



**Civil and Administrative Tribunal
New South Wales**

Case Name: **Patel v Noori Homes Pty Ltd**

Medium Neutral Citation: [2023] NSWCATCD

Hearing Date(s): 11 November 2021 and 23 May 2022.

Date of Orders: 1 February 2023

Date of Decision: 1 February 2023

Jurisdiction: Consumer and Commercial Division

Before: H. Woods Senior Member

Decision: (1) In matter HB 21/13119, the respondent, Noori Homes Pty Ltd is to pay the applicant, the sum of \$119,519.19 within 28 days.

(2) In matter HB 21/17292, the Application is dismissed.

Costs

(3) Within 14 days of the date of this decision, any party may file submissions and evidence in support, seeking an order in respect of the costs of the proceedings.

(4) If any party files submissions in accordance with order (3), the other parties may file submissions in response, within a further 14 days.

(5) Submissions in reply to submissions filed in accordance with order (4) may be filed within a further 14 days.

(6) Any submissions filed in accordance with orders (3) and (4) must address the question whether the issue of costs can be determined on the written submissions and without a further hearing.

(7) Subject to the parties' submissions, the Tribunal will determine any costs application made based on the papers lodged in the Tribunal

(8) If no submissions are filed in accordance with order (3), there will be no order in relation to the costs of the proceedings

Catchwords: BUILDING AND CONSTRUCTION – Home Building
– Contract – Defective work – Incomplete work

Legislation Cited: Home Building Act 1989 (NSW)
Home Building Regulation 2014 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW)

Cases Cited: *Kurmond Homes Pty Ltd v Marsden* [2018]
NSWCATAP 23

Category: Principal judgment

Parties: HB 21/13119
Mithilesh (Applicant)
Noori Homes Pty Ltd (Respondent)

HB 21/17292

Noori Construction Pty Ltd (aka Noori Homes Pty Ltd) (Applicant)
Mithilesh and Sneha Patel (respondents)

Representation: Counsel:
Mr Tiliakos for Noori Homes Pty Ltd

Solicitors:
Birch Partners for Mithilesh and Sneha Patel
Harrington legal for Noori Homes Pty Ltd

File Number(s): HB 21/13119 and HB 21/17292

Publication Restriction: Nil

REASONS FOR DECISION

INTRODUCTION

- 1 The proceedings concern residential building work performed by Noori Homes Pty Ltd (previously known as Noori Constructions Pty Ltd) for Mithilesh and Sneha Patel (at 9 Garnet Drive, Caddens NSW (*“the Property”*) pursuant to a contract made in January 2019 for the construction of a new home on the Property (*“the Work”*) for the price of \$342,140.00 including GST.
- 2 The Property is owned by Mr and Mrs Patel. Mr Patel is the applicant in matter HB 21/13119 and together with Mrs Patel, the respondents in matter HB 21/17292.
- 3 I will refer to Mr and Mrs Patel as the Homeowners and Noori Homes Pty Ltd as the Builder.
- 4 Although there was some dispute as to the terms of the Contract, when the Contract was entered and whether the Contract complied with the requirements of the Home Building act 1989 (NSW) (*“HBA”*), the parties agree that the Homeowners contracted the Builder to perform residential building work, that the Work was performed between about January and December 2019 and that subject to the relatively small amount claimed by the Builder in respect of one invoice, the Builder has been paid for the Work.
- 5 The Homeowners claims compensation for the cost to remedy defective work and complete incomplete work, plus removalist and rental costs and the cost of having an expert inspect and certify that defective works have been remedied.
- 6 The Builder claims \$1,067.23 as the unpaid balance owing on tax invoice No. 1063, and delay damages of \$143,450.00.
- 7 Although the Builder’s Amended Points of Defence deny the Homeowners application was filed within the limitation periods prescribed by s 18E HBA, the

Builder's final submissions do not dispute that the Homeowners claim was commenced in time.

