 The Builder's counsel cross examined Mr Harenza at length in respect of each of the invoices contained in paragraphs 51 and 52 of the Owner's statement. The transcript of evidence from T2354 to T3411 can be effectively summarised as follows:

(1) The Owner received these invoices from the Builder mainly as variations and paid them;

(2) The mode of dealing with variations in clause 18 of the Contract was not followed either by the Builder or the Owner;

(3) The Owner paid these invoices without disputing them in writing to the Builder;

(4) The Owner often answered "no, not in writing" when asked if the particular invoice had been disputed, but acknowledged there were no conversations in his statement supporting any oral challenge to these invoices or to any variations that they allegedly supported; and

(5) If there had been a dispute about the amount of the invoice or the amount of the variation it purportedly represented, the Owner should have raised it at the time he received the invoice. When this was put to the Owner in cross-examination, he responded '*I assume so*'.

124 In cross examination some of the contents of these invoices could be referred back to the VOC quotation (191) to ascertain the degree to which or the way in which the variation extended beyond the original scope of works. However because the scope of works was only a bare or rudimentary description and relied upon plans and drawings, neither party could establish this: see (124-5) of the Contract.

125 The Builder submitted that the law, following an English Court of Appeal decision, is that if an owner is aware of the true entitlements under a contract at the time of payment and yet makes a voluntary overpayment to a builder, the owner is not entitled to recover the overpayment: *Leslie v Farrar Construction Limited* [2016] EWCA Civ 1041 at [56].

126 Further, attempting to align or reconcile the items in the scope of works to those described in the variation invoices to ascertain the proper description of the variation and whether it was outside the scope of works and any progress payments was a task unable to be satisfactorily determined by the business records tendered in this dispute, or by the Owner's Statement or oral evidence of Mr Harenza.

127 The Description of Work in the Contract, Schedule 4 (326) is imprecise and refers at:

(1) Schedule 3 to the 'V4 Revised Quotation, Q1043 dated 22 October 2020' (359-377),

(2) Schedule 4 to the 'Plans and Specifications', and

(3) Schedule 5 to the 'Quotation V4, Plans No. LMH001, Development Application Parramatta Council DA/33/2020.

128 Of the 20 invoices of the Builder referred to in paragraph 51 of the Owner's statement, the Owner gave evidence that in respect of 8 of those invoices, his concern lay with the margin applied by the Builder, which was alleged to be 35% - more than the 20% agreed in the Contract (123).

129 A review of those 8 invoices in paragraph 51 of the Owner's statement reveals the following invoices charged at 35% margin:

(1) Invoice 202132 dated 17 November 2021 in the sum of $5,578.39 with a margin of $1,446.25;

(2) Invoice 202137 dated 22 November 2021 in the sum of $1,832.22 with a margin of $475.02;

(3) Invoice 202155 dated 20 January 2022 in the sum of $2,761.34 with a margin of $715.90;

(4) Invoice 202156 dated 20 January 2022 in the sum of $1,667.25 with a margin of $432.25;

(5) Invoice 202157 dated 27 January 2022 in the sum of $9,848.37 with a margin of $2,737.64;

(6) Invoice 202158 dated 7 February 2022 in the sum of $6,839.50 with a margin of $2,194.68;

(7) Invoice 202163 dated 17 February 2022 in the sum of $5,112.68 with a margin of $1,325.51; and

(8) Invoice 202174 dated 30 March 2022 in the sum of $672.01 with a margin of $276.61.

130 There appear to be some miscalculations by the Builder in at least three of these invoices – 202157, 202158 and 202174.

131 In respect of Invoice 202157 dated 27 January 2022 in the sum of $9,848.37, the Builder has charged the Owner $7,110.73 for termite repair and a 35% margin on this sum. Leaving aside the issue of whether the Owner sought, accepts or disputes the variation, a 35% margin on $7,110.73 should be $2,488.76. But the Builder has charged the Owner $2,737.64, so first the Owner is entitled to a credit of $248.88.

132 In respect of Invoice 202158 dated 7 February 2022 in the sum of $6,839.50, the Builder has charged the Owner $4,644.82 for termite remediation and a 35% margin on this sum. Leaving aside the issue of whether the Owner sought, accepts or disputes the variation, a 35% margin on $4,644.82 should be $1,625.69. But the Builder has charged $2,194.68 so first the Owner is entitled to a credit of $568.99.

133 In respect of Invoice 202174 dated 30 March 2022 in the sum of $672.01, the Builder has charged the Owner $395.30 for an Amended Construction Certificate and a 35% margin on this sum. Leaving aside the issue of whether the Owner sought, accepts or disputes the variation, a 35% margin on $395.30 would be $138.36. But the Builder has charged $276.71, which appears to be twice that amount or a 70% margin, so first the Owner is entitled to a credit of $138.35.

134 The total of these three mathematical errors in Invoices 202157, 202158 and 202174 is $956.22.

135 In addition, the total of the margin amounts in these 8 invoices at 35% is $9,465.61. If the margin had been charged at 20% as was the agreed rate in the Contract, then the total of the margin amounts in these 8 invoices should have been $5,408.92. It follows that the Owner is entitled to a refund of the difference between these two amounts namely the sum of $4,056.69, plus $956.22 in paragraph 134 above, a total of $5,012.91.

