Civil and Administrative Tribunal
New South Wales

Case Name:	[redacted] & [redacted] v [redacted] Pty Ltd
Medium Neutral Citation:	[2023] NSWCATCD
Hearing Date(s):	15 June 23, 3 July 2023 on papers.
Date of Orders:	21 September 2023
Date of Decision:	21 September 2023
Jurisdiction:	Consumer and Commercial Division
Before:	Dr [redacted]

Decision:

(1) [redacted] Pty Ltd is to pay to [redacted] and [redacted] the sum of $ 55,269.56.

(2) Payment is to be made on or before 19 October 2023

(3) Orders in respect of costs;

(a) Any party wishing to seek an order for costs is to file and serve that application with any further documents and any submissions relating to that application (including any request with supporting reasons for a further

hearing on costs) on or before 10 October 2023.

(b) Any documents and submissions in response to the material served under (a) is to be filed and served on or before 24 October 2023.

(c) Documents and submissions filed and served are not to repeat existing evidence and submissions but may cross refer to them.

(d) The hearing to be conducted on the papers in accordance with S50(2) (a) of the NCAT Rules, unless there is objection to that cause by either party.

Catchwords:	Work/money orders, expert conclaves, concurrent evidence, expert disagreement, calculation of rectification costs, liquidated damages.
Legislation Cited:	Home Building Act (NSW) 1989. New South Wales Civil & Administrative Tribunal Act 2013.
Cases Cited:	Clyde Contractors Pty Ltd v Northern Beaches Developments Pty Ltd [2001] 18 BCL 144. Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd 2008 NSWSC 1163. Gordon Investments Pty Ltd v Lesdor Properties Pty Ltd [2012] NSWCA 184. Wigan v Edwards (1973) 1 ALR 497. Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd [2012] NSW 184.

	Building Insurers' Guarantee Corporation v Owners – Strata Plan No. 57504 [2010] NSWCA 23. Kirby v Coote [2006] QCA 61. Jadson Pty Ltd v James [2021] NSWCATAP 274. Butler v Fairclough [1917] HCA9 23 CLR 78. Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) SR (NSW) 632.) Bellgrove v Eldridge 1954 90 CLR 613. Westpoint Management Pty Ltd v Chocolate Factory Apartments Ltd [2007] NSWCA 253. Allied Pastoral Holdings Pty Ltd v Commissioner for Taxation [1983] 1 NSWLR. Turner Corporation Ltd v Austotel Pty Ltd 13 BCL 378. Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd [2008] NSWSC 1163.
Texts Cited:	Nil
Category:	Principal judgment
Parties:	[redacted] & [redacted] – Applicants [redacted] Pty Ltd
Representation:	Counsel: [redacted] for the applicants. Respondent represented by its director [redacted]. Solicitors. [redacted] for the applicants. [redacted], director of the respondent.
File Number(s):	[redacted]
Publication Restriction:	Nil

REASONS FOR DECISION

1 The proceedings arise out of residential building works at [redacted], conducted by [redacted] Pty Ltd pursuant to a standard form HIA Residential Building Contract dated 25 July 2019. The homeowners are [redacted] and [redacted].

2 The form and terms of the contract are not in dispute.

3 Three central issues in dispute have been identified by the applicants as;

(1) Whether the applicants are entitled to liquidated damages in accordance with their rights under Clause 32 of the contract. Associated with this, is the issue of whether the works reached practical completion in accordance with the definition in clause 1. of the contract, or whether the works were not completed until the applicants were able to occupy them on 23 September 2021.

(2) Whether the works were defective and incomplete and in contravention of *S18B of the Home Building Act 1989 (NSW) (the Act).* There were *21 items in dispute identified in the Joint Scott Schedule.* Of those items there are.

(a) Three items of defective workmanship where liability and quantum are in dispute, being 1. for removal of construction debris and items 5 & 6 relating to lack of Hebel panelling articulation joints and cracking.

(b) One item of incomplete work where the applicants allege the eaves are not constructed in accordance with the approved contract drawings, where liability is disputed but quantum is agreed.

(c) One item of incomplete work that the applicant alleges is a variation relating to the supply of sliding door & furniture that is

flush with the door cavity where liability is in dispute, but quantum is agreed.

(d) Five items of defective workmanship where liability is agreed but quantum is in dispute, being item 6 - insufficient fall in balcony tiled area, item 16 timber floor scratching, item 18 – cracking benchtop, Items 20 & 21 negative fall to niches in four shower enclosures and first floor ensuite bathroom and shower leak.

(3) The remaining 12 items of the Joint Scott Schedule are agreed as to liability and quantum where the expert engaged by the respondent agrees that the respondent is liable, and the quantum is agreed.

(4) The final area of dispute is the entitlement of the applicant to a money order pursuant to *S48O (1)(a)* of *the Act* rather than a work order entitling the respondent to undertake rectification work ordered by the Tribunal.

Applicant's submissions.

Practical completion

4 "Practical Completion" is primarily a question of fact to be determined by the Tribunal (*Clyde Contractors Pty Ltd v Northern Beaches Developments Pty Ltd [2001] 18 BCL 144)* and because practical completion is not determined by a process of progress certification under this contract a Court or Tribunal is entitled to look to external matters such as the issue of interim or final occupancy certificate. *(Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd 2008 NSWSC 1163 at [84])*.

5 The applicants' position is that despite many attempts by the respondent to force the applicant to accept that practical completion had occurred, the facts are simply that, in December 2020 the works were still both incomplete and defective and there were patent defects that were not *de minimus* (*Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd [2012] NSWCA 184.*)

Therefore, it can be construed that the works had not reached practical completion.

6 The applicant maintains that it is evidence from the PCA inspection on 1 December 2020 that the works were unsatisfactory and that further inspections were requires. The fit out to the four bathrooms, among other things, had not been completed.

7 Correspondence from the Respondent contains admissions that post December 2020 the following works were incomplete.

(a) rough plaster and faulty paintwork where the respondent says, as at 21 September 2021 – “Painter to return”.

(b) the tiler and the plumber had only started to move the ground floor toilet.

(c) change top vanity drawers in bathrooms

(d) skirting near staircase – started.

(e) Cleaning finished – January 2021 after the purported date for practical completion.

(f) other items – eaves, timber, “paperwork please see [redacted]”.

(g) Installation of hot water system.

8 The applicant also sent several emails, largely rejected by the respondent, claiming works were defective and incomplete after December 2020.

9 On 26 January 2021, when the respondent was still in possession of the premises, the kitchen and hall flooded due to faulty workmanship by the

respondent's plumber who, it is submitted failed to install the hot water system correctly. Despite the respondent's assertion that the damage was minor the rectification works were the subject of an insurance claim, which was accepted, but the approval and rectification work took until September 2021 to complete.

10 During the rectification further damage was caused which the respondent has refused to rectify, and which forms part of the damages now claimed.

11 Thirty-two days extension of time was approved by the applicants, nevertheless the handover date was 21 September 2021, 247 workdays late, at $100.00 per day - $24,700.00 as claimed in the applicants' points of claim.

12 The applicants maintain that the contract clearly envisages an alternative date for practical completion can be determined by the Tribunal.

13 There are several contract clauses which deal with "practical completion". Clause 1.-"Interpretation" provides "practical completion means the building works are complete except for minor defects or omissions that do not prevent the building works from being reasonably capable of being used for their usual purpose". Clause 21. governs the notice provisions regarding the bringing of works to practical completion. Clause 21.3 then empowers the owner to give notice that the building works have not reached practical completion and clause 1. (Interpretation) defines Date of Practical completion under Clause 21 as - where the date is determined by dispute resolution (including litigation) then that date will be the date of practical completion.

Construction period.

14 The applicant has contended that there was no controversy during the hearing or on the documents that were before the Tribunal that the building period was to be 40 weeks and that the period was to commence from the date the slab was poured and finished. It is not controversial that the date was 13 November 2019 and that consequently the date for practical completion should have been 19 August 2020.

15 It was not disputed that 32 days extension of time was granted by the applicants and a further 9 days were claimed by the respondent but refused in accordance with the five-day notice period under the contract by the applicant. The additional 9 days claimed were not disputed at the hearing or under contract by the respondent.

16 It would follow that from 2 October 2020 the builder was in breach of the contract having failed to bring the works to practical completion on or before the extended contract time.

17 By August 2020, it is submitted that the applicants were becoming concerned by the continued existence of defects and the and lack of progress. Mr [redacted], the director of the respondent, attributed the delay and lack of progress at least in part to Mrs [redacted] being "frustrating and difficult".