- 8 Further, the Builder's application states the work was completed in July 2019 and Mr Noori gives evidence at paragraph 13 of his 15 September affidavit, that the "Building Works and Further Building Works" were completed, and an occupational certificate was obtained on 20 December 2019.
- 9 Regardless of whether the Homeowners' application is in respect of minor or major defects, I am satisfied that it was made in time.
- 10 Neither party otherwise raised jurisdiction as an issue and I am satisfied that the claims are for the payment of money or the supply of specified services arising from the Work, which involved the supply of building goods or services by the Builder in connection with residential building work, and that the Tribunal has jurisdiction to hear and determine the matter.

ISSUES

- 11 Many of the items of alleged defective or incomplete work, together with the method and cost of rectification are agreed.
- 12 A preliminary issue in respect of both the Homeowners' and the Builder's application is the identification of the contract documents.
- 13 Otherwise:

(1) The issues for consideration in respect of the Homeowners' claim are:

- (a) In respect of the items of defective or incomplete work that remain in dispute, whether the Builder was engaged to perform the work as a variation and is responsible for the work and / or whether the work is defective or incomplete and if so the method and cost of rectification;

- (b) Whether a work or a money order ought to be made.
 - (c) Whether the Homeowners are entitled to compensation for removalist and rental costs, as well as the cost of having any remedial work inspected.
- (2) The issues for consideration in respect of the Builder's claim are:
- (a) Whether the Contract complies with the requirements of the HBA and whether the Builder is owed \$1,067.23 or any other amount as the unpaid balance of invoice 1063 or on quantum meruit basis; and
 - (b) Whether the Builder is entitled to delay damages and if so, how much.

DOCUMENTS / EVIDENCE

- 14 The evidence was largely contained in a joint tender bundle which, together with Points of Defence (added at pages 11.1 to 11.5) and a Joint Scott Schedule (added at pages 666 to 712) was marked Exhibit A.
- 15 An additional affidavit of Mr Patel dated 9 November 2022 was marked exhibit B, a tax invoice no. "INV – 00-63" for \$3,185.00 exhibit C, a further revised (joint) scott schedule exhibit D, a colour coded version of the further revised (joint) scott schedule exhibit E, the Homeowners cross examination bundle of documents exhibit F and the Builder's bundle headed "File and service of reply evidence" exhibit 1.
- 16 At the commencement of the hearing the Tribunal was also provided with Homeowners opening submissions, Homeowners reply submissions, Homeowner' agreed facts and issues remaining in contention, Homeowner's chronology, Homeowners schedule summarising defects liability and quantum agreed and not agreed, Builder (as Respondent's) outline of submissions,

Builder (as cross applicant's) outline of submissions, Builder's (revised) statement of agreed facts and issues remaining in contention and chronology.

- 17 The Homeowners' statement of agreed facts and issues remaining in contention as revised by the Builder in its Statement of agreed facts identified the following agreed facts:

The contract was between the homeowners and Noori Construction Pty Ltd.

The contract price was \$342,140.00.

The contract documents comprised the tender dated 21 January 2019, architectural plans 0.00, 0.01, 0.02, 1.01, 1.02, 3.01, 3.02, 4.01, and 4.02 prepared by Everlast Drafting Services, building specifications prepared by Everlast Drafting Services, structural plans WP172/19, SH1/2 and SH2/2, storm water plan SW0 and BASIX certificate prepared by ED Services Pty Ltd.

The Contract Works were residential building works for purposes of the HBA.

The Contract Works were subject to the warranties prescribed by Section 18B of the HBA. T

The builder provided to the Homeowners [the HBCF certificate] dated 4 March 2019.

The final occupation certificate was issued on 20 December 2019.

- 18 Following the first day of hearing, the parties filed an Amended Homeowner's Points of Claim, Builder's Amended Points of Defence and Homeowner's Reply.
- 19 The Tribunal thereafter received the Builder's outline of submissions dated 23 May 2022, the Homeowners closing submissions dated 11 August 2022, the Builder's submissions in respect of Builder's claim dated 15 August 2022, the Homeowners reply submissions dated 15 August 2022, and the Builder's submissions in respect of Homeowners' claim filed 29 August 2022.

CONSIDERATION

Contract

- 20 Noori Construction Pty Ltd issued a 15-page tender dated 21 January 2019 to Sneha Patel and Mithilesh Patel identifying a price of \$342,140.00 for the Work.