136 For these reasons, the Tribunal proposes to limit the claim for overpayment by the Owner to the invoices in paragraph 51 and 52 of his statement to the sum of $5,012.91 and reimburse the Owner for that sum. The Tribunal simply does not have the detailed evidence before it to adequately and fairly adjudicate on the balance of the Owner's claims of 'overpayment'

137 In summary, therefore, the total therefore of the Owner's claim is $50,282.48 plus $5,012.91, a total of $55,295.39.

Builder's cross application

138 In its cross application, the Builder seeks an order that the Owner pay its two final invoices issued in respect of the construction work and variations that it had undertaken at the Property. These are:

(1) Invoice 202184 in the sum of $14,889.15 incl. GST dated 22 April 2022 (174, 569) issued with the purported Notice of Practical Completion to the Owner; and

(2) Invoice 202248 in the sum of $6,711.46 dated 17 December 2022 (511) in respect of a variation to upgrade a window.

Invoice 202184 dated 22 April 2022

139 On 22 April 2022 the Builder claimed it had achieved practical completion with respect to the works and issued a Notice of Practical Completion in accordance with clause 21 of the Contract. The Owner denied practical completion was achieved but attached to the Notice was a final progress invoice claim, Invoice 202184 dated 22 April 2022 in the sum of $14,889.15. That invoice has not been paid.

140 Invoice 202184 is comprised of three items for:

(1) Completion of all contractual items and decommission site - $16,044.55;

(2) Credit for painting as described (sic) in email dated 22/4/22 – ($1,235.00); and

(3) Credit for the supply of extra sand for the laundry floor – ($79.60).

141 In respect of Invoice 202184 the Tribunal notes that:

(1) there is no detail for, or itemisation of, the major item in the invoice,

(2) two of the items are credit items which favour the Owner, and

(3) no margin has been applied by the Builder to any of the amounts in the invoice.

142 Invoice 202184 remains unpaid, but it has not been included in the Owner's statement in either paragraph 51 or 52 as an invoice that the Owner disputes in his application.

143 At paragraph [30]-[32] of the Owner's Closing Submissions, the Owner disputes practical completion and therefore his obligation to pay the Invoice 202184 on the basis that an Occupation Certificate had not been granted as a result of six outstanding items requiring rectification by the Council of the City of Parramatta.

144 The Builder submits that there is no obligation in order to achieve practical completion under the Contract for the Builder to do all things necessary to achieve an Occupation Certificate, an entirely different stage.

145 At T8602-8604 the Owner stated that '*practical completion is achieved when the works have been completed, except for minor omissions or defects which do not affect those works being used for their intended purpose*'.

146 The Tribunal considers that if practical completion was not achieved by 22 April 2022 it has been achieved since or shortly after that date. And, in any case, the alleged failure to achieve practical completion by 22 April 2022 (or when the invoice was forwarded to the Owner) is not sufficient grounds upon which to

refuse to pay Invoice 202184. The Tribunal finds therefore that Invoice 202184 is due and payable to the Builder.

Invoice 202248 dated 17 December 2022

147 In respect of the second invoice, the Owner notes that the Builder did not make any claim for this invoice in its cross-application. Similarly, it was not included in the Builder's points of claim (25-27).

148 Notwithstanding the Owner's detailed submissions, it appears to the Tribunal that the Owner has received the benefit of this variation – see (491) which is a text message in which the Owner instructs the Builder to proceed with the work contained in the variation in respect of windows for the agreed sum of $6,711.46. There appears to be no dispute that the Owner has received the benefit of this variation which was acknowledged in his cross-examination: see also T3793-3802.

149 Invoice 202248 remains unpaid but it has not been included in the Owner's statement in either paragraph 51 or 52 as an invoice that the Owner disputes.

150 The Tribunal finds therefore that the sum of $6,711.46 incl. GST is due and payable by the Owner to the Builder under the Builder's cross-application.

151 The Tribunal notes that that sum will be the subject of a separate order in the Builder's application but that between the parties it may ultimately be set-off against the sums that the Builder has been found liable to pay the Owner in the Owner's application.

Mitigation

152 Under Question 3 of the Builder's Reply dated 19 January 2024 to the Owner's Closing Submissions, the Builder addresses the issue of mitigation at paragraphs 152-162.

153 The Tribunal has reviewed these paragraphs carefully. The Builder asks whether the Owner has mitigated his loss in respect of those proven defects by affording the Builder the opportunity to minimise the damages by allowing the Builder to rectify the defects rather than a third party.

154 The Builder asserts in this respect that the Owner has prevented the builder from returning to the Property to rectify the defects and therefore has not mitigated his loss. The Builder quotes Ball J. in *The Owners SP 76674 v. Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 at [44] in support of this contention.

155 The Owner has not addressed this issue because, in part, it appears to have been first raised in the Builder's Reply dated 19 January 2024 to the Owner's Closing Submissions which was the last set of submissions served by the parties.

156 The Tribunal however refers to those factors submitted by the Owner in paragraph 27 above and upon which the Tribunal relied in making a money order and not a work order. The Tribunal considers that the same factors gravitate against the Tribunal finding that the Owner has not mitigated its loss, and that the Owner therefore is not entitled to recover his loss in the sum assessed by the Tribunal.

Conclusion

157 As a result of the above findings, the Tribunal proposes to make the following orders in the two applications.

158 In the Owner's application, the Tribunal will order that the Builder pay the Owner the sum of $55,295.39 within 28 days. The Tribunal shall also make an order that the Builder pays the Owner's costs in that application on a party/party basis and as agreed or assessed as the sum determined by the Tribunal exceeds $30,000.00 and Rule 38 of the *Civil and Administrative Rules 2014* (NSW) permits the Tribunal to award costs in such proceedings, despite s.60 of the *Civil and Administrative Tribunal Act 2014* (NSW).

159 In the Builder's application, the Tribunal will order that the Owner pay the Builder the sum of $21,600.61 within 28 days, with no order as to costs.

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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