18 The applicants have submitted that the builder lacked a sophisticated understanding of the operation of construction programming and that it's failure to prepare a construction programme, although there was no such requirement, deprived it of the advantage of a useful management tool to assist in compliance with its contractual timing obligations.

19 The builder's oral evidence was that practical completion was achieved on 21 December 2020 however the chronology of events does not support that assertion. On 1 December 2020 an inspection by the registered certifier, [redacted], reported: "Not ready for occupation, Inspection outcome unsatisfactory, complete all bathrooms."

20 The same day, 1 December 2020 the respondent sent the applicants a document that would have the effect of having the applicants agree and be contractually bound that practical completion had been achieved.

21 On 3 December 2020 the applicants rejected the respondent's claim that practical completion had been achieved and provided a defects list of items to

be completed for the work to reach practical completion by 10 December 2020. No response was received from the builder. The items remained outstanding at 14 December 2020 and on 21 December 2020 the Respondent again attempted to have the applicant sign the "deemed practical completion form".

22 The applicants responded by returning the form with a number of defects listed, which they required to be completed plus a further list dated 16 December 2020 which identified additional items.

23 On 4 January 2021 the builder required the applicants to write-up an agreement indicating a date for hand-over, as 29 January 2021, subject to several conditions associated with completion of the bathrooms and relocation of an AC grille. The agreement included a provision that the applicants recognised that the eaves did not have to be completed, however that requirement was crossed out by Mrs [redacted] before the document was signed.

24 It is the applicant's submission that by 29 January 2021 the conditions had not been met – a toilet /cistern was not installed the AC grille was not addressed until August of 2021, the cistern had not been moved, the vanity tap had not been changed, the tiling was incomplete, and the premises were by that time flooded in the kitchen, forth bedroom, study, lounge room and hallway areas.

25 It is also argued that the builder has provided no consideration in order to create an enforceable agreement (*Wigan v Edwards (1973) 1 ALR 497*)

26 The builder has made no promises "…to perform obligations that he has already agreed to perform in the past and under the written agreement that makes up the contract between the parties he brings nothing else to the table in terms of forbearance or other valuable consideration." The document, it is submitted, is but a further example of the builder's avoidance of rectifying defects and limiting its own liability.

27 The original works were not completed to the satisfaction of the certifier until April 2021. Despite this it is submitted that the applicants were still unable to

occupy the premises because the rectification of the flooding works was on-going.

Substantial Defects and incomplete work.

28 The Tribunal is entitled to take into account the builder's compliance with the plans and specifications at the time practical completion which is said to have occurred and to consider if there are significant defects or incomplete work at that time.

29 In *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSW 184 the Court of Appeal per Bathurst CJ held:

> Further, the primary judge identified what he described as five major defects which he said demonstrated that the work had not been done in accordance with the plans and specifications…

30 It is the applicant's submission that the significance of this decision cannot be understated. Where it is clear from the evidence that at the time practical completion is alleged to have occurred, there are significant defects and incomplete work in existence then practical completion cannot, as a matter of fact, occur. In this case it was agreed by the respondent in cross examination as follows;

> a) As at 21 December 2020 and continuing until the hearing of this matter the Eaves have not been constructed;
>
> b) As at 21 December 2020 and continuing the balcony tiling had incorrect falls and required rectification;
>
> c) As at 21 December 2020 and continuing the painting had not been completed to the requisite standard;
>
> d) As at 21 December 2020 and continuing the shower niches in four of the bathrooms had not been constructed in accordance with the BCA and required rectification.

31 Further it is submitted that the Hebel cladding was not compliant with the Australian Standard, and the builder's report in this regard should be accorded little or no weight.

The Eaves.

32 This is an item of incomplete work and remains so, but only on the basis that the builder asserted that there was an agreement to remove the item from the scope of works.

33 There is no binding negative variation in evidence in the builder's bundle or statement. The building contract requires pursuant to Clause 18 of the Special Conditions of Contract that any deletion from the scope of works requires a written deduction of all reasonable costs of deletions from the building works and Clause 16 requires a contract price adjustment to reflect the deletion.

34 There has been no deletion and no binding agreement to remove the eaves from the scope of works, the builders' attempt to have the applicants concede the item failed on 4 January 2020 when the applicant deleted (crossed out) this item from the list of items in issue.

35 Mr [redacted], the expert engaged by the builder conceded that the dispute in relation to this item was contractual however the experts have agreed the cost to rectify/complete. It is difficult to accept that a change of this magnitude would be made by the builder without authorisation because it involves reduced rafter lengths and probably some redesign of the roof support at the external wall.

36 It is the applicant's conclusion that "…there were significant items of defective and incomplete works at all dates the builder asserts that practical completion was reached or that there was hand-over and the builder's assertion that it took place prior to 21 September 2021 should be rejected by the Tribunal".

Acceptance of works by possession.

37 It is asserted that the applicants were not in possession of the premises at any time and that they physically did not move into the premises. Mrs [redacted] evidence was that she borrowed a copy of the keys in order to move some furniture in, which she did, but her evidence was that "…the builder failed to

meet the certifier's requirement for interim occupation certificate so I couldn't move in, so I shouldn't be paying the handover payment."

38 The applicant referred to correspondence of 26 January and 4 February 2021 in which Mrs [redacted] indicated… "You agreed that everything would be completed for handover on 29 January … save only for the installation of the bathroom vanity units which were to be delayed a further 1-2 weeks. The plumbing work was incomplete at 4 February and the certifier required a further inspection because the bathroom/powder room was still not finished.

39 Furthermore, on 18 January 2021, the premises became unoccupiable as a result of flooding which became the subject of an insurance claim which was not finalised until 21 September 2021. At some point after the flooding the applicant's furniture was removed from the house and not restored until after 16 September 2021. It is submitted that this clearly demonstrates that the applicants were not in possession as their furniture had been removed in order for the rectification works to be carried out.

40 The owners relocated to a hotel in [redacted] from 13 March 2021 until 21 September 2021. The costs of which were met by the builder's insurer.

41 The applicant refers again to *Cordon* where the Court of Appeal addressed the issue of whether the owner taking actual possession resulted in the owner accepting the works and practical completion. Bathurst CJ refers to whether or not the builder voluntarily gave up possession but continued;

> Irrespective of this there is nothing to suggest that the taking of possession Lesdor was forbearing or abandoning its right to insist on completion in accordance with the terms of the contract although clause 9A in the agreement required Lesdor to give possession of the land to Cordon on receipt of building approval, there is nothing to suggest that the retaking of possession by Lesdor hindered or prevented Cordon from completing the works or was relied on by Cordon in declining to do so. *Agricultural & Rural Finance Pty Limited v Gardiner [2008] HCA 57 (2008) 238 CLR570 at [83]* Further, to the extent that abandonment was relied upon, contrary to abandoning its rights to full completion Lesdor was insisting on it thus the letter of 22nd and November 2005 contained the following demand…

> Nor was there any waiver in the sense of election between inconsistent rights: *Sargent v ASL developments Pty Limited (1974) 131 CLR 634 at 641*. There does not seem to me to be any inconsistency between taking possession of part of the premises and insisting that Cordon complete its contractual obligations.

42 It is submitted that "despite the builder's assertions, practical completion did not, and could not have occurred between February 2021 and September 2021, even if the applicants had the keys, because significant defects and incomplete works still remained."

43 The flooding to the kitchen which occurred in January 2021 was approved by the builder's insurer in February 2021 and rectification work commenced March 10 or thereabouts; the rectification work continued until September 2021 this is confirmed an email from Mrs. [redacted] dated 22nd of September where she states;

> "This is to confirm we now have full access to the property and can take occupation since the interim occupation certificate was issued on 8 April 2021, obtained through you. During the handover defects were identified; there are two defects lists 1. ground floor remediation work due to water leakage, and
>
> 2. rest of the house internal and external."

44 During the period July to October 2021 the listed defects were not rectified, and the builder refused to rectify the majority of the current defects which are the subject of these proceedings.

The Liquidated Damages claim.

45 It is submitted that the building period commenced on 13 November 2019 and the works did not reach practical completion until 21 September 2021, a period of 279 days less the approved EOT of 32 days – 247 working days. It is submitted that the contract is clear – the applicants are entitled to $100.00 per working day, representing a total of $24,700.00.

Defective and Incomplete works -Agreed items

46 The applicant's submissions address the contentious items and reference to items agreed between the experts were addressed in their outline of submissions served prior to the hearing.