- 21 Mr and Mrs Patel accepted the tender by signing at page 14 under the words “we wish to accept the above tender and its specification” and initialling each page of the tender. The tender was also signed on behalf of the Builder.
- 22 An undated HIA NSW residential building contract for new dwellings, identifying a contract price of \$342,140.00 including GST (although the stated GST figure appears to be a mistake) identifying Mr and Mrs Patel as the owners and Abdullah Noori as the builder was also initialled at pages 1 to 12 and signed by the Homeowners and Mr Noori. It did not contain the general terms and conditions.
- 23 A further undated HIA contract document also undated and containing the general terms and conditions was relied on by the Builder. It was neither signed nor initialled by or on behalf of any of the parties.
- 24 Notwithstanding that the signed HIA contract identifies Abdullah Noori as the builder, the parties agree that the builder was Noori Construction Pty Ltd now called Noori Homes Pty Ltd. Consistent with Noori Homes Pty Ltd being the builder, the tax invoices put into evidence were all issued by Noori Homes Pty Ltd, Noori Homes is licenced, and the certificate of home warranty insurance identified that the work was carried out by Noori Construction Pty Ltd.
- 25 Given that the Homeowners signed or initialled each page of the tender and pages 1 to 12 of 28 of the HIA contract document and there is no evidence of them having signed or initialled any other pages of the HIA contract document, I am not satisfied that the Homeowners were provided with the general conditions of contract which appear at pages 13 to 28 of the HIA contract document relied on by the Builder and find that to the extent written, the contract comprised the tender and, pages 1 to 12 of the HIA contract document containing the homeowners’ initials and signature.

Items of defective or incomplete work in the order they are dealt with in the Joint Scott Schedule.

- 26 The Homeowners relied on the expert evidence of Mr Matthew Melick which was largely contained in a report dated 4 August 2021. The Builder relied on the evidence of Mr Gordon Xue of Jim's Building Inspections which was largely contained reports dated 23 June and 25 August 2021.
- 27 Mr Melick and Mr Xue also prepared a joint report in the form of Scott Schedule and gave concurrent evidence at the hearing.
- 28 I will deal with each of the items alleged defective/incomplete work in the order in which they are dealt with in the joint Scott Schedule.
- 29 Where the claimed defect, rectification work and cost are agreed, the agreed rectification is, unless otherwise stated, that proposed by Mr Melick in exhibit E.
- 30 Item 1.1(a) Front stairs subsiding. The experts agree that the work is defective, and the method of rectification is that provided by Mr Melick and that the cost of rectification is \$14,000.00. The dispute arises because this work was not part of the original contract, and the issue is whether the Builder is responsible for the rectification of the stairs.
- 31 It appears that the Homeowners maintain a claim in respect of the stairs they but did not include the \$14,000.00 agreed by the experts in their calculations at paragraphs 35 and 100 of their submissions.
- 32 The Homeowners say that the stairs were constructed pursuant to an oral variation to the Contract between the Homeowners and the Builder. Mr Noori says the stairs were not required by the Contract, that any agreement for the construction of the stairs was between the Homeowners and Capano Concreting Pty Ltd and that to the extent he was involved he simply acted as an intermediary between the two.

- 33 Notwithstanding that there is little if any evidence from the Homeowners as to the conversation said to give rise to the variation, in circumstances where the Contract was with the Builder, there is no dispute that the work was performed whilst the Builder was performing the Contract and had charge of the Property, the Builder received a tax invoice from Capano Concreting (although that tax invoices wasn't put into evidence) for the construction of the stairs, payment was made by the Homeowners to the Builder for the construction of the stairs, and the Builder issued a receipt to the Homeowners for the receipt of \$1,454.55 for the stairs, in my view it is more probable that and I find that the Builder arranged for and was responsible for the construction of the stairs and any agreement for the construction of the stairs was between the Homeowners and the Builder.
- 34 In circumstances where the experts agreed that the work is defective and the rectification work required and the cost of that work, I find that the work in respect of the stairs was not performed with reasonable care and skill and that the rectification work required is as agreed by the experts and that the cost of rectification is \$14,000.00.
- 35 Item 2.1(a) - Wall under the main slab abutting the driveway is saturated. The joint scott schedule identifies that this is agreed as a defect and that the method of rectification and rectification cost of \$2,340.00 is agreed. There was some argument about whether this work was required in the first place. In my view, to the extent there remains any dispute, because the Builder attended to the painting of the relevant wall and the paint is peeling off because the source of moisture was not first removed, the work is defective and ought to be rectified.
- 36 Item 3.1(a) - Blocked weep holes to the front of the house. Mr Melick says that he observed weepholes at the front of the house were full of mortar and were required to be cleaned out. Mr Xue says that he didn't see the weepholes to be blocked. Because the photos referred to by the experts do not clearly show the weepholes as being clogged, I am not satisfied that the weepholes are blocked