47 The experts agree that the following items from the Scott Schedule prepared on the owner's behalf are defective, and the rectification cost was agreed as follows;

Item 3. parapet wall capping -		$ 5,730.00
Item 7. general painting		$ 2,127.00
Item 8. cracked and chipped tiles		$ 141.00
Item 9. damaged trim ensuite floor tiles		$ 129.00
Item 10. Cracks, ceilings, skirtings & architraves	$ 25.00	
Item 12. water stain to plaster		$ 2,720.00
Item 13. wall out of plumb		$ 5,125.00
Item 14. Scratches to window fames		$ 100.00
Item 15. Caulking to floor and skirting joints		$ 133.00
Item 17. Chipped timber flooring		$ 100.00
Item 19. Scratched benchtop	$ 157.00	
Item 22. Water leaks		$ 2,488.00
Total		$ 18,975.00

48 It has been submitted that the expert engaged by the respondent has accepted that the water leak (item 22 above) derives from plumbing leaks and these were the responsibility of the respondent after further investigation.

49 The applicant's submissions suggest that the above list of defective items results in admissions by the respondent that the cost to rectify agreed defects will be $55,187.00.

Disputed items.

50 The first submission by the applicant in relation to the defective works is that the evidence of the expert engaged by the applicant ought to be preferred over that of the expert engaged by the respondent, primarily because he has provided a detailed cost estimate which is in evidence.

51 Turning to the individual items in dispute;

Hebel.

The joint Scott schedule has addressed this item in separate sections -

the panel configuration and

- the control joints. render covered and non- compliant with the Australian Standards

52 The applicant's first submission is that the expert engaged by the builder did not attend to give evidence, he had prepared a report and this was admitted at the hearing subject to weight, over the applicant's objection to allow me to better inform myself of the issues in contention.

53 The report in question is limited in relation to the Hebel installation, it records that the Hebel joints have been installed in accordance with the locations shown on the architectural drawings, one single crack was observed but no other cracking or movement was identified on the entire façade of the building.

54 In contrast the expert engaged by the applicant gave evidence of his investigation and the "likelihood of water penetration" resulting from the rendering over the control joints which he said were non–compliant, (presumably with the manufacturer's specification). Mr Azdari also noted the presence of a single crack and said that he had not identified any water penetration. Mr Azdari conceded that the joints were covered by render and that it was not possible to identify, or not identify the presence of the required

backing rod and flexible sealant. He said that "…the issue is that it's covered with render."

55 The applicants submitted that similar factual circumstances arose in *Building Insurers' Guarantee Corporation v Owners – Strata Plan No. 57504* where a contractor failed to construct hobs to balconies and relied upon an unidentified sealant as an alternative to the specified design. One unit exhibited signs of water penetration but in respect of the remainder of units there was no current evidence of damage.

56 Handley JA found;

> There was a clear breach of contract, the specified hobs which would have acted as a secure waterproof barrier had not been installed and those that had been were inferior in the circumstances the Guaranty had at least an onus of evidence of functional equivalence, that the hobs as installed were just as effective as those specified.
>
> A defendant in cases such as this may actually have the legal ownus of proving functional equivalents so that reinstatement would be unreasonable, the defendant has the ownus of establishing a failure to mitigate and demolition and reinstatement may well involve mitigation but it is not necessary to pursue the question.
>
> The evidence called by the owners corporation taken at its highest did not establish functional equivalences and its evidentiary owners was not discharged.

57 It has been further submitted that the expert report from [redacted] should be given little or no weight as the consultant was the engineer retained by the builder to prepare the engineering documentation for the project.

58 The applicants submit that "…the cogency of evidence is affected by commercial interest the builder's expert has in the proceedings. Added to the poor factual basis for the report the Tribunal should give the report little or no weight.

59 The submission continues that the applicants should be entitled to the proper remedy for non-compliance as set out in the report prepared by the expert engaged by the applicants, full removal of the existing hebel cladding.

Tiling.

60 Item 6 of the Scott Schedule deals with floor and wall tiling and item 20 with the shower niches and negative grading to four showers. There is agreement between the experts that the defects are apparent the real issue concerns the rectification process proposed by the builder which is asserted to be a "risky" process because it involves careful removal of the tile surface on the assumption that this can be carried out without disturbing the moisture barrier membrane.

61 There is an issue as to the nature of the membrane used. If the membrane is epoxy then it is agreed by both experts that the entire balcony will need to be remediated and that the cost will be $12,007.00.

62 The expert retained by the builder maintained his position in cross-examination that the tiles could be removed without damage to the membrane. He also identified an alternative position involving cutting and re-activating the membrane although he was unable to indicate with any degree of certainty what membrane had been installed.

63 Counsel for the applicants put to the expert "difficulty with that approach, you don't know if it works until you've undertaken part of it. If it fails you need to remove the entire balcony. Correct?" The expert agreed that proposition was correct.

64 In *Building Insurers Guarantee Corporation v the Owners - Strata Plan No. 57504 [2010] NSWCA 23 per Hadley JA at [63] to [71]* the NSW Court of Appeal considered the entitlement of the plaintiff to full remediation where partial remediation of a defect is risky and does not ensure the defect will be properly remedied. The court found that the plaintiff in that case should not be expected to bear the risk involved in partial remediation.

65 The applicants have submitted that the approach taken by the expert engaged by the respondent requires an uncertain scope of works or uncertain levels of damages that will be payable and this is against the authorities on the right to

damages ‘once and for all’ as discussed by Keane JA at [70] in *Kirby v Coote [2006] QCA 61* where his honour succinctly noted in respect of the option advocated for by the builder involved risks that, “reasonableness does not require the respondent to carry those risks”.

The Kitchen benchtop.

66 Item 18. It is claimed that the damage to a corner of the kitchen benchtop occurred during the rectification work resulting from the flooding of the premises. The expert engaged by the builder has contended that the bench top can be repaired satisfactorily but the owners rely upon the previously cited *Builders Insurers Guarantee Corporation* where it was held that the applicants do not have to accept a lesser remedy, particularly where the builder has not met the onus to establish that the repair method will achieve the same result as complete remediation.

The timber flooring.

67 Item 16. The defect has been agreed by both experts. It is argued by the applicant that the damage reflects the builder’s level of competence because the damage is claimed to have occurred when it had control over the site to carry out repairs from flooding. It is the applicant’s submission that the builder calculated the cost which has been accepted by the experts during settlement negotiations that fell away after the builder refused to accept liability for the entire works.

The leaking bathroom.

68 It was agreed by both experts that there is evidence of water penetration from the bathroom and that this is a defect resulting from the builder’s work. The applicant’s submission is that they are entitled to full remediation as set out by the expert engaged by them. It is also submitted that the rectification proposed by the builder has not met the onus that alternative rectification methods will be sufficient to remedy the defect.

The guttering.

69 Item 1. A photograph showing water cascading down the dining room window is relied upon as evidence that the guttering is blocked. The photograph was taken prior to handover, on or about 11 July 2021. At that time the premises were in the control of the builder, and it is the applicant's submission that he was contractually bound to maintain the guttering free from blockage and fully functional.

Incomplete work.

70 Under-stair sliding door not flush.

The applicant's evidence is that there was an agreement between Mrs [redacted] and the builder that all sliding doors should be fitted with edge pulls and sit flush with the cavity when open. The builder agreed in cross examination that the under-stair sliding door has not been fitted.

The builder referred to changes to the design initiated by the applicants after the contract was signed, which resulted in the door selection being untenable. There is no evidence of the applicant's raising such a variation. It is the applicant's position that there is nothing on the architectural drawings which form part of the contract, that the sliding doors ordered by the applicant could not be used. The under-stair area depicted on the plans does not show the outward swinging doors which the respondent asserted in cross examination had been changed by Mrs [redacted] after the contract was signed.

Refund.

71 At paragraph 16 of the applicant's amended points of claim, the applicants seek a refund of monies paid to the builder in the sum of $825.00 to relocate an AC grill which the applicants say has been wrongly located by the builder. (I note that the evidence indicates that the AC grille was rectified in August 2021.)

Entitlement to a money order.

72 The applicants contend that there are 3 pivotal issues to consider when determining whether the Tribunal should make a money order as opposed to a rectification order. These are;

- Whether the builder has made all attempts to rectify known defects.
- Whether the builder has the capacity and capability to rectify the defects which would be the subject of a work order; and
- Whether the relationship of trust that underpins an on-going contractual relationship has broken down to such an extent that future engagement will be impossible.