such that the work referred to by Mr Melick is required. This item is therefore rejected.

37 Having regard to the table at paragraph 34 of the Homeowners submission and the calculation of the Homeowners claim at paragraph 100, it appears that items 4.1(a) - Front door and frame water damaged and 4.1(b) - Front door does not have seals installed per the Australian standards are no longer claimed:

38 Item 5.1(a) – Front corner window rendered sill. The experts agree that this is a defect but disagree as to the method and cost of rectification.

39 Mr. Melick says that based on measurements made by him as to where the window sits relative to the sill, that the front wall in which the window sits has been built out of square and ought to be demolished and rebuilt. Mr Melick says that the window is to be removed, the wall demolished and rebuilt and the window then re installed.

40 Mr Xue agreed that the window is not parallel to the front wall and is not sitting square to the wall, but says in his report that there is no evidence that the outside wall has not been built square, and is of the opinion that the defect can be remedied by removing the window and then reinstalling it parallel to the wall so that it is square and that the tapering that would then occur on the inside can be remedied by adjusting the wall framing of the internal walls.

41 The difficulty I have with Mr Xue's method of rectification is that in cross examination he agreed that squaring up the window with the sill and the wall at the front of the house will make the fact the window is not square worse at the side of the house, and that if his method of rectification was followed, then there will be a tapering of the window against the internal walls, although he says that can be remedied by a framing adjustment of the internal plasterboard walls. He also agreed in cross examination that the fact that there is presently tapering on the outside where the window sits, but none on the inside indicates that the wall wasn't built square.

- 42 I therefore prefer the method of rectification proposed by Mr Melick and find that the underlying cause of the window not being parallel with the front wall is that the wall has not been constructed square and the appropriate rectification work is as opined by Mr Melick and that the cost of rectification in accordance with Mr Melick's opinion is \$14,271.20.
- 43 6.1(a) - Render not sealed against brickwork. This item is no longer pressed.
- 44 7.1(a) - Area between metre box and brickwork is not sealed. The experts agree that this is a defect and with the method and cost of rectification of \$136.21.
- 45 8.1(a) - External face brickwork is poorly pointed, and brick cleaning is incomplete. Having regard to the table at paragraph 34 of the Homeowners submission and the calculation of the Homeowners claim at paragraph 100, it appears this item is no longer pressed.
- 46 9.1(a) - Eave trims are poorly painted and poorly fixed off. Trims are separating at mitre joints. The experts agree that this is a defect and with the method and cost of rectification of \$1,450.00.
- 47 10.1(a) - Brick joints not continuous through to the base course. The experts agree that this is a defect and with the method and cost of rectification of \$200.00.
- 48 10.1(b) - Brick joints running through brick windowsills are not free of mortar. The experts agree that this is a defect and with the method and cost of rectification of \$500.00.
- 49 11.1(a) - Sensor for light to the left side passages installed in the incorrect position. The experts agree that this is a defect and with the method and cost of rectification of \$400.00.
- 50 12.1(a) - Gaps between tiling and brick column at alfresco. The experts agree that this is a defect and with the method and cost of rectification of \$50.00.

- 51 13.1(a) - Cracking to cornice in alfresco area. The experts agree that this is a defect and with the method and cost of rectification of \$150.00.
- 52 14.1(a) - Garage floor is not cleaned or tiled. The experts agree that this is a defect and with the method and cost of rectification of \$3,000.00.
- 53 14.1(b) – Poorly fitted mouldings either side of garage door. The experts agree that this is a defect and with the method and cost of rectification of \$350.00.
- 54 14(c) - Rear wall of the garage deviates 11 millimetres over 2 metres. The experts agree that this is a defect and with the method and cost of rectification of \$1,533.33.
- 55 15.1(a) - Paint splatter has not been cleaned from lounge room window. The experts agree that this is a defect and with the method and cost of rectification of \$40.00.
- 56 15.1(b) - Plastic reveals are not sealed against the window frame and are poorly painted with undulations to plaster visible and starved areas. External angles can be seen through the paint. This item does not require separate determination because if rectification is required it will have been included in the rectification methods proposed by Mr Melick and Mr Xue in respect of item 5.1 (a).
- 57 15.1(c) - Glazing beads to the front window acting detached from their required position. The experts agree that this is a defect and with the method and cost of rectification of \$125.00.
- 58 15.1 (d) - Windows noted within the professional witness report do not have keys provided by the builder. Having regard to the table at paragraph 34 of the Homeowners submission and the calculation of the Homeowners claim at paragraph 100, it appears this item is no longer pressed.
- 59 If that is not the case, having regard to the emails at pages 129 to 135 of exhibit A, I understand that the keys were provided by the window supplier to the

Homeowners, but that the Homeowners believe that keys were also provided to the Builder which have not been handed to the Homeowners and that for security reasons the Homeowners want any other copies of the keys. I am not aware of any other evidence identifying what has become of the claimed missing keys. In circumstances where the Homeowners have keys to the windows and there is no other evidence that the Builder has copies of the keys that haven't been handed over, I would not in any event be satisfied that there has been a breach of the Contract, or the warranties implied by s 18 B HBA and the claim is rejected.

- 60 15.1(e) - Air conditioner diffuser not fitted off to the ceiling securely. The experts agree that this is a defect and with the method and cost of rectification of \$75.00.
- 61 16.1(a) - Wall between the hall way and garage is not straight. The experts agree that this is a defect and with the method and cost of rectification of \$2,500.00.
- 62 16.1(b) - Plasterboard ceiling outside the bedroom door is cracked. The experts agree that this is a defect and with the method and cost of rectification of \$75.00.
- 63 16.1(c) - Walls in the hallway either side of the master bedroom door do not align. The experts agree that this is a defect and with the method and cost of rectification of \$1,700.00.
- 64 17.1(a) – Shower rail has not been provided to that shower recess per agreed quotation. The experts agree that this is a defect and with the method and cost of rectification of \$2,720.00.
- 65 17.1(b) – Silicone application. The experts agree that this is a defect and with the method and cost of rectification of \$80.00.

- 66 17.1(c) - Poorly cut tile at hose connection with wall. The experts agree that this is a defect and with the method and cost of rectification of \$80.00.
- 67 17.1(d) - Shower leaks under the bottom rail of the shower screen. The experts agree that this is a defect and with the method and cost of rectification of \$80.00.
- 68 17.1(e) - Plaster and paint stains noted to the wall tiles. The experts agree that this is a defect and with the method and cost of rectification of \$70.00.
- 69 18.1(a) - Removable pelmet is not installed to the master bedroom cavity sliding door. The experts agree that this is a defect and with the method and cost of rectification of \$65.00.
- 70 19.1(a) - Shower rail has not been provided to the shower rest recess per the agreed quotation. The experts agree that this is a defect and with the method and cost of rectification of \$2,700.00.
- 71 20.1(a) – Hole to wall next to linen cupboard sliding door frame. The experts agree that this is a defect and with the method and cost of rectification of \$70.00.
- 72 21.1 (a) - Orange feature wall at the end of the hallway is poorly painted with paint drips and runs noted. The experts agree that this is a defect and with the method and cost of rectification of \$80.00.
- 73 22.1 (a) - Large gap between garage internal door and jamb and door does not latch easily. The experts agree that this is a defect and with the method and cost of rectification of \$100.00.
- 74 23.1 (a) – Experts agree that there is no defect, and the item is not pressed.
- 75 24.1 (a) - Experts agree that there is no defect, and the item is not pressed.