73 In relation to dot point 1. the applicant says that the builder has always asserted that he is ready willing and able to rectify defects but the documentary evidence from Mrs [redacted] reflects a different attitude where the respondent has consistently refused to rectify defects when he was notified of them.

74 The builder, in his written evidence states that he was frustrated by the applicants' requests. This occurred at a time when practical completion should have been reached under the contract and "…the builder has "run aground" on the contract period. The builder had claimed 42 days extension for various reasons, but the applicants had accepted only 32 of those claimed days.

75 The builder attempted to force the applicants into accepting practical completion had been achieved despite having been notified of defects some of which have now been accepted by the expert he engaged.

76 On 16 December 2020 the applicants sent a list of defects that they required to be rectified before they would accept practical completion, including defects some of which are now admitted but also remain unrectified, these include painting, missing eaves, sliding doors and defective tile grouting and chipped tiles in the kitchen.

77 The builder responded by locking down the project over the Christmas break and advising that he would send final revised accounts as per the contract notwithstanding that practical completion had not been reached.

78 In January 2021 the builder had trades on the site but made a further attempt to have the applicants sign a document, the effect of which would be to deny the applicants their rights under the contract to liquidated damages and to complain about defects which the builder claimed were not his responsibility.

79 In February 2021 the builder claimed the applicants had taken possession and by virtue of that practical completion had been achieved. In cross examination, Mrs [redacted] referred to 2 defects in the downstairs bathroom, the width of the vanity to be installed and the position of the toilet. She indicated that the certifier had refused to issue the OC because of the 2 outstanding issues.

80 It is submitted that this cross examination is evidence of the builder's attempts to minimise the defects or deny their existence. The builder asserts that the errors were made by the applicants and refused to make changes required because of his own poor planning and execution.

81 On 28 July after a walk-through with the applicants the builder refused to rectify the painting defects, the wardrobe doors, the damaged trim to the en-suite, glue on the kitchen bench top, chipped tiles, sliding door edge pulls, overflowing guttering, timber floor damage, shower niches cracked kitchen bench top, completion of the eaves and refused to pay the applicants' claim for liquidated damages.

82 Between July and October 2021 there is a continual flow of correspondence from the applicants to the builder seeking rectification of the defects, but the builder refused claiming them to be minor items.

83 On 23 September 2021, in the 90-day request form the builder refused to rectify the defects to the sliding doors missing edge pulls, rough plasterwork and poor painting, kitchen tiling and grout, chipped timber flooring.

84 On 13 October 2021 Mrs [redacted] emailed the builder with a list of defects which she followed up with on 26 October setting out the crack to the kitchen bench top, residual glue on the kitchen bench top, the chipped timber floors, damaged trim to the en-suite, rough plaster and paintwork sliding door edge pull and other items.

85 In response on the same day as the last email the builder responded, "…please do not send any further emails or phone calls …these are our final responses. This response was in the light of then admitted defects in the sum of $55,000.00.

86 The applicants were left with no option other than to commence these proceedings, in circumstances where it is submitted the builder had been given ample opportunity to rectify defects but simply failed to engage. His approach was to attempt to have the applicants sign away their contractual rights when it was clear that there were significant defects and the contract had run well over time.

87 It is submitted that the applicants should not be required to accept further rectification from a builder who has exhibited a lack of capacity to programme the works correctly and supervise and control his sub-trades caused flooding of the works and then caused further damage in the rectification process.

88 In cross examination the builder conceded that the relationship had broken down, he indicated that it wasn't just his relationship with the client. "… the insurance company also complained to me (Mrs [redacted]) … cant keep sending constant emails and phone calls. The builder conceded that he was going to block Mrs [redacted] emails and agreed in cross examination that such an action was not indicative of a good relationship.

89 The builder described Mrs [redacted] as always on the site interfering, constantly changing her mind and difficult, he described the $55,000.00 of defects as minor to be fixed at the end. He also asserted that the applicants had agreed

to expensive scope deductions without any costings or notice and did not provide the discounts.

90 The applicants submit that Mrs [redacted] Mr [redacted] and it is submitted that a work would expose both Mr and Mrs [redacted] to further engagement with the builder which, it is implied, will result in further distress to both of them. For those reasons the applicants submit that the relationship should be terminated and a money order should be made.

Respondent's Submissions

91 The respondent [redacted] Pty Ltd was represented by its director [redacted], who was not legally represented at the hearing. (I note that the submissions are confusing and to some extent inaccurate.)

92 [redacted] relied upon Points of Defence prepared by Mr [redacted] which allege that the dispute between [redacted] and Mr and Mrs [redacted] had settled and that the settlement included an agreement that the builder was prepared to rectify the defects.

93 [redacted] sought to rely upon a report from [redacted], Engineers and [redacted] and the Statement of [redacted] and the statutory Declaration of [redacted], the site foreman. The Report of [redacted] was admitted subject to weight. It emerged that [redacted] was the engineer for the project and as a consequence its report is not, as claimed by the respondent a compliant expert report and can be accorded little weight.

94 The experts engaged by each party met in conclave at the hearing and prepared a joint Scott schedule which formed the basis for concurrent evidence. Mr [redacted] did not take part in this conclave and was not available for cross examination.

Alleged settlement.

95 [redacted] maintains that the dispute between the parties was settled on 4 January 2021 when both parties signed a document, which is in evidence and contains the following;

> 1. All invoices for storm water, basix and lift shaft so far submitted accepted.
>
> 2. Handover Payment is $10,000.00 as full and final settlement with no future claims by either party.
>
> 3. Toilet/cistern and tile to be completed by 29 January 2021.
>
> 4. Air con man to come to site to discuss with …/me to discuss relocation after 11/1/21.
>
> 5. Vanities to be completed, by 29 Jan, if possible. Else by 15 February 2021.

96 It is not in dispute that the document was signed by both owners and Mr [redacted], on behalf of the company on 4 January 2021.

97 It is submitted that agreement was reached after an email from Mrs [redacted] on 2 January seeking a meeting and suggesting a compromise to achieve a "win/win" solution to the disputes about achievement of practical completion.

98 The respondent refuted the applicant's submission that the agreement was not binding because it is conditional upon completion of the toilet /cistern relocation, relocation of the AC grille and the kitchen tiling work, by 29 January 2021 and further, because there was no consideration.

99 Further the respondent submits that if it is found that an agreement was reached between the parties in the above terms on 4 January 2021 the Tribunal does not need to determine any further matters relating to defects or whether it should make a work order or when practical completion was achieved or claims for delay and liquidated damages.

100 In the event that the determination of the agreement issue is against the respondent, it has provided a response to the applicants claim for defective work.

Determination in relation to the purported settlement.

101 The applicant submits in response to the purported settlement that in order for there to be a binding settlement of the dispute the purported agreement must have all the elements of a contract and there must be evidence that there was a meeting of the minds of the parties with regard to the express terms of the agreement.

102 In *Jadson Pty Ltd v James [2021] NSWCATAP 274* the appeal panel outlined the relevant authorities on the formation of a contract and set out the leading Court of Appeal authority on the informal formation of contracts as follows:

> In *Kriketos v Livschitz [2009] NSWCA 96* the Court reviewed the principles to be applied in determining the formation of a contract in the absence of conventional offer and acceptance. That case, which involved a dispute between a company shareholders turned on whether an exchange of three letters constituted a legally binding contract. At first instances the Supreme Court found that a contract had been formed by the exchange of letters. However, on appeal the Court of Appeal concluded that no contract had been formed applying the following principles:
>
> The essential question is with the weather the exchange of the three letters must be seen to have constituted the parties' mutual communication of their respective assents to being legally bound by terms capable of having contractual effects [113]
>
> The question whether such mutual ascent was communicated turns on whether "viewed as a whole and objectively from the point of view of a reasonable person on both sides that dealings show a concluded bargain" [114]. The parties' conduct must reveal that the parties both have the same understanding of the terms of the agreement.
>
> Acceptance of an offer can be inferred from the subsequent acts and conduct of the parties including by their silence. However, for conduct to amount to implied acceptance of an offer it must be "of such a character as necessarily to lead to the inference that the offer has been accepted." [117]
>
> The Court concluded that whether one assessed the three letters or read 3 letters in their context or read the three letters in their context and considered all subsequent conduct there was no contract formed between the parties.

103 There was no evidence to indicate that there was an agreement between the parties to settle the matter. The email from Mrs [redacted] referred to by the builder in his submissions is irrelevant to the determination of the issue because it does

not disclose specific terms upon which the applicants say they will agree to a settlement of the issues in dispute. When the document that purports to contain the settlement was given to the applicants they amended it with regard to the eaves which is still in dispute. The respondent continues to dispute its liability for completion of the eaves, so the assertion that the documents created on the 4 January 2021 represent a final meeting of the minds is inaccurate.

104 The respondent has acknowledged in his submission that that it cannot contract out of the statutory warranties under s18B of the Home Building Act 1989. The Tribunal is still required to determine the breaches of statutory warranty and the damages that flow from the contraventions - the majority of which are admitted. When a major element of the purported settlement is unenforceable, the terms of the agreement itself are so uncertain as to be unenforceable.

105 With regard to the issue of consideration, after the hearing the respondent now asserts that as it had invoices due at 4 January 2021 the reference to these in the settlement agreement is consideration. While this may have been the case, there was no evidence from the respondent in these proceedings that at the time of his purported agreement he believed he had a cause of action for a particular sum of money which he promised not to pursue as a term of the agreement.

106 In Butler v Fairclough [1917] HCA9 23 CLR 78 Issacs J. held:

> It must not be assumed-as the appellants argument undoubtedly assumed-that a promise to abstain from issuing a writ is always a valuable consideration. This position may I think be classified thus:-
>
> 1. A promise not to sue for a limited period, definite or indefinite, is valuable consideration when the substantive claim is one for which the other party is liable. (Longridge the Dorville (5 B and Ald117; Fullerton the Provincial Bank of Ireland ((1903) AC 309)).
>
> 2. A promise not to sue at all, that is an abandonment of a substantive claim is a valuable consideration, if there be either liability or a bona fide belief of liability (*Longridge v Dorville) Miles v New Zealand Alfor Estate Co (32CH D 266 at 290-291.*

> 3. A promise to abandon a suit in whole or part already commenced is a valuable consideration where there is a bona fide claim (ibid).
>
> 4. Mere temporary forbearance to sue where there is no liability is no consideration (*Jones v Ashburnham (4 East 455 at 464); In re Pillet (1915)3 KB 519 at 526; Longridge v Dorville; Graham v Johnson (LR 8 Eq36 at 44), even if the claim be disputed (Edwards v Baugh (11M & W 641)*

107 In *Wilson Pastoral* (as cited in *Jadson*) Kourakis CJ discussed the fourth proposition of Isaacs J as follows;

> The ratio of the decision of the Court of Exchequer in Edwards v Brough which Isaacs J cites in support of the fourth proposition, is a narrow one the case was decided on the face of the pleadings which alleged only that there were certain disputes and controversies pending between the plaintiff and the defendant. It was not pleaded that the plaintiff genuinely believed he had a claim, Nonetheless, I acknowledge that Lord Abinger CB went further, stating that for a forbearance to be good consideration the plaintiff must prove that at least some amount about which there was a dispute was owing which resulted in a compromise for an amount certain.

108 I find, having considered the authorities that the necessary elements for a forbearance to arise were not present at the time of the settlement proposal, there was no current dispute that was documented about a particular sum that was the subject of the forbearance. There was no actual amount which was the subject of a dispute contained in the settlement documentation which was compromised.

109 In the alternative, the respondent is denied the benefit of the alleged settlement agreement without complying with its own obligations under it. Those obligations were fundamental to practical completion because without them being satisfied the Certifier could not and did not issue the occupation certificate which is one of the tests for satisfaction of practical completion. One party cannot enforce an agreement when it is in breach of a fundamental term of that agreement. (*Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) SR (NSW) 632.)*

Agreed items.

110 Of the items in dispute there was agreement between the experts on 12 of 21 items, quantum was agreed on 1 incomplete item and liability was agreed on 5 of the remaining items in dispute. It is not open to [redacted] to cavil with these outcomes in its submissions.

111 The respondent has recorded that the experts have agreed liability and quantum of the rectification works in the schedule which is a repeat of that provided by the applicant. Accepting liability and quantum at $18,975.00.

Disputed items.

112 In relation to the disputed items the respondent submits that the Tribunal should prefer the evidence of the expert engaged by his company. The respondent also raised issues which suggest that the process of obtaining evidence and responding were unfair to the respondent however the applicants have identified errors in the submissions and say that the claims if they are relying on them as mitigation must fail because they are factually inaccurate.

113 The respondent has referred to the first directions hearings, to explain the background of some items in dispute. It is the respondent's submission that the Member conducting that directions hearing explained to the applicants that they needed an expert building report and explained that this report was to be forwarded to the respondent for investigation and response as well as to NCAT. The homeowner's response was limited to providing a building quote, rather than an expert report and it was on the basis of that quote the respondent arranged a site inspection with its expert.

114 It has been asserted that at a subsequent directions hearing despite the explanations given at the first hearing, the applicants were allowed a further opportunity to obtain another report completed by an expert and it was the only after this report that the respondent was made aware of the Hebel issue (items 4 and 5), parapet capping (item 3), bathroom leak (items 20 and 21) and balcony tiling (item 6). This had the effect that the respondent's experts had to

participate in the preparation of a joint report at another site meeting where the respondent's engineer attended at the same time. Although separate requests were sent by the respondent seeking site access to investigate that work it was denied access and therefore the respondent was denied the opportunity to investigate all the new issues raised.

115 An expert report by [redacted], Mr [redacted], produced (13 December 2022) after the evidence closed, was accepted into evidence with qualifications as to weight. The respondent has argued that the report should be accepted without reservation because it complies with the requirements of the Tribunal expert code of conduct. It is true that the engineer was not in attendance at the hearing, however the respondent argued the solicitor for the homeowners did not provide the unrepresented respondent with notice that they required the attendance of the engineer for cross examination. Furthermore, the respondent maintains that it was not given an opportunity during the hearing for a brief adjournment to telephone the engineer to request his presence for cross examination. The respondent has not made out any claim for mitigation.

116 At the commencement of the hearing the respondent maintained that the relative positions in relation to the disputed defects is as set out below (Item numbering follows the Scott schedule.)

1. Item 1. Gutter and fascia + remove debris - disputed defect but agreed quantum ($22,966.00 - this is an incorrect cost).

2. Item 3. parapet walls disputed defect and quantum dispute. range $2,000.00 - $90,776.00

3. Item 5. Control joints disputed defect and disputed quantum range disputed $1,500.00 to $20,004.00.

4. Item 6. Floors and walls insufficient fall - agreed defect quantum range disputed $7,000.00 to $12,000.00.

5. Item 16. timber flooring scratched agreed defect - quantum range disputed $1,831.83 to $2,765.00.

6. Item 18. benchtop cracked agreed defect disputed quantum range $387.50 - $12,379.00.

7. Items 20-21. Showers and waterproofing agreed defect quantum disputed range $7,468.23 + $13,600.00 - $58,972.

117 Not used.

118 [redacted] has asserted that the homeowners have not discharged their onus to prove their claim on the balance of probabilities, particularly in relation to the Hebel claim, and they will be unable to claim for losses which may or may not eventuate in the future.

Submissions in relation to the disputed items

Gutter 7 Fascia (Item 1)

119 Gutter + Fascia. In reply to the evidence that the gutter was blocked and overflowing the expert engaged by the respondent, Mr [redacted], maintained that the gutter was blocked by tree litter and there was no building material causing the blockage. He asserted that the builder is not required to remove tree litter from the gutters because this is a maintenance issue for the owners. Clearly, the responsibility for that item becomes a maintenance issue for the applicant only after hand-over, before that the builder is contractually responsible to maintain the works fit for handover with surfaces and gutters clear and clean. The builder must also complete a final clean as a requirement for practical completion.

120 The applicants have noted that there are factual errors in the respondent's submission and that Item 1; Gutter and fascia, identifies an incorrect quantum. ($22,966.00). I find that the builder is responsible for maintenance of the property until practical completion at which time he should present the works as fit for purpose excepting for minor issues that can be rectified during the

defects liability period. The blocked gutter should be cleaned as part of the builder's final clean before practical completion. I accept the cost calculation by Mr Azdari at $600.00 but I do not accept that the applicants should contribute to the removal of the obstruction.

The Hebel/control joints issue. (Items 4 & 5)

121 As noted in the applicant's submissions this item of work has been split into, the configuration of the Hebel panels, and the joints between them. The issues are that the layout of the panels is not in accordance with the manufacturer's specification and the flexible joints between panels have been rendered over. One crack has been identified by both experts at a joint but there is no other evidence of failure of the installation or the joints. It has not been established that the cracked joint leaks.