- 76 25.1 (a) - Family room and dining room walls, ceilings, skirtings, architraves, and corners are poorly painted with brush marks, starved areas and inconsistent finish noted. The experts agree that this is a defect and with the method and cost of rectification of \$600.00.
- 77 26.1(a) - Experts agree that there is no defect, and the item is not pressed.
- 78 26.1 (b) - Cornice is separating from the ceiling in the kitchen and living room. The experts agree that this is a defect and with the method and cost of rectification of \$500.00.
- 79 26.1 (c) - Paint to the kitchen ceiling is wrinkling and damaged. The experts agree that this is a defect and with the method and cost of rectification of \$75.00
- 80 26.1 (d) – Wall between kitchen and hallway is poorly painted and some paint patches missing. The experts agree that this is a defect and with the method and cost of rectification of \$75.00
- 81 26.1 (e) – Island bench is not installed square with the opposite bench. The experts agree that this is a defect and with the method and cost of rectification of \$1,580.00.
- 82 27.1 (a) - Bedroom 3 internal angle left side of the window is poorly plastered. The experts agree that this is a defect and with the method and cost of rectification of \$120.00
- 83 27.1 (b) - Bedroom 3 wardrobe door is not plum. The experts agree that this is a defect and with the method and cost of rectification of \$110.00
- 84 27.1 (c) – Wall left of bedroom 3 wardrobe is not installed square. The experts agree that this is a defect and with the method and cost of rectification of \$935.07.

- 85 28.1 (a) - Rollers to window are not operating as designed. Window gets stuck while opening. The experts agree that this is a defect and with the method and cost of rectification of \$150.00.
- 86 29.1 (a) – Main bathroom heat lamp is loose in the ceiling. The experts agree that this is a defect and with the method and cost of rectification of \$170.00
- 87 29.1 (b) - Silicon gap filling is incomplete to the side of the mirror and behind the toilet. The experts agree that this is a defect and with the method and cost of rectification of \$120.00
- 88 30.1 (a) - cavity sliding doors to the kitchen and laundry do not lock. Latches do not align with keepers in the wall. The experts agree that this is a defect and with the method and cost of rectification of \$130.00
- 89 30.1 (b) - Cracking noted to the internal corner outside the laundry door. The experts agree that this is a defect and with the method and cost of rectification of \$75.00
- 90 31.1 (a) - Builder has not provided keys for rear stacker door, bedroom 3 window, bedroom 4 window, both windows to the family room, garage door. This item is disputed. Mr Malik allows for a locksmith to attend the site and re-key the locks at \$110 per lock to be rekeyed, being a total of \$660.00. Mr Xue says that he has been advised by the builder that all keys have been handed over. For the reasons set out at paragraph 42 above, this claim is also rejected.
- 91 32.1 (a) - All toilet seats have broken in the same spot. The experts agree that this is a defect and with the method and cost of rectification of \$220.00
- 92 33.1 (a) - Front roof constructed incorrectly and not in accordance with the approved drawings, roof is allowing rain to enter the building. This item is disputed.
- 93 Mr Melick's opinion is that the front part of the roof, more particularly the roof hips, have not been constructed in accordance with the approved drawings and

there is a gap on the left side where the roof sheet meets the parapet box gutter, exposing the roof cavity which would allow rain to enter. Mr Melick's opinion as to the rectification work required and the cost of that work of \$38,930.77 is detailed in Mr Melick's report and the scott schedule to that report and is repeated in Exhibit E. In summary, he says that the roof at the front of the house, including roof sheets, hip capping, sarking, roof batons at the front of the building back to the ridge, ceilings, ceiling joists and roof trusses is to be removed and that part of the roof rebuilt.

94 In his report, Mr Zhu agreed that the roof hips do not match the approved documentation but said that in his opinion the approved documentation is incorrect and that it is not possible to construct the roof as per the approved documentation. He further opined that there is no defect caused by loss of amenity and the claimed defect is not found.

95 At the hearing Mr Xue gave evidence that after consideration he accepted that the roof sheeting could have been more securely fixed and that there was a gap as identified by Mr Melick. Mr Xue's opinion however was that to the extent the roofing was defective, as accepted by him, it could be remedied by removing the roof sheeting to the affected area, installing additional blockings to reduce any gaps, installing any required additional support to secure the roof sheeting, and then reinstalling the roof sheeting. The time and cost to perform that work was outlined by Mr Xue in the Exhibit E. In his opinion the rectification work would cost \$5,400.00.