122 In relation to the control joints, the respondent has submitted that its engineer did not find any issue with control joints and there was no evidence that the Hebel or the control joints were not performing as required. The Hebel manufacturer, it was asserted, having seen the engineer's report did not have any concerns with the location and installation of the control joints and there has been no loss or failure of the product that is now almost 4 years old.

123 The evidence relied upon by the respondent was inadmissible because it was given third hand and relied upon unsubstantiated advice provided in an email based upon assumptions that were provided in the engineering report which had been admitted subject to weight. The report was prepared after the evidence closed and it follows that the email from Hebel was produced after the close of evidence. The author of the email was not present to give evidence and has not provided a statement and his qualifications to accept or reject the Hebel layout and design are not known. His email is not admissible for those reasons.

124 The respondent claims that it was denied the opportunity to telephone the engineer to attend and give evidence at the hearing. In the circumstances where the report was given limited weight had the engineer been permitted to

attend and give evidence the applicant would have been disadvantaged or the proceedings would have had to be adjourned in circumstances where the respondent was aware that evidence had closed. Furthermore, there would have been no reason for the applicants to require the engineer to attend and give evidence when his report had not been admitted into evidence prior to the hearing.

125 The applicant's evidence is that the builder served the expert engineer's report on 20 December 2022 and other supporting documents on 22 December 2022 which addressed the applicant's lay and expert evidence. The applicant says that "no request to inspect the property prior to the service of those documents or before the joint Scott schedule was finalised on 12 February 2023 was refused by the applicants." The only request to inspect was refused in late March of 2023 when the builder sought to inspect with tradespersons long after the evidence was closed.

126 The report on which the respondent wishes to rely reads like a dilapidation report rather than and expert report for litigation. It simply records the following observation;

> "Articulation joints in the external cladding of the Hebel panels were observed to have been installed in the locations as marked up on the architectural plans …1 single crack was observed... no other cracking or evidence of movement were observed in the external facade of the dwelling."

127 There is no response to the expert opinion provided in support of the applicant's claim, no reference to the relevant Australian standards or manufacturer's specification.

128 It is acknowledged however that the expert engaged by the applicants has not established in evidence or cross examination whether the joints below the render, between panels were compliant with the manufacturer's requirements for Hebel joints because they were rendered over. However, it is fundamental that the joints which are required to be formed with a backing rod and sealed with a robust flexible sealant will be inhibited from performing their function if they are covered with a brittle render. What can be drawn from the evidence of

Mr Azdari is that the present condition of the façade exposes the applicants to a significant risk in the event of failure of the joints.

129 It has been submitted by the applicant that the circumstances outlined above reflect a similar factual scenario to that considered in *Building Insurers Guarantee Corporation v Owners – Strata Plan No. 57504* where there was evidence of water penetration in a single unit of a multi-unit development, but no current evidence of that type of damage in the other units. Hadley JA treated the Owners Corporation as having an evidentiary onus of at least adducing evidence of "functional equivalence" that hobs installed to a different design would be as effective as those specified.

130 That evidence has not been provided by the respondent, the applicant can draw little comfort from the fact that the work has only cracked at one joint after four years when the life of the building is anticipated to be 50 years. I find that, consistent with observation of Keane JA at [70] in *Kirby v Coote [2006] QCA 61* where his honour considered an option for rectification advocated for by the builder which involved risks to the respondent that, "reasonableness does not require the respondent to carry those risks".

131 I find that the joints should be cut back, render removed, and the joints re-made in accordance with the Hebel manufacturers standard requirement that the joints be expressed and sealed with a high grade flexible sealant.

132 I find that the evidence supports the builder's claim in relation to the disposition of the Hebel panels, in that it was required to construct the works in accordance with the plans and specifications. The plans provide the location of the Hebel joints and the panel layout and the builder has constructed the cladding in accordance the panel layout as identified on the plans. The evidence of the Mr [redacted] is uncontradicted in respect of the panel layout.

133 I find that the builder has satisfied its contractual requirements in relation to the set-out of the panels but has failed to provide compliant joints. I find that the

cost to rectify the joints to match the manufacturer's standard is $2,000.00 as calculated by Mr [redacted].

Tiling (item 20 & item 21)

134 This heading includes defects to the balcony floor (Item 6) and to the niches in four bathrooms (Item 20).

135 In relation to Item 6 the experts agree that the fall to the balcony floor is less than required to effectively drain the balcony but there is disagreement between them as to the rectification process. The expert engaged by the applicant, Mr Azdari's method requires removal and replacement of the tiles to the correct fall. The process requires both removal of the tiles and removal and regrading of the screed. The effect of this will probably result in damage to the water-barrier membrane which will also need to be replaced.

136 Mr [redacted] has proposed careful removal of the tiles which he says can be carried out without damage to the membrane or alternatively, in the event the membrane is damaged the reactivation of the membrane followed by adjusting the tiles to achieve a fall and marry up with part of the balcony which he says does not require work.

137 The respondent interjected in the cross examination and said that the treatment was epoxy render – which is not a waterproofing membrane.

138 Counsel for the homeowners then questioned Mr [redacted] who agreed that if epoxy was used then the entire balcony would need remediation and he also accepted that in those circumstances the cost calculated by Mr Azdari at $12,007.00 was an accurate cost if the membrane is damaged.

139 Mr [redacted] maintained that "if it is built on certain flooring, not a concrete slab. You take off a sample tile first, once the sub stratum is determined, I would assess the job from that point. There is a screed under there. (possibly the answer was preceded by 'If') Any membrane joined would need to be tested before putting the tile back."

140 The answer is predicated upon assumptions, clearly Mr [redacted] does not know what membrane has been installed, he fails to address the need to re-grade the screed, and he has assumed that the unidentified membrane can be re-activated satisfactorily. He agreed with the proposition put to him by counsel that "difficulty with that approach you don't know if it works until you've undertaken part of it. If it fails, you need to remove the entire balcony (flooring) Correct? [redacted] – correct.

141 In spite of the concessions made Mr [redacted] did not agree that there was a large risk involved in the method he advocated.

142 I find that it will be reasonable and necessary to remove the flooring, screed and membrane, apply a new membrane, regrade the screed and re-tile to achieve the correct falls away from the walls and windows. I find that the reasonable cost of this work is $12,607.00 as calculated by Mr Azdari.

143 The second issue relating to tiling work is the niches in all four bathrooms which have not be graded to shed water. (Item 20)

144 The evidence of Mr [redacted] is that the niches are sufficiently graded, he maintains the only retained water, is the effect of surface tension which will evaporate after the use of the showers. In this instance the severity of the defect needs to be considered against the scope of rectification and the cost. Mr [redacted] has taken a similar approach to his approach to the previous tiling item, essentially cut out some tiles and adjust whereas he says that Mr Azardi has opted to rip out the entire bathroom.

145 The applicant has submitted that this is a similar item to the balcony tiles, where the "…authorities are clearly against this type of proposal as outlined by the Builder's expert." A plaintiff is not required to take risks with or accept a lesser form of rectification of defects that may result in a lesser form of rectification of defects that may result in a lesser finish to works that could remain defective.

146 “Further, this approach requires an uncertain scope of works or uncertain levels of damages that will be payable and this is against all authorities on the right to damages ‘once and for all’ as discussed by Keane JA at [70] in the judgement referred to above.

147 In relation to Items 20 and 21 refer to the finding below paragraphs 147 to 149.

Kitchen bench top.

148 Item 18 relates to damage to the kitchen bench top which is claimed to have occurred during rectification of the flooding damage of the premises. Once again the issue concerns the applicant’s right to have the work completed as new and not blemished by an obvious repair. I note that the applicant’s evidence refers to a stone bench top but the experts have commented on a manufactured stone bench, which can be rectified as proposed by Mr [redacted]. The applicant relies again on the decision in *Builders Insurers Guarantee Corporation* to claim for complete replacement of the bench top.

149 The expert, Mr [redacted] and the builder, have accepted that the benchtop is cracked. The crack is at a corner of the benchtop close to its junction with a wall. Mr [redacted] has rejected complete replacement of the top in favour of rectification which involves cutting a groove into the top along the crack and applying resin which can be polished to match the finish of the top. The respondent claims that it would be unreasonable to replace the entire bench top having regard to the extent of the damage and the probability that the repair can be carried out effectively.