96 The difficulties I have with Mr Xue's position are that:

- (1) his opinion that the architectural drawings and engineering drawings in so far as they provide for the relevant part of the roof are incorrect is not supported by any engineering evidence;
- (2) he has not provided any drawings or measurements that detail the work that in his opinion should be performed and that will have the effect of varying what Mr Mellick describes as an "engineered product";

- (3) Mr Xue conceded in cross examination that he was making assumptions that the roof truss manufacturer modified the roof, or the trusses based on the way the roof was built, but there was no lay evidence as to why the roof was constructed the way it was; and
- (4) there was no engineering evidence certifying to the effect that the construction of the roof contrary to the plans was satisfactory.

97 I therefore prefer the opinion of Mr Melick as to extent to which the roof is defective and constructed in breach of warranties implied by s 18B HBA and the rectification work required, and the cost of that work.

98 34.1 (a) - Back blocking has not been installed to ceiling sheets. The experts agree that this is a defect and with the method and cost of rectification of \$1,800.00

99 35.1 (a) - Ceiling insulation is not correctly installed in the ceiling cavity. The experts agree that this is a defect and with the method and cost of rectification of \$200.00.

100 36.1 (a) – This item is not pressed.

101 37.1 (a) - Painting two down pipes and water tank plumbing is incomplete. The experts agree that this is a defect and with the method and cost of rectification of \$200.00.

102 The cost of the rectification work required is \$94,481.58.

103 The experts agree that an amount is to be added for what Mr Melick identifies as “Builder’s margin” and Mr Xue as “Builder’s overhead and profit”.

104 Mr Melick says that 25% should be allowed, whereas Mr Xue says that having regard to Rawlinson’s cost guide 2021 7.5 % should be allowed. In cross examination, Mr Xue agreed that because the work was rectification work it would be reasonable to allow 15%. I prefer Mr Xue’s reasoning based on an

accepted cost guide but revised by him having regard to his experience to reflect that the work is rectification work and will allow 15%. That takes the cost of the rectification work to \$108,653.81, to which is to be added 10% for GST, taking the rectification cost to \$119,519.19.

Homeowners' claim for removal and rental costs and additional inspections.

- 105 Much of the rectification work is relatively minor work.
- 106 The largest three items are the front stairs, the wall at the front of the house and the roof at the very front of the house.
- 107 Although the Homeowners submit that it would not be safe for them and their family to reside at the property during those construction works, that submission is not in my view supported by any evidence and although there will be some level of inconvenience, I am not satisfied that the Homeowners will be required to vacate the property while the work is performed.
- 108 I therefore reject the claims for removalist and accommodation costs.

Section 48MA Home Building Act

- 109 Section 48 MA HBA, "Rectification of defective work is the preferred outcome in proceedings" provides that "A court or tribunal determining a building claim involving an allegation of defective residential building work or specialist work by a party to the proceedings (the *responsible party*) is to have regard to the principle that rectification of the defective work by the responsible party is the preferred outcome".
- 110 I am satisfied that the Builder is the person responsible for the defective work identified above.
- 111 The Homeowner submits that a money order as opposed to a work order should be made because, according to the Homeowner, the Builder has not proven it is ready, willing, and able to comply with its obligations pursuant to the Contract

or that it can complete the Contract Works to an acceptable standard and the Homeowner has lost all confidence in the Builder being able to comply with its obligations pursuant to the Contract or the Tribunal's orders.

112 The Builder submits that a work order ought to be made because it is the preferred outcome, the Builder is ready, willing, and able to remedy any defective work, the Builder has conceded much of the alleged defective work, the Builder is licensed, and the work has otherwise been completed and most of the defects works are relatively minor.

113 Although the preferred outcome, a work order is not mandatory and as pointed out by the appeal panel in *In Kurmond Homes Pty Ltd v Marsden* [2018] NSWCATAP 23 at [31], the intent of s 48MA is to promote “the timely and cost-effective resolution of disputes”.