150 The applicant’s submission involves an assumption that the repair will result in an inferior appearance to the bench top but no evidence has been provided to support that assumption. Given the nature of the crack, its size and location I have formed the view that complete replacement of the benchtop is unreasonable and unnecessary in accordance with the qualification in *Bellgrove v Eldridge 1954 90 CLR 613* that “…not only must the work undertaken be necessary to produce conformity, …it must also be a reasonable

course to adopt", this qualification was endorsed in *Westpoint Management Pty Ltd v Chocolate Factory Apartments Ltd [2007] NSWCA 253*.

151 I do not accept that it is for the expert to opine on the reasonableness or otherwise of the options for rectification, but I accept that the builder can make that submission.

152 I find that replacement of the bench top, taking into consideration the likely additional damage that can be caused by its removal and replacement and also considering the size, nature and location of the crack to be rectified, that it is unreasonable to order full replacement when the technology for repairs to manufactured stone bench tops is of a standard that it is unlikely that the former crack will be discernible.

153 I find that the reasonable cost of high standard repair is that determined by Mr [redacted] in the sum of $387.50

Scratched timber floor. (item16)

154 The respondent has submitted that during concurrent evidence from the experts it became clear that there was insufficient evidence as to how the floor was scratched and therefore that it should not be a responsibility of the builder to compensate the applicants for the damage.

155 The applicant submitted that the damage arose when the builder had control of the site during the rectification of the flood damage. However, there were others at the site delivering furniture and taking it out again. There is no evidence to establish when the damage occurred although it is asserted by the applicants that it occurred during the period of flood rectification. Although the builder is claimed to have established a cost of rectification in a failed negotiation prior to the applicants commencing these proceedings, I cannot be satisfied that the damage was caused by the builder or his workers during the flood repairs or that the damage was caused during the period when the builder had control of the site.

156 I find for the above reason the claim for the floor damage must fail.

Leaking bathroom & shower niches (items 20 & 21)

157 The experts agreed that there was evidence of water staining to the ceilings below the bathroom, but they had conflicting opinions of whether the stains represented moisture from the bathroom. The expert engaged by the builder disputed the interpretation of infra-red camera images which, according to the expert engaged by the applicants established the presence of moisture and was therefore evidence of a breach of the statutory warranties. The only probable source of the water is from the shower recess above the water-stained ceiling.

158 There was a further dispute between the experts as to the method of rectification with the builder and the expert he engaged opting for a “band-aid” type rectification, which requires further invasive investigation in response to Mr Azardi’s conclusion that required the removal and re-construction of the floor tiling and wall tiling, floor screed and membrane. The respondent has also again pleaded that he was denied access after this item was first identified in the Applicant’s report by Mr Asardi. It follows from that the only expert to view the damage is Mr Asardi and I prefer his report for that reason.

159 However, I find that the appropriate rectification procedure is that recommended by Mr [redacted]. There are 4 niches in issue the reasonable cost to rectify proposed based upon the scope of works by Mr Asardi approximates to $14,000 per niche. It is based on a scope of works that requires extensive demolition of the existing bathroom tiling and waterproofing, none of which has been reported as having any waterproofing failure. Mr [redacted] scope could only be followed by a competent tiler even allowing for some careful investigation and de-construction it can be anticipated that the work to each of the niches will be the same, the cost per niche appears to be reasonable in the circumstances.

160 I find that the cost of rectification is to be based on the scope of works proposed by Mr [redacted] at a cost of $7,468.73

Under-stair sliding door to finish flush.

161 The sliding doors were included as a contract variation accepted by the builder but not installed. The builder has claimed that the variation arose after the surrounding work was completed.

162 I find that the work was accepted as a variation and consequently is required to be completed as part of the contract after payment.

The eaves

163 It has been claimed by the applicants that there is outstanding work in relation to a change to the eaves detail which the builder says was agreed between the parties. The builder claims that the change arose from the applicants wish to include a feature blade wall which affected the design of the eaves. There has been no evidence of how the blade wall could have affected the construction of the eaves. The blade wall was to be tiled but the applicants say the tiling was omitted and a credit of $10,000.00 was allowed. However, the contract drawings Western Elevation show a notation that the blade wall was to be tiled at the owner's cost after handover of the work. It is therefore more probable than not that the $10,000 credit was in relation to the deletion of the eaves extension above the balcony. I find that there is uncontradicted evidence that Mrs [redacted] was frequently on the site seeking changes to the work and instructing the builder. The absence of eaves would have been obvious even to an non-technical person, I have formed the view that an instruction was given and the $10,000.00 credit in the proposed settlement agreement reflected this.

164 I find that the credit was given as claimed by the builder for the elimination of the eaves over the Family Room balcony.

Refund - wrongly located AC grille.

165 The applicant's have included in their amended points of claim for a refund in relation to an air conditioning grille which in their submission has not been

located in accordance with the plans. The respondent had arranged for the "AC guy" to attend and determine if there was a possibility of relocation but this arrangement, if it happened, did not result in any outcome that has been recorded, however there is evidence that the work was carried out in August of 2021. The owners claim for the relocation is for a refund of the payment made of $825.00 which I have assumed was made to the "AC guy" by Mr and Mrs [redacted].

166 In the absence of evidence to the contrary I find that the builder is to refund the sum as claimed $825.00.

Money or work order

167 The applicant is seeking a money order primarily because she says the relationship of trust that an extensive work order would require has been lost and the parties' capacity to work with each other to the extent required to bring the work to a satisfactory conclusion "…has broken down to such an extent that future engagement will not be possible."

168 The respondent has referred to *s48MA* of the *Home Building Act* which provides;

> 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.

169 Mr [redacted], on behalf of the company, has raised the possibility of [redacted] undertaking the rectification work on a work order either by its own resources or by others engaged by [redacted]. He has proposed that his site representative Mr [redacted], who he says, in his evidence has a good working relationship with Mrs [redacted] and would be prepared to return to the site to undertake the rectification works or to supervise and co-ordinate others. Mr [redacted] concludes his submission in relation to his preference for a work order that the respondent ought to be permitted to return to rectify the works, "…especially in the situation where they were not afforded the opportunity to inspect."

170 It is not a mandatory requirement in *the Act* that a builder has a right to return to rectify defective work but only that the Tribunal give consideration to the preferred option. There is authority from the Appeal Panel that even in circumstances where there is animosity between the parties to a dispute, that in itself is insufficient reason to refrain from making a work order.

171 The applicant has referred to other circumstances, apart from the animosity and loss of confidence, which have arisen in this matter that she says should persuade the Tribunal to make a money order rather than a work order. These are the builder's continual failure to address the rectification work under the provisions of the contract, the flooding of the dwelling which resulted from inadequate work of the builder's sub-contract plumber, the builder's attempts to force the owners into accepting practical completion when the dwelling could not be occupied for the purpose for which it is intended which was supported by the certifier's requirement for the bathroom work to be completed. The on-going dispute regarding practical completion extended from July 2021 until 26 October 2021 when the builder refused to receive further emails or phone calls. The final emails concerned the crack in the kitchen bench top, some glue on the same benchtop, chipped/scratched timber floors, damaged trim to the ensuite, rough plaster and paintwork edge-pull to sliding door, cracks to kitchen tiles and grout and other items. I find that those defects are the type of defect that would not warrant refusal of practical completion.

172 I do not attribute the complete responsibility to the builder's failure to satisfy the respondent, it appears to me that the applicant, Mrs [redacted] was a difficult client, given to changing her mind and introducing late changes to the work. For that reason and having regard to the builder's submission that some of his trades, and the insurer have been reluctant to work with Mrs [redacted], together with the builder's own declared frustration in dealing with her, it is my view that there is little chance that a work order can result in a sufficiently harmonious and cooperative relationship to ensure the smooth and satisfactory resolution of the items which the applicant still holds to be in dispute.

173 The applicants have included some evidence that [redacted] Although the assertion that dealing with the builder will [redacted], I do not consider this alone to be a sufficient reason to make a money order. The overwhelming reason that I have determined that a money order should be preferred is the extent and duration of disputes between the builder and Mrs [redacted] made worse by the flooding of the premises and the builder's refusal to accept defects exist even when those defects have been accepted by the expert engaged by the builder.

174 I find that a money order is the appropriate order in the circumstances of this case.

Entitlement to Liquidated damages

175 [redacted] has submitted that the owners have no entitlement to claim liquidated damages because of their (Mrs [redacted]) conduct in requesting variations by email on 2 September 2020. The builder's submission is that she failed to return the variation confirmation until she attended upon site and instructed the builder on 9 October 2020. It is also submitted by the builder that she arranged for work to the timber flooring by email on 30 October 2020 and issued directions at the site. Further, on 10 November she again attended the site and issued directions for changes to the ground floor bathroom. The builder has submitted that the delays to practical completion of the works are all attributable to Mrs [redacted] intervention on the site, issuing instructions and late variations.

176 Mrs [redacted] was vigorous in her denial that her instructions caused delay in relation to the bathroom which she maintained was entirely the fault of the builder having installed wrong fittings and having to relocate the toilet pan and cistern.

177 In submissions in reply the applicant identified authorities relating to the "prevention principle" which provides a legal excuse for the delay on the part of the builder that is caused by the owners acts of prevention and avoids liability for liquidated damages on the part of the builder.

178 The applicant has submitted that the effects of the purported variations were not put to Mrs [redacted] in cross-examination and the builder is now unable to frame its case on this claim including making submissions and drawing conclusions. In *Allied Pastoral Holdings Pty Ltd v Commissioner for Taxation [1983] 1 NSWLR*, Hunt J held, regarding the Rule in Brown v Dunn;

> It has in my experience always been a rule of professional practise that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practise is necessary both to give the witness the opportunity to deal with that other evidence or the inferences to be drawn from it and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practise follows from what I have always believed to be the rules of conduct which are essential to the fair play at the trial and which are generally regarded as being established by the decision of the house of lords in *Browne v Dunn (1894) 6R 67 R 67)*

179 Secondly, the applicant submits that a contract, such as the one in this matter which contains an extension of time clause which anticipates and captures delays caused by variations raised by the owners, including, relevantly anything done or not done by the owners. These reasons for delay captured in contract clause 19.1(a) and 19.1 (f) are extremely broad. They entitle the builder to an extension of time for any type of preventative conduct of the applicants, including but not limited to making directions on site (which the applicant denies) and issuing variations. In the face of such conduct the builder did not avail itself of its right to issue an extension of time claim. Clause. 10.2 requires written notice of such a claim by the builder and he admitted not making any such claims in cross-examination and there is no evidence of them in the court book. A builder's failure to apply for extensions of time was dealt with by *Cole J* in *Turner Corporation Ltd v Austotel Pty Ltd 13 BCL 378* where His Honour held;

> If the builder, having a right to claim an extension of time, fails to do so, it cannot complain that the act of prevention which would have entitled an extension of the time for practical completion resulted in its inability to complete by that time. A party to a contract cannot rely on preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of the preventing conduct.

180 The builder is unable to claim delays were caused by the actions of the applicants and that as a result time is now at large or that liquidated damages are not available to them.

181 In any case the builder has not provided any detailed explanation of the time delay which he says arose from the applicant's interference with the progress of the works, nor has it addressed the flooding which caused further delays until 21September 2021, nor any of the delays caused by its failure to rectify the notified defects some of which were sufficient to prevent the issue of an Occupation Certificate.

Occupation by possession.

182 The applicants found it necessary to receive a shipment of furniture which they sought the builder's permission to store in the house, permission was gained, and the furniture was stored in the house until the house was flooded as a result of a plumbing mishap.

183 The respondent has claimed that the storage of the furniture, should be regarded as "possession" and therefore that practical completion was achieved at the date the furniture was stored.

184 The applicant's submission on possession has been set out in some detail at paras 38 – 45 of these reasons. The respondent has not addressed the applicant's submissions regarding the mere use of the premises for storage. Suffice to say that the applicant relies on the reasoning of *Bathurst CJ in Cordon* to support the claim that use of the premises for storage does not relieve the builder of the contractual responsibility to complete the works.

185 I find that the use of the premises for storage of some furniture with the agreement of the builder is insufficient to trigger practical completion when there is outstanding work which prevents the legal occupation of the dwelling.

The claim for liquidated damages.

186 The primary submissions by the applicant in relation to the claim for liquidated damages derives from clause 32 of the building contract which provides;

> If the works do not reach Practical Completion by the end of the building period. The owner is entitled to liquidated damages in the sum specified in Item 11 of Schedule 1 for each working day after the end of the building period to and including the earlier of (a) the date of practical completion (b) the date this contract is ended and (c) the date the owner takes possession of the site or any part of the site.

187 The Building Period is defined in the contract Clause 1 Interpretation as;

> the number of calendar weeks or working days stated in item 6 Schedule 1 as extended by Clause 19.

Cl 12 .2 Commencing the Building works indicates that;

> The building period commences on the date the builder starts performing the building works on the site.

Clause 19. deals with the builder's rights to claim for delays and extension of time,

> CL19.1 The builder is entitled to 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…

188 It is common ground that in the subject contract the building period is to commence on completion of the pour of the ground slab. The parties differ on what that date should be between the applicant's position that the slab was poured on 11 November 2019 and the builder which maintains that the date was 13 November 2019.

189 Practical Completion is the point from which an entitlement to claim for liquidated damages is measured. Practical Completion is defined at Clause 1 as meaning;

> … when the building works are complete except for minor omissions and defects that do not prevent the building works from being reasonably capable of being used for their usual purpose.

190 Practical Completion is primarily a question of fact to be determined by the Tribunal and as practical completion is not determined by certification under this contract it has been submitted that the Tribunal is entitled to look to external determinations of completion such as the issue of an interim or final occupancy certificate. *Corbett Court Pty Ltd v Quasar Constructions (NSW) Pty Ltd [2008] NSWSC 1163 at [84].*

191 The builder claimed that practical completion was achieved on 21 December 2020 and attempted to persuade the applicants to sign a document effectively agreeing that they will make no further claims on the builder. On the same day after refusal by the applicant to the builder's proposed agreement the builder advised that it would put the project into "lockdown" over the Xmas break and send final revised accounts as per the contract.

192 The applicants have claimed liquidated damages from 19 August 2020 to 21 September 2021 when the rectification work arising from the flooding of the premises was complete under a claim on the applicant's insurer.

193 It is common ground that the applicants agreed to 32 days extension of time and rejected a further claim for an additional 9 days. Based on the applicant's calculation the delay was 279 days less the 32 approved days-a total claim of 247 days at $100.00 per day = $24,700.00.

194 The evidence indicates that from the date of the flood (21 January 2021) to the date of handover 21 September 2021 a total of 174 days the premises were fit for occupation but for the intervening flood and accepting that some relatively minor works remained.

195 The applicant is unable to claim actual damages for the hotel stay during the period they were unable to occupy as they accepted liquidated damages under the contract.

196 I find that as the insurance claim was made under the applicant's home/contents policy and not the builder's construction all risk policy which indicates the owners have accepted the premises and insured them in accordance with the requirements for practical completion when the insurance responsibility for the premises fall upon the homeowners.

197 I find that the delay to the works should be calculated as 247 days less 174, a total of 73 days. Applying the rate of liquidated damages to the delay found, results in an obligation to the builder of $7,300.00.

Damages.

198 From the above I find that the following damages arise in respect of defective/incomplete works, AC refund + liquidated damages;

Item 1. gutter fascia	$ 600.00
Item 2. extend roof/Eaves	$ Nil
Item 3. parapet wall capping -	$ 5,730.00
Item 4. panel layout/joints	$1,500.00
Item 5. Included above in 4.	
Item 6. balcony floor tiles	$ 12,007.00
Item 7. general painting	$ 2,127.00
Item 8. cracked and chipped tiles	$ 141.00
Item 9. damaged trim ensuite floor tiles	$ 129.00
Item 10. cracks, ceilings, skirtings & architrave	$ 25.00
Item11. Sliding door + furniture	$ 4,425.00
Item 12. water stain to plaster	$ 2,720.00
Item 13. wall out of plumb	$ 5,125.00
Item 14. scratches to window fames	$ 100.00

Item 15. caulking to floor and skirting joints	$ 133.00
Item 16. scratched timber floor	$ 1,831.83
Item 17. chipped timber flooring	$ nil
Item 18. cracked Caesarstone	$ 387.00
Item 19. scratched benchtop	$ 157.00
Item 20. Niche grading	$ 7,468.73
Item 22. Water leak study	$ 2,488.00
Total incl of OH&P.	$47,094.56

199 Refund from previously paid relocation of AC grille

$875 + liquidated damages $7,300.00 $8,175.00

---

200 Total damages $55,269.56

201 I order [redacted] Pty Ltd to pay to [redacted] and [redacted] the sum of $55,269.56. payment to be made on or before 9 October 2023

****

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

[redacted]