114 Although the Builder submits that it is ready, willing and able to attend to the rectification work, it has not provided evidence as to how the work, which on the face of the work will involve several different trades, would be attended to so that the Tribunal could be satisfied that that the Builder has the resources to have the work performed and more importantly to ensure the work is supervised and inspected so that the Tribunal can be satisfied that it would be carried out with due care and skill and in a timely fashion.

115 Given the large number of defects, even though many are relatively minor, and the lack of evidence as to how the work would be attended, I am not confident that if a work order was made that the work would be carried out with due, care and skill and in a timely fashion. I therefore I decline to make a work order.

Builders Claim for \$1,067.23

116 The Builder claims the sum of \$1067.23 being the balance said to be outstanding on invoice numbered 1063 for \$3,185.50.

117 The Builder says that the Homeowner only paid \$2000.00 towards the invoice. The Homeowner says he paid \$3000.00 in cash in satisfaction of the invoice.

- 118 The Builder claims this amount for variation works in respect of which it says there was agreement for the work to be performed but not the price. The amount can therefore only be claimed on a quantum basis.
- 119 But for the fact of the invoice there is no evidence that would enable the Tribunal to determine the reasonable value of the variation works to which invoice 1063 relates.
- 120 In any event because of the written receipt which identifies (in type) that a payment of \$2,000.00 was made and a further written and initialled entry refers to a further \$1,000.00 being paid, I am of the view that it is more probable that the further sum of \$1,000.00 in cash was paid and accepted in satisfaction of the outstanding balance of \$1,067.23.
- 121 The Builders claim for \$1067.23 is therefore rejected.

Builder's claim for delay damages.

- 122 The Builder relies on clause 19 and more particularly clause 19.4 of the Contract as purported by the Builder for its claim for delay damages of \$143,450.00.
- 123 Clause 19 headed delays and extensions of time states:

19.1 The builder is entitled to a reasonable extension of the building period if the building works are delayed by the builder suspending the building works under clause 25 or from a cause beyond the sole control of the builder including:

...

(f) anything done or not done by the owner...

19.2 The builder is to give the owner written notice of an entitlement to an extension of time detailing both:

(a) the cause of the delay; and

(b) the extension of time

within 10 working days after becoming aware of both the cause and extent of the delay.

...

19.4 For every day the subject of an extension of time caused by an act, default or a mission of the owner, delay damages, being the total of the actual increase in cost to the builder to carry out the building works plus the builder's margin applied to that cost is due and payable to the builder on demand.

- 124 The delay damages claim is rejected for the following reasons.
- 125 Firstly, I have found the terms and conditions contended for by the Builder and at pages 92 to 111 of exhibit E were not provided to the Homeowner and were not part of the Contract.
- 126 Secondly, there was no evidence that any notice was given as required by clause 19.2 identifying an extension of time and the cause of the delay.
- 127 Thirdly, evidence of Mr Noori and the witnesses relied on by the Builder as to the fact of any delay and the cause of any such delay at pages 173 to 174 and 211 to 233 of exhibit A contains little more than assertions as to delays having been caused with no evidence provided as to how the asserted periods of delay have been determined.
- 128 Fourthly, the evidence of claimed losses and costs at page 211 of exhibit A is likewise nothing more than assertion of lost hours and hourly rates and costs incurred with no evidence provided in the form of records or analysis to substantiate the claimed losses or costs.
- 129 I note that the Homeowners also submits that the Builder is not entitled to maintain its claim for the unpaid balance of tax invoice 1063 and delay damages because the Contract did not comply with various provisions of the HBA and by reason of s 10 HBA the Builder is not entitled to damages or to enforce any other remedy in respect of a breach of the contract committed by the Homeowners.
- 130 Because of my findings in relation to both the claim for the unpaid balance of tax invoice 1063 and delay damages, I have not considered that part of the Homeowners' defence to the Builder's claims.

131 The Builder's application will be dismissed.

ORDERS

132 The Tribunal's orders will be:

(1) In matter HB 21/13119, the respondent, Noori Homes Pty Ltd is to pay the applicant, the sum of \$119,519.19 within 28 days.

(2) In matter HB 21/17292, the Application is dismissed.

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